Inquiry into provisions of the *Parliamentary Evidence Act 1901*

"Fit for Purpose and Modernised"

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Introduction to the Discussion Paper

This Discussion Paper has been commissioned by the Privileges Committee of the New South Wales Legislative Council ('the Committee') to assist the Committee in its inquiry into the provisions of the *Parliamentary Evidence Act 1901* (NSW) ('the Act'). The purpose of that inquiry is to 'identify[] amendments to ensure [the *Parliamentary Evidence Act*] is fit for purpose and modernised, including in relation to the summoning of witnesses.' The reasons for the establishment of that inquiry, and its historical context, are set out in **Part 1** of this Discussion Paper.

The 14 issues and questions relating to the operation of the *Parliamentary Evidence Act* that are canvassed in this Discussion Paper were set by the Committee. These questions are set out at the commencement of each section of the Paper, and are set out in full in **Appendix 1**. They are drawn from the extensive practice and experience of the Legislative Council in taking evidence under the *Parliamentary Evidence Act*, comparative experience, and academic commentary on the operation of the legislation.

The Discussion Paper is divided into two parts. **Part 1** provides the context for the inquiry and the review of the *Parliamentary Evidence Act*. This includes a brief history of the Act, an articulation of the constitutional principles and factors that should inform the review of the *Act*, and the context for the current inquiry. **Part 2** then addresses each Issue set for the Discussion Paper by the Committee. For each Issue, the current practice in New South Wales, the practice in other jurisdictions, and other relevant context is considered. Each Issue concludes with a discussion of possible options for reform. These options are collated in **Appendix 1**.

The issues that are addressed in the Discussion Paper are often interrelated, and as such, when contemplating reform in relation to one issue, it is often necessary to consider possible reforms in relation to other issues. These connections are highlighted throughout the Discussion Paper.

In completing this Discussion Paper, I have been greatly assisted by the Office of the Clerk of the Parliaments and the secretariat of the Committee, and in particular I would like to thank Steven Reynolds, Stephen Frappell, Sharon Ohnesorge, Beverly Duffy and Tina Higgins . I was also assisted by invaluable research support from Velia Mignacca into the law, practice and procedure in other jurisdictions.

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Part 1: Parliamentary Evidence in New South Wales – History and Context

1.1 There are three historical and contextual matters that should inform the Committee's inquiry into the *Parliamentary Evidence Act 1901* (NSW). These include:

(a) the history of the enactment of the *Parliamentary Evidence Act* itself, which, as a piece of legislation that largely governs how parliamentary evidence is taken, is unique across Australian jurisdictions;

(b) the constitutional principles and other relevant factors that will inform best practice for taking evidence in a modern Parliament; and

(c) the current context for the parliamentary inquiry, including placing this inquiry in the broader context of previous calls to reform the *Parliamentary Evidence Act*.

1.A History of the *Parliamentary Evidence Act*

1.2 In New South Wales, the taking of parliamentary evidence is governed by an amalgam of:

- the common law (which provides the basis for parliamentary privilege in the doctrine of 'reasonable necessity'[1]);
- statute (including the *Parliamentary Evidence Act,* the statutory adoption of Article 9 of the *Bill of Rights*,[2] as well as other relevant statutory provisions[3]); and
- parliamentary standing orders and other practices.

1.3 Justice McHugh of the High Court of Australia has explained that the common law power of necessity provides no power for the Houses to compel witnesses to give evidence and produce documents.[4] This power is sourced elsewhere, including in the provisions of the *Parliamentary Evidence Act* (see the further discussion at Part 2.3.1 below).

1.4 The *Parliamentary Evidence Act* is a relatively short piece of legislation that largely, although not exclusively, governs the taking of evidence by the Houses of Parliament and their Committees (including joint committees[5]) in New South Wales. It provides for the summoning of witnesses by the Houses or Committees,[6] with the exception of Members of Parliament, whose attendance is to be procured in accordance with the mode of procedure observed in the British House of Commons.[7] It provides for the expenses of witnesses

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1 *Egan v Willis* (1998) 195 CLR 424.

2 Under the *Imperial Acts Application Act 1969* (NSW) schedule 2.

3 Including, for example, sections 27-29 of the *Defamation Act 2005* (NSW), and provisions relating to the functions and powers of joint committees.

4 *Egan v Willis* (1998) 195 CLR 424, 468 (McHugh J).

5 Under s 14.

6 Under s 4.

7 Under ss 4(1) and 5.

summoned.[8] Where a person fails to appear in accordance with a summons, it provides for a procedure for that fact to be certified by the President or the Speaker, and issued to a Supreme Court Judge, who shall issue a warrant for the apprehension of the individual.[9] The Act provides for the administration of an oath or declaration.[10] There are penalties for witnesses who refuse to answer any lawful question,[11] and for providing false evidence.[12] The Act also expressly provides for privilege against defamation.[13]

1.5 The *Parliamentary Evidence Act 1901* is in large part a re-enactment and consolidation of the *Parliamentary Evidence Act 1881* (NSW). The 1881 legislation was passed in the wake of two key historical events. The first was the 1858 Privy Council decision in *Fenton v Hampton*,[14] a case relating to the Legislative Council of Tasmania. The Privy Council confirmed that there was no power in that House to arrest for contempt for failing to appear to answer a charge of disobeying a summons to appear before a select committee. Tasmania responded by enacting the *Parliamentary Privileges Act 1858* (Tas), which included, amongst other matters, clarification of the power to summon and compel the attendance of witnesses.

1.6 In New South Wales, there were a number of attempts to enact parliamentary privileges legislation from the 1850s. Following the discharge of the one of these attempts – the Parliamentary Powers and Privileges Bill – and in the wake of frustrated attempts to compel the attendance of witnesses before the Houses and their committees in the following years,[15] a more targeted piece of legislation was enacted to clarify the power to summons and compel attendance in the form of the *Parliamentary Evidence Act 1881*.[16] The preamble to the 1881 Act explained its objective as follows:

> Whereas it is expedient that the power of compelling the attendance of Witnesses and of examining them on oath should be possessed by Parliament and Parliamentary Committees.[17]

1.7 As the *New South Wales Legislative Council Practice* explains, the 1881 legislation was passed with little debate and great expedition: indeed, it was passed by both Houses in less than a month.[18] The debate around the introduction of the legislation tells us very little to

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8 Under s 6.
9 See ss 7, 8, and 9.
10 Under s 10.
11 Under s 11.
12 Under s 13.
13 Under s 12.
14 (1858) 14 ER 727
15 See further Stephen Frappell and David Blunt (eds), *New South Wales Legislative Council Practice* (Federation Press, 2nd Edition, 2021), 78.
16 See further on the connection between the 1858 Bill and the Parliamentary Evidence Act: David Clune and Gareth Griffith, *Decision and Deliberation: The Parliament of New South Wales 1856-2003* (Federation Press 2006) 134.
17 *Parliamentary Evidence Act 1881* (NSW), preamble.
18 See discussion Frappell and Blunt (n 15) 78-9.

assist in the interpretation of its provisions. Nonetheless, the circumstances of its enactment are revealing in a number of ways for the questions now before the Committee.

- The 1881 legislation was passed largely as a response to recalcitrant witnesses, and the need for a clearer power to compel the attendance of witnesses to appear, with appropriate penalties for failing to do so. This was the primary motivation for the passage of the legislation, and the constitutional principle that was given the most weight by the Parliament at the time (as against, for instance, the rights of the witnesses involved, see further discussion in Part 1.B).
- Given the speed at which the legislation was passed, the Parliament in the 1880s paid little attention to many of the questions of detail that have subsequently arisen, including those issues canvassed in this inquiry.
- The lack of any significant amendment to the legislation since 1881 (notwithstanding its re-enactment in 1901) means that even if the drafters *had* turned their mind to these matters, they were not anticipating the circumstances in which the modern New South Wales Parliament operates.

1.8 The *Parliamentary Evidence Act 1901* has another important feature. The New South Wales Parliament's privileges rest on the common law requirement of *necessity*, that is, what is necessary to enable the Houses to conduct their constitutional functions. It is widely accepted that there is no general power to punish for contempt, and the power of the Houses are likely constrained to those that are protective and self-defensive only.[19] This means that the provisions of the *Parliamentary Evidence Act* are the only clear source for the powers of the New South Wales Parliament to punish for contempt.[20]

1.9 Since 1901, the *Parliamentary Evidence Act* has been amended only in minor ways, and remains largely as enacted.

1.B Constitutional principles and other relevant factors

1.10 The question of whether the *Parliamentary Evidence Act* is fit for purpose for a modern New South Wales Parliament will be informed by principles drawn from our system of constitutional government, and other factors relevant to modern law reform.

1.11 Two key principles that underpin our constitutional system of government are relevant here. The first relates to the constitutional role of the Parliament, and the need for it to be empowered to fulfil that role. The second relates to the rights of individuals as against the state. Under our constitutional system these rights are not constitutionalised, but, rather, protected through foundational common law principles such as procedural fairness, and the will of the Parliament itself (referred to as 'political constitutionalism'). This places a

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19 See discussion in Frappell and Blunt (n 15) 71-75.

20 See, eg, *Willis and Christie v Perry* (1912) 13 CLR 592.

particular responsibility on the Parliament to consider these rights, not only in the exercise of its powers, but in the passage of legislation. The equilibrium to be found between these principles in any particular instance will be informed by history, constitutional context, and changing political and social expectations.

1.12 The first principle then is the need for the New South Wales Parliament to have the ***appropriate inquiry powers for it to undertake its key constitutional functions***. The key functions, performed by the State's key democratic institution, are the legislative function, and the function of overseeing the executive. To exercise both of these functions, the Parliament must be able to inform itself, that is, make inquiries in the form of questioning witnesses, and calling for documents. In so doing, it needs to be able to access a diversity of perspectives – including from the government, experts and members of the public[21] – and ensure the quality and integrity of evidence that it relies on in the conduct of its inquiries.

1.13 The second principle is the ***respect for the rights of those individuals who might be called before the Parliament or its committees***. Those individuals who are called before Parliament should be treated fairly, both to ensure the quality and integrity of their evidence, as well as to ensure respect for their individual rights and dignity. Where there is the possibility that they might be exposed to penal consequences, such as imprisonment, they should be accorded appropriate fair process rights, and not to be subject to arbitrary or disproportionate punishment.

1.14 Designing a system to authorise and regularise the taking of parliamentary evidence that finds the most appropriate equilibrium between these two principles will be an ever-changing matter. It will depend on practice, including the extent to which the powers are used and the practical issues that have arisen in their use, and shifting public expectations of the Parliament.

1.15 For instance, with public trust in public institutions, including governments and political parties, at alarmingly low levels,[22] this is likely to influence the need for caution both in terms of the powers conferred on Parliaments to undertake inquiries (such as a criminal power to summons), and the clarity around the types of protections that then attach to them. Revealing in this respect is that in contrast to trust in Parliaments, the public's sense of a need for other accountability institutions such as independent anti-corruption bodies – which have quasi-independent statutory status from the government and Parliament and more regulated powers, procedures, and protections for individuals – is high.[23]

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21 See further Robyn Webber, 'Increasing Public Participation in the Work of Parliamentary Committees' (2001) 16(2) *Australasian Parliamentary Review* 110, 111-112.

22 See, eg, The Australia Polling Council Quality Mark and The Australia Institute Polling: *Perceptions of Corruption* (September 2023), <https://australiainstitute.org.au/wp-content/uploads/2023/10/Polling-brief-Corruption-WEB.pdf>; ANUPoll 2012, *Perceptions of Corruption and Ethical Conduct*, <https://politicsir.cass.anu.edu.au/research/publications/perceptions-corruption-and-ethical-conduct>.

23 See, eg, the results of the Griffith University and Transparency International Australia, *Australian Global Corruption Barometer 2018* <https://transparency.org.au/the-global-corruption-barometer-survey-results/>.

1.16 In addition to these two principles, any review of the *Parliamentary Evidence Act* for a modern context should be informed by public expectations of contemporary governing institutions. Factors relevant to public policy reform include:

- **Accountability:** Contemporary society demands that the exercise of public power will be accountable – and accountable in a robust form. Today, this extends to demands for accountability across all three branches of government. Previously 'self-regulated' areas of public administration (such as within the Parliament or the judiciary) are no longer seen as meeting public expectations. We see this, for instance, in relation to changing expectations of enforceable standards of conduct for parliamentarians,[24] and the judiciary.[25]
- **Efficiency (including technological adaptation):** The public expects modern governing institutions to exercise their powers efficiently (both in terms of time and cost). This includes using technology in ways that increases that efficiency, but not at the cost of good and fair administration.
- **Transparency:** The public expects governing institutions to exercise their powers transparently, particularly where those powers affect the rights and interests of individuals. The expectation of transparency is closely associated with the many protections afforded through procedural fairness, and the value of accountability.
- **Diversity:** There is an increasing expectation that the diversity of society will be reflected in the composition and practice of governing institutions. This includes diversity of experiences and perspectives in the composition of those institutions that wield power over individuals; as well as institutional processes that are inclusive, and sensitive to the diversity of individuals who appear before them.

1.17 While these additional factors will not form the primary framework of analysis in this Discussion Paper, they arise and are discussed where relevant in relation to the issues canvassed.

1.C Context for the current inquiry

1.18 As the Terms of Reference make clear, the current inquiry arose from the report of the Portfolio Committee No 7 – Planning and Environment into 'Allegations of impropriety against agents of the Hills Shire Council and property developers in the region" (March 2023) ('the Hills Shire Council Report'). The substance of the inquiry related to allegations

[24] In New South Wales, see the *NSW Code of Conduct for Members* (most recently adopted March 2020); and at the federal level, Australian Human Rights Commission, *Set the Standard: Report on the Independent Review into Commonwealth Parliamentary Workplaces* (2021). See more generally, eg, Ken Coghill, Ross Donohue and Peter Holland, 'Parliamentary Accountability to the Public – Developing MPs' Ethical Standards' (2008) 23(2) *Australasian Parliamentary Review* 101.

[25] In New South Wales, judicial misconduct is now governed by the Judicial Commission of New South Wales. At the federal level, the introduction of such a commission has been promised by the current government.

made regarding collusion between The Hills Shire Council and developers in relation to the replacement of members and allegations of branch stacking.

1.19 In the course of that inquiry, the Committee faced serious difficulties in obtaining evidence from witnesses to inform its inquiries. The Chair's Foreword noted 'the gaping hole in evidence left by key witnesses who have gone to great lengths to avoid scrutiny.'[26] The challenges faced by that Committee included:

- witnesses avoiding personal service of summonses, as is required by s 4 of the *Parliamentary Evidence Act*, and the Committee engaged professional process servers to serve the summons; and
- witnesses avoiding summons because they were out of jurisdiction.

1.20 There was also the refusal to give evidence to the Committee by the Minister for Transport, a Member of the Legislative Assembly. This matter was the subject of a separate inquiry by the Public Accountability and Works Committee, after the introduction of the Parliamentary Evidence Amendment (Ministerial Accountability) Bill 2023.[27]

1.21 This is not the first time that questions have been raised as to the application, coverage and appropriateness of the *Parliamentary Evidence Act* to meet the needs and expectations of a modern parliament. For instance, in the 2011 inquiry into the sale of state electricity assets by General Purpose Standing Committee No. 1 (the 'GenTrader Inquiry'), the power to compel witnesses to attend came into question. This was ultimately not tested on the basis that the President was satisfied that the prorogation of Parliament, and the legal uncertainty this created for the application of the protections of the *Parliamentary Evidence Act*, constituted just cause or a reasonable excuse for witnesses not complying with the summons.[28]

1.22 In 2015, in the setting up of the Select Committee's inquiry into the Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect", relating to alleged illegal surveillance of New South Wales police officers, a number of procedural and legal questions were raised as to the operation of the *Parliamentary Evidence Act*. Advice was sought from Bret Walker SC that related to, among other matters, the protections afforded to persons responding to a committee's call for submissions where not compelled to give evidence, and the circumstances in which a witness before a committee could in effect exercise a right to

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[26] Portfolio Committee No 7, Planning and Environment, 'Allegations of Impropriety Against of the Hills Shire Council and Property Developers in the Region' (March 2023) vii.

[27] See further Public Accountability and Works Committee, 'Parliamentary Evidence Amendment (Ministerial Accountability) Bill 2023 (Report 1, 27 November 2023). See also further discussion at **Issue 6** in this Discussion Paper.

[28] See further General Purpose Committee No 1, *The Gentrader transactions* (Report 36, February 2011) [1.60], 12. See further discussion of the effect of prorogation at **Issue 3** in this Discussion Paper.

silence on the grounds that to answer a question may have a deleterious impact upon future legal proceedings or on the grounds of self-incrimination.[29]

1.23 Further, questions have previously been raised by those working in the parliament and on these matters as to whether the *Parliamentary Evidence Act*, and in particular the punitive provisions and procedures adopted, are in keeping with modern expectations.[30] However, it should also be noted that the clarity that is gained through the *Parliamentary Evidence Act*, and its codification of many matters that remain subject to debate in other jurisdictions, has also been praised.[31]

1.24 The current context, then, is one in which the New South Wales Parliament has been placed on further notice of the desirability of reviewing the *Parliamentary Evidence Act*, in light of the Hills Shire Council Report. However, it is not the case that there is some immediate crisis that pushes urgent (and potentially hasty) action on the Parliament. Rather, there is time for an informed and deliberative inquiry into the desirability of amendments to the Act to see whether it is 'fit for purpose and modernised'.

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29 Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect" (2015), 4. That advice was attached at Appendix 5 to the Report.

30 See, eg, Stephen Frappell, 'Parliamentary Privilege in New South Wales' (2020) 48(1) *International Journal of Legal Information* 20, 21; Beverly Duffy and Sharon Ohnesorge, 'Out of step? The New South Wales Parliamentary Evidence Act 1901' (2016) 27 *Public Law Review* 37.

31 See, eg, Anne Twomey, 'Executive Accountability to the Senate and the NSW Legislative Council' (2008) 23(1) *Australasian Parliamentary Review* 257, 273.

Part 2: Discussion of issues raised by the Committee

2.0 A set of 14 general issues have been identified by the Committee to be canvassed in this Discussion Paper, with a number of more specific questions attaching to each issue. Those issues and questions are set out in the start of each section of this Part, as well as in **Appendix 1**. I have then set out the context that needs to be considered in answering the question, and explained the nature of the issue raised by the question, as well as canvassing possible answers and solutions to it, particularly by reference to comparative practice and constitutional principle. These reform options are also extracted in summary form in **Appendix 1**. The necessity and desirability of reform in some areas is closely connected to other areas – and as such the issues and options that are assessed are often interrelated, as explained below.

2.1 **Issue 1. Consequences for failing to answer questions/false evidence (offences & penalties)**

Questions asked by the Committee:

- *Sections 11 and 13 of the Parliamentary Evidence Act adopt significant penalties for refusal to answer a question and for provision of false evidence. Are these penalties in keeping with societal standards and expectations?*
- *Should the Parliament retain a penal jurisdiction in these matters?*

The position in NSW

2.1.1 Section 11 of the *Parliamentary Evidence Act* provides as follows:

> **11 Penalty for refusal to answer**
>
> (1) Except as provided by section 127 (Religious confessions) of the *Evidence Act 1995*, if any witness refuses to answer any lawful question during the witness's examination, the witness shall be deemed guilty of a contempt of Parliament, and may be forthwith committed for such offence into the custody of the usher of the black rod or serjeant-at-arms, and, if the House so order, to gaol, for any period not exceeding one calendar month, by warrant under the hand of the President or Speaker, as the case may be.
>
> (2) Such warrant shall be a sufficient authority for all gaolers and other officers to hold the body of the person therein named for the term therein stated.
>
> (3) No person acting under the authority of this section shall incur any liability, civil or criminal, for such act.

2.1.2 Section 11 raises a number of questions:

- Does the provision apply to any witness appearing, or must the witness be sworn in by oath or affirmation?[32] (This is addressed in **Issue 12**, below)
- What amounts to a 'lawful question'? (This is addressed in **Issue 4**, below)
- Does 'shall be deemed guilty of a contempt of Parliament' mean that there is no further discretion (other than as to sentence) for the House to consider guilt?[33]
- What procedure is followed upon the failure to answer? For instance, where would the individual be held by parliamentary staff upon a further order of the House to commit them to 'gaol'?
- If an order was so made, where would the individual be placed in 'gaol' (noting that there is no 'gaol' in the parliamentary precinct)?[34]
- Is imprisonment the only possible consequence? In other jurisdictions, 'penal jurisdiction' of the Parliament includes the power to impose a fine or a term of imprisonment[35] (the practice of other jurisdictions is returned to, below);
- Is there any opportunity to review or appeal a term of imprisonment issued under this provision?

2.1.3 Section 13 of the *Parliamentary Evidence Act* provides as follows:

> **13 Penalty for false evidence**
>
> 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.

2.1.4 Section 13 raises a number of questions:

- Does the provision apply to any witness appearing, or must the witness be sworn in by oath or affirmation?[36] (This is addressed in **Issue 12**, below)
- By creating a criminal offence, and not referring to the conduct as contempt (which Parliament is generally seen as competent to determine) the breach of this provision appears to be determined by a court rather than the House.[37] This raises questions as to what extent the Court can inquire into matters before the Parliament, and the application of parliamentary privilege.

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32 See, eg, Frappell and Blunt (n 15), 823.

33 See further Duffy and Ohnesorge (n 30) 50-51, noting some previous disagreement as to the meaning of the drafting.

34 See further Duffy and Ohnesorge (n 30) 50.

35 Geoffrey Lindell and Gerard Carney, *Review of Procedures of the House of Representatives relating to the Consideration of Privilege Matters and Procedural Fairness* (23 February 2007) 3.

36 See further Frappell and Blunt (n 15) 808.

37 See, eg, Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 517.

- Unusually, and as with section 11, it appears there is no alternative penalty to imprisonment, such as a maximum fine.

2.1.5 There is a substantial debate as to the desirability of modern Parliaments retaining a penal jurisdiction. It is helpful for this larger debate to be broken down into two separate questions.

1. The first question is whether there should ever be a criminal penalty imposed for failing to attend or providing false evidence to Parliament or a Committee, and what that should be (what will be referred to as '*Penal consequences').*
2. The second question is whether if there are criminal penalties, the appropriate forum and procedure for those to be considered and imposed (that is, whether the matter should be determined by the Houses, or by the Courts) (what will be referred to as *Parliament's penal jurisdiction).*

(a) Parliament's penal jurisdiction

2.1.6 Much of the commentary regarding the desirability of retaining a 'penal jurisdiction' has conflated these two questions. The predominance of concerns focus on the desirability of Parliament's penal jurisdiction (the second question). With respect to this, four different types of risk can be distilled:

1. The first relates to concerns that the Parliament's penal jurisdiction amounts to an inherent ***conflict of interest***. That is, Parliament acts as both an accuser, and a judge. As the Privy Council said back in 1866, the Parliament's penal jurisdiction 'carries with it the anomaly of making those who exercise it judges in their own cause, and judges from whom there is no appeal.'[38]
2. The 1908 Commonwealth Joint Select Committee on Privilege acknowledged that it was not just a matter of conflict of interest, but a ***practical procedural risk***, given the Parliament has very little guidance as to the procedure to follow to determine such matters (in contrast to the courts, with well-established judicial safeguards and daily judicial experience in dealing with such matters).[39] The Committee said:

   > The ancient procedure for punishment of contempts of Parliament is generally admitted to be cumbersome, ineffective and not concomitant with modern ideas and requirements in the administration of justice.[40]

3. Then there are concerns about the ***reputational risk to Parliament***, and bringing the Parliament into disrepute or ridicule in the eyes of the public. This concern is related

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38 *Doyle v Falconer* (1866) LR 1 PC 328, 340-341, quoted in Enid Campbell 'The Penal Jurisdiction of Australian Houses of Parliament' (1963) 4 *Sydney Law Review* 212, 225.

39 See Campbell (n 38) 192.

40 Joint Select Committee on Procedure in Cases of Privilege Parliament of Australia, Progress Report (1908) 2.

to the first two concerns. One Federal Minister referred to the prospect of ridicule as follows:

> The very idea of a chamber of elected people threatening and then imposing imprisonment … has the overtones of a Gilbert and Sullivan farce. The mindset that prompts this self-righteous pomposity is archaic and typical of those who think that dressing up in wigs, frilly shirts and knee breeches represents the symbols of modern democracy.[41]

4. The fourth risk relates to ***public confidence*** in the ability of the Parliament to exercise a penal jurisdiction impartially. As former Speaker of the NSW Legislative Assembly Kevin Rozzoli wrote:

> Most decisions in parliament are made on political grounds and the public understands and accepts this as a natural phenomenon of our system. Accepting that such decisions are generally made in the party room, it is therefore difficult to reconcile that process with a decision that could result in the imprisonment of a member of the public for alleged contempt of the House. The public perception of such decision-making would certainly be one of subjective political purpose rather than disinterested justice.[42]

2.1.7 These dangers to reputation – and the lack of familiarity of the Houses with the procedure for punishing contempt – have led in practice to a lack of use. However, commentators including John Waugh and Enid Campbell have noted that, nonetheless, there remains the potential of their use – and thus the dangers associated with it should be addressed.[43]

2.1.8 Against this set of concerns in relation to Parliament's penal jurisdiction is the objective of maintaining parliamentary control over its proceedings, and the concern that involving the courts in the punishment of contempt for these matters would invite judicial consideration and possible interference – with the Parliament.[44] Further, it has been argued that Parliament's penal jurisdiction ensures these matters can be dealt with expeditiously by the Parliament.[45]

2.1.9 As set out above, the different language of the provisions indicates section 11 (failure to appear) creates an offence punishable by Parliament, whereas section 13 (false evidence) creates an offence punishable through the courts. The reasons as to why the distinction was

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41 Quoted in Heather Goodwin, Aaron Stewart and Melville Thomas, 'Imprisonment for Contempt of the Western Australian Parliament' (1995) 25 *University of Western Australia Law Review* 187, 196.

42 Kevin Rozzoli, 'Perceptions of Parliamentary Privilege in today's Legislative System' (2002) 17(2) *Australasian Parliamentary Review* 232, 239.

43 John Waugh, 'Contempt of Parliament in Victoria' (2005) 26 *Adelaide Law Review* 29, 30; Campbell, (n 38), 225.

44 See further Harry Evans (Clerk of the Senate) Letter to David Elder (Secretary, House of Representatives, standing Committee of Privileges) 6 August 2007.

45 Isla Macphail, 'Is Parliamentary Privilege Incompatible with a Modern View of the Public Interest?' (2010) 25(2) *Australasian Parliamentary Review* 162, 168.

created are not clear. There are certainly a number of important distinctions between the two offence provisions as set out above, and in particular:

- Section 11 is considered to address a less serious offence (it carries with it a lesser penalty of imprisonment up to 1 month); as against the potential 5-year sentence under s 13.
- There appears to be no discretion as to whether an offence has been committed under s 11 (where guilt is deemed), whereas there are factual matters to be determined in the false evidence offence under s 13.

(b) Penal consequences

2.1.20 The desirability of there being penal consequences for refusing to answer a question, or providing false evidence, has been less controversial. Certainly, the importance of potential penal consequences to encourage witnesses to comply with summons to appear was the driving reason for the enactment of the 1881 version of the *Parliamentary Evidence Act*. But, as Stephen Frappell has argued:

> While the provisions of the *Parliamentary Evidence Act 1901* have been used sparingly over the years, nevertheless the words of the 1984 Commonwealth joint select committee ring true: the Act has at times been essential in enabling committees of the Parliament to operate effectively.[46]

2.1.21 The 1984 Joint Select Committee on Parliamentary Privilege, which Frappell refers to, said:

> But there must, at the end of the day, be a means of enforcing the bedrock safeguards or conditions essential to Parliament's operation. …
>
> The ultimate sanction possessed by Parliament is its penal jurisdiction – the power of the Houses to examine and to punish any breach of their privileges or other contempt.[47]

2.1.22 A similar sentiment was expressed in 1999 by the UK Joint Committee on Parliamentary Privilege:

> If the work of Parliament is to proceed without improper interference, there must ultimately be some sanction available against those who offend … unless a residual power to punish exists, the obligation not to obstruct will be little more than a pious aspiration. The absence of a sanction will be cynically exploited by some persons from time to time.[48]

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46 Frappell (n 30) 20.

47 Commonwealth Joint Select Committee on Parliamentary Privilege, *Final Report* (October 1984) 79.

48 UK Joint Committee on Parliamentary Privilege, *Report: Volume 1,* Chapter 6 [302], quoted in Macphail (n 43) 168.

2.1.23 Duffy and Ohnesorge are slightly more circumspect as to the causal effect of penal consequences, stating: 'it is difficult to know with any certainty whether any particular punitive power is essential (political pressure and media scrutiny may be more persuasive than never-used punitive powers to persuade reluctant witnesses to co-operate with a committee)'. Nonetheless, they support the retention of 'strong powers to ensure compliance with committee inquiries', but urge reform of the procedure to reflect contemporary views regarding the role of Parliament and the administration of justice.[49]

The practice in other jurisdictions

2.1.24 Looking comparatively to parliamentary practice in other Australian jurisdictions, and in the UK and New Zealand, in relation to the jurisdiction over, and consequences for similar conduct, there is no general or best practice that emerges.

2.1.25 Many jurisdictions include failing to answer questions and false evidence within the broader power to punish for contempt;[50] although some may also have specific provisions relating to such conduct.[51]

2.1.26 Most other jurisdictions include within the general penal jurisdiction of the Parliament the power to issue a fine *or* a term of imprisonment.[52] In Queensland and Western Australia, the Parliament's power to issue a warrant for a term of imprisonment is only able to be issued in default of the payment of a fine.[53] In the ACT, there is no power to imprison or fine.[54]

2.1.27 Some other jurisdictions draw a distinction between failing to answer (to be treated as a contempt) and giving false evidence (to be treated as an offence, brought before the Courts, or as contempt).[55] In the United Kingdom, there is a further distinction drawn between false

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49 Duffy and Ohnesorge (n 30) 51.

50 See, for instance, the general statutory contempt powers conferred on the Commonwealth Parliament in the *Parliamentary Privileges Act 1987* (Cth) s 7. Note Senate Privilege Resolution 6, setting out the matters constituting contempt, to include refusing to answer relevant question without reasonable excuse (12(b)) and giving false or misleading evidence (12(c))). In Queensland, s 39(1) of the *Parliament of Queensland Act 2001* (Qld) confers broad power to punish for contempt, noting that examples of contempt in s 37(2) of that Act include failure to answer questions (this is also clarified under Standing Order 266).

51 For instance, at the Commonwealth level, failing to answer questions and give false evidence is made an offence (punishable in the Courts) under the *Public Accounts and Audit Committee Act 1951* (Cth) s 17-18; *Public Works Committee Act 1969* (Cth) ss 30-31.

52 See, eg, s 7(5) of the *Parliamentary Privileges Act 1987* (Cth) which provides the power to fine up to $5000 (natural person) and $25,000 (corporation). Note that in the UK, David Natzler and Mark Hutton (eds) *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (LexisNexis, 25th ed, 2019), ('*Erskine May*') indicates while the Lords may imprison or fine for contempt, there is some doubt as to whether the Commons retains the power to fine: *Erskine May* 11.23; 11.27.

53 *Parliament of Queensland Act 2001* (Qld) ss 40, 41, 43, 44, 44, 45; *Parliamentary Privileges Act 1891* (WA) s 8.

54 *Australian Capital Territory (Self-Government) Act 1988* (ACT) s 24(4).

55 This occurs in Victoria and Tasmania. Victoria: There is a general contempt power in section 19(1) of the *Constitution Act 1975* (Vic), which would cover matters such as failing to answer questions. The

evidence given on oath (punishable as perjury before the Court); and false evidence not on oath (punishable as contempt by the Parliament) (this raises the issue of the purpose of the administration of the oath, which is considered at **Issue 12**, below).[56]

2.1.28 In some jurisdictions, failing to answer or giving false evidence may be treated as an offence, to be determined by the courts *or* a contempt of Parliament and subject to the Parliament's penal jurisdiction.[57] In Queensland, s 47 of the *Parliament of Queensland Act* provides that if conduct is both contempt and an offence, a person cannot be proceeded against in both the courts and the Parliament, thus preventing potential double punishment or double jeopardy. Long term Clerk Neil Laurie has indicated that his views are that, in general, contempt proceedings for non-members are best deal with by the courts.[58]

2.1.29 In Western Australia, either House can direct the Attorney-General to prosecute before the Supreme Court any person guilty of any other contempt which is punishable by law.[59] In Tasmania, the Houses have the power to direct the Attorney-General to prosecute any offence committed against the House or any Member thereof.[60]

Options and discussion

2.1.30 A number of reform options for the New South Wales *Parliamentary Evidence Act* emerge from the above analysis and comparative review. Four categories of options are considered below.

1. **Retention of penalties:**

   The initial question is whether it is considered desirable to retain any penalty for conduct amounting to failure to answer or giving false evidence. It would seem consistent with the predominance of parliamentary practice (the ACT excluded), and opinion, that there is benefit to retaining penal consequences to encourage witnesses to cooperate with parliamentary inquiries. However, should penalties be retained, questions arise as to the appropriate substantive and procedural

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Constitution Act 1975 (Vic) s 19A(8) then specifically provides that a sworn witness who wilfully gives false evidence 'shall be liable to the penalties of perjury'. In addition to this, there are parliamentary contempt powers for giving false evidence set out in the Standing Orders of the Victorian Legislative Council or Assembly: See *Standing Orders of the Victorian Legislative Council* 17.10; *Standing Orders of the Victorian Legislative Assembly* 200. Tasmania: *Parliamentary Privilege Act 1858* (Tas) s 2A(3) (a witness who wilfully gives false evidence is guilty of perjury); s 3 then provides a general power to punish for contempt.

56 See discussion in *Erskine May* (n 52) [38.47]; [40.28].

57 These jurisdictions are Queensland, Western Australia and the Northern Territory: Queensland: *Parliament of Queensland Act 2001* s 37(2) s 39(1); Standing Orders 266; *Criminal Code Act 1899* (Qld) ss 57 and 58 relating to giving false evidence and failing to attend or answer. Western Australia: *Parliamentary Privileges Act 1891* (WA) s 8(b) and Standing Orders (LC) Sch 4 13; *Criminal Code* ss 57 and 59; *Legislative Assembly (Powers and Privileges) Act 1992* (NT) s 21 (creating an offence); s 25 (indicating that the Legislative Assembly may impose a penalty for offences against the House).

58 Neil Laurie, Submission to Legal Affairs and Community Safety Committee, Parliament of Queensland, *Inquiry into the Criminal Law (False Evidence Before Parliament) Amendment Bill 2012*, 27 June 2012, 5.

59 *Parliamentary Privileges Act 1891* (WA) s 15.

60 *Parliamentary Privileges Act 1858* (Tas) s 11.

protections provided to witnesses, such as the availability of privileges such as self-incrimination (canvassed below at **Issue 4**), and procedural fairness (canvassed next, in **Issue 2**).

2. **Forum:**

   A major question that arises is which forum should hear and determine these matters. There are a number of options that could be adopted.

   It could be determined that, based on the concerns regarding parliamentary privilege and the potential interference by the courts, these matters should come exclusively within the Parliament's penal jurisdiction, removing the Courts entirely. This would also allow for these matters to be dealt with more expeditiously.

   Weighing against this option, however, are the significant concerns expressed regarding the exercise of penal jurisdiction by the Parliament.

   There are many options that might be formulated to meet this concern, to greater or lesser degrees:

   - Transfer jurisdiction over both forms of conduct to the courts for all witnesses.
   - Retain the status quo, with failure to answer being dealt with by the Parliament and false evidence (the more serious offence) to be dealt with by the courts.
   - Conferring jurisdiction on either the Parliament or the courts. If this option is adopted, thought must be given as to how the jurisdictions would interact (to avoid double jeopardy or double punishment), and whether the Parliament should be able to request the Attorney-General to prosecute an offence in court.
   - Conferring jurisdiction on the Parliament for members, in recognition of the exclusive cognisance over members, while conferring jurisdiction on the courts in relation to non-members.

3. **Appropriate penalties:**

   A further question that must be considered is whether there should be included the possibility of a fine or imprisonment for conduct amounting to failure to answer or giving false evidence. Introducing the possibility of a fine seems appropriate, and gives the Parliament or the Court greater discretion to determine a reasonable and proportionate penalty for the conduct in the circumstances. A further option, as in Queensland and Western Australia, would be to make imprisonment an option only if a person has failed to pay a fine.

4. **Procedure for contempt:**

   If the Parliament's penal jurisdiction is retained, there should be further consideration given to a number of procedural matters, including:

   - Specifying the procedure by which contempt is determined. That is, rather than using the language of 'deeming' a contempt as occurs in s 11, the provision might specify that a witness might be found guilty of contempt by a House, thus engaging the need for a resolution of the House relating to the conduct, which might be preceeded by an inquiry into the full circumstances around the conduct; and
   - Clarifying how penalties are imposed. This includes where individuals might be held pending the determination of a penalty, and the practical limitations of the Parliament as a place of punishment. Given the infrequent use of such facilities in the Parliament, it might be more practical for the ordinary machinery associated with criminal proceedings to be engaged for this purpose, including holding cells and jail.

2.2 Issue 2. Protections for witnesses

Questions asked by the Committee:

- *Noting the significant penal powers given to the Parliament in sections 11 and 13, do the procedural protections adopted by the House for witnesses before committees – including notably the Procedural Fairness Resolution adopted by the House – accord with modern standards of procedural protection for witnesses in quasi-judicial proceedings?*
- *Should the recognition in section 22G(1) of the Constitution Act 1901 of the President as the 'independent and impartial representative' of the Council be extended to committee chairs in the Parliamentary Evidence Act? Alternatively, would such a measure be more appropriately considered as an amendment to the Procedural Fairness Resolution?*

2.2.1 It should be noted that this question assumes the retention of penal consequences for failing to answer questions, and giving false evidence. Possible changes to this position, and the reasons for that, are canvassed above in **Issue 1**. However, the importance of fair procedures for witnesses appearing before the Parliament and its Committees is not solely dependent on potential penal consequences.

The purpose of procedural fairness protections

2.2.2 In administrative law, which sets the standard rules for procedural fairness for government decision-makers and quasi-judicial institutions such as tribunals, procedural fairness encompasses two key rules: the right to be heard before an impartial tribunal (the 'bias rule') and the right to have a fair hearing before decisions are made that affect a person's interests (the 'hearing rule'). In judicial proceedings, there are a number of additional procedural protections for witnesses beyond these two rules.

2.2.3 Procedural fairness and other procedural protections perform a number of important functions. While they do not pertain to the substance of decisions, they are seen as important contributors to better decision-making. This is because procedural fairness ensures that decision-makers approach their task with an open mind, informed by the arguments and evidence put forward. Procedural fairness protections are also justified by reference to individuals' rights to be given basic respect when appearing before public decision-makers, and participate in decisions, particularly where they affect them. Treating witnesses fairly is also an important factor contributing to public confidence in the integrity of the decision-maker.

2.2.4 There is no single set of procedural rules that will meet the requirements of procedural fairness. Rather, the standards will change depending on the nature of the matter under inquiry, and the impact of any decision on the individual involved. For instance, where inquiries relate to matters concerning national security, there may be justifications for fewer

procedural protections regarding disclosure of information. Where decisions might are have a significant impact on an individual (be that their reputation, their financial position, or liberty), more procedural protections are appropriate.

The position in NSW

2.2.5 There is no statutory requirement in New South Wales for the Houses or their Committees to afford individuals appearing as witnesses procedural fairness. However, in recognition of the importance of procedural fairness as a basic right in judicial and quasi-judicial proceedings, as well as where government officials make decisions that affect individuals' rights, the practice has in the past been to accord such fair process rights.

2.2.6 In the New South Wales Legislative Council, procedural fairness is provided in the *Procedural Fairness Resolution*, adopted by the Legislative Council on 25 October 2018. This followed the recommendations of an inquiry by the Privileges Committee into *Procedural Fairness for Inquiry Participants*,[61] which conducted an extensive comparative analysis to develop a proposed resolution for the Legislative Council. The Committee commented in that inquiry:

> The adoption of a Senate-style resolution by the Legislative Council would ensure that a consistent level of procedural fairness was applied in all Council committee inquiries and strengthen the committee system. While Council committees endeavour to apply procedural fairness as noted …, the codification of a uniform set of procedures by a resolution of the House would foster greater clarity and transparency and facilitate the process of informing inquiry participants of their rights. It would also be likely to enhance the standing and legitimacy of committee work in the eyes of stakeholders and the public by formalising committees' commitment to the responsible use of their powers.[62]

2.2.7 The Legislative Council Procedural Fairness Resolution provides a number of procedural protections, these include:

- Reasonable notice and information provided to witnesses;
- Witnesses have an opportunity to make a written submission before a hearing;
- Witnesses may request a private (in camera) hearing, and be provided with reasons if this is refused;
- Where the Committee intends to publish evidence from an in camera hearing, the Committee will consult the witness and advise them of the outcome;
- Witnesses may, with the prior agreement of the Committee, attend with a legal adviser or support person;
- Committee chairs will ensure that all questions are relevant to the inquiry.

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61 Privileges Committee, *Procedural Fairness for Inquiry Participants* (Report No 75, June 2018).

62 Ibid, 10.

- Public servants are not to be asked to give opinions on matters of policy.
- Witnesses may request to take questions on notice.
- Where witnesses object to answering a question, and the question is pressed, the Committee will consider whether the question requires an answer, and reasons will be provided. If a witness continues to refuse to answer the question, different procedures apply depending on whether the witness appeared by invitation or under summons.
- In relation to evidence that may seriously damage the reputation of a third party, the Committee must take a number of steps, including considering hearing the evidence in camera, keeping evidence confidential, and giving the person or body an opportunity to respond.
- The Committee will consider expunging information from the transcript where there is evidence that might place a person at risk of serious harm.
- Requests may be made to keep documents provided to a committee confidential;
- Witnesses have an opportunity to correct transcripts;
- Witnesses will be treated with courtesy;
- The Committee will investigate any concerns that a person has been improperly influenced with respect to their evidence;
- The Privileges Committee may adopt additional procedures where inquiring into matters that might involve allegations of contempt.

2.2.8 In many respects, these procedural protections go beyond the minimum requirements of the hearing rule in procedural fairness. Yet, in one key respect they are silent: there is no explicit reference to the rule against bias and the need for the Committee to approach their inquiries with an open, impartial mind.

2.2.9 As reported in 2018,[63] the Privileges Committee has in the past adopted a number of additional procedures, including:

- allowing a member whose conduct is being investigated to submit to the Chair written questions to be asked of witnesses in the event that hearings are held;[64]
- inviting a member whose conduct is being investigated to respond to draft material before its inclusion in the committee's report;[65]

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63 See Legislative Council Privileges Committee, *Procedural Fairness for Inquiry Participants* (Report 75 - June 2018) 5-6.

64 Standing Committee on Parliamentary Privilege and Ethics, *Report on statements made by Mr Gallacher and Mr Hannaford*, (November 1999) Appendix 2, 4.

65 Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry into the pecuniary interests register* (October 2002) 107.

- allowing legal advisers for a witness to be present while the witness gives evidence in camera;[66]
- engaging legal advisers to advise the committee on the application of the principles of procedural fairness/natural justice;[67]
- conducting all hearings in camera and only authorising the subsequent publication of those sections of the evidence which would not cause unnecessary damage to the reputations of individuals, compromise ongoing police investigations or prejudice matters currently before the courts;[68]
- seeking approval for financial assistance from Treasury to allow a member whose conduct is being investigated to access legal advice.[69]

2.2.10 In addition to this Resolution, the *New South Wales Legislative Council Practice* notes that committees have developed additional protections in relation to particularly vulnerable groups, including those at risk of mental health stress, and children and young people.[70] Some of these protections go to specific and additional procedural fairness guarantees. However, to date, these have not been developed into a public codified form.

2.2.11 Under the 2018 Procedural Fairness Resolution, the Committee Chairs are explicitly responsible for ensuring that all questions put to witnesses are relevant to the inquiry (clause 9), as well as being implicitly responsible for other parts of the resolution, as they have a general responsibility for guiding an inquiry. To perform these functions, the Chair must have the confidence of both the members, and those appearing before the Committee, that they are acting impartially and fairly. In this respect, the role of the Chair reflects the role of the President in the Legislative Council. Indeed, the *New South Wales Legislative Council Practice* states: 'The role of the chair of a committee is analogous to the role of the President in the House.'[71] It goes on to explain the role:

> The chair of a committee is responsible for guiding the inquiry process and presiding over meetings of the committee, including conducting votes. During public hearings, this responsibility extends to swearing in witnesses, maintaining order and ruling on the admissibility of questions and points of order. For example, where a remark is considered to be offensive, the chair may request that the offensive remark be withdrawn.[72]

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66 Standing Committee on Parliamentary Privilege, *Report concerning the publication of an article in the Sun Herald newspaper containing details of in camera evidence* (October 1993) 46.

67 Standing Committee on Parliamentary Privilege and Ethics, *Report on inquiry into the conduct of the Honourable Franca Arena MLC* (June 1998) Report 6, Vol 1, p 9

68 Ibid, Report 6, Vol 1, p 11.

69 Ibid, Report 6, Vol 1, p 9.

70 Frappell and Blunt (n 15) 818-819.

71 Ibid 753.

72 Ibid.

2.2.12 Similarly, Odgers' Senate Practice explains that the role of the Chair is to maintain order in a committee, including making rulings on points of order on any question relating to the proceedings of the committee.[73]

2.2.13 Given the role that committees play in modern parliaments, conducting inquiries and taking the vast majority of evidence from witnesses, the role of the committee chair has an additional layer to that of the President, in that they are, in the bulk of matters, the officer with whom members of the public will interact. Public confidence in their independence and impartiality is therefore vital for the performance of these functions.

2.2.14 In recognition of the importance of the role of the presiding officer, and that they retain the confidence of members across the House, section 22G(1) of the *Constitution Act 1902* (NSW) was amended in 1992 to recognise the President as the 'independent and impartial representative' of the Council. There is no such equivalent recognition of the role of the Chair.

The practice in other jurisdictions

2.2.15 Other Australian jurisdictions have adopted procedural fairness and other protections for witnesses appearing before committees in different forms. These include through resolutions, standing orders, and guidelines and practice. The leading jurisdiction in this respect, both in terms of the length of time that the protections have been in place, and their scope, is the Commonwealth Senate (although some jurisdictions have extended the scope of the Senate's protections – see full comparative analysis in the Legislative Council Privileges Committee Report from 2018).

2.2.16 The Senate adopted a series of resolutions following the introduction of the *Parliamentary Privileges Act 1987* (Cth). Privilege Resolution 1 sets out general protections available to all witnesses and participants in Senate inquiries; Privilege Resolution 2 concerns special procedures for the protection of witnesses before the Senate Committee of Privileges in inquiries concerning a possible contempt (given the potential for the Committee to impose penalties for findings of contempt). Odgers' Australian Senate Practice explains the need for the additional protections in Privilege Resolution 2:

> Special procedural protections are provided for witnesses involved in investigations by the Privileges Committee into allegations of contempt of the Senate. The reason for this is that the Privileges Committee investigates in particular cases whether contempts have been committed. If a finding of contempt is adopted by the Senate, the consequences for the person or persons concerned are very serious. A finding of contempt may in itself damage a person's reputation or professional standing, and it is open to the Senate to impose a penalty of up to 6 months' imprisonment or a fine of up to $5 000 for a natural person and $25 000 for a corporation.[74]

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73 Harry Evans, *Odgers Senate Practice* (14th ed, 2007, updates to 2022), ch 16.

74 Ibid 552.

2.2.17 In New Zealand, significant additional protections are in force that are worth noting, including:

- allowing counsel for a witness to object to answering a question (SO 232);
- disqualifying a committee member who has made an allegation of crime or expressed a concluded view on such a matter in certain circumstances (SO 236);
- specifying a procedure for dealing with complaints of apparent bias on the part of a committee member, although this is a narrow definition of apparent bias and relates only to the expression of an allegation of a crime or the expression of a concluded view on criminal activity in relation to a person where the inquiry relates to that criminal matter, or the reputation of the person (SO 237);[75] and
- giving a person against whom a seriously damaging allegation has been made a reasonable opportunity to respond (SO 242).

Options and discussion

2.2.18 The Legislative Council's general procedural protections, adopted in the 2018 Resolution following an extensive inquiry by the Privileges Committee, represent a significant step forward in providing the reality and appearance of fairness for those appearing before the House and Committees. However, a number of matters remain unresolved by the 2018 Resolution.

1. Adoption of minimal procedural protections in statute

While the Procedural Fairness Resolution represents an important advancement for procedural protections in the New South Wales Legislative Council, a question arises as to why minimal procedural protections are not established in the legislation that sets out the powers of the Parliament in relation to taking evidence (ie, the *Parliamentary Evidence Act*). This might be seen to be particularly important given the Resolution is framed in language of 'general' practice, and not absolute requirements. Witnesses – and the public more generally – might expect that where powers are statutorily conferred, protections are also contained in statute. A set of minimum requirements in the statute would at the least set a baseline for the expectations of witnesses. For instance, s 31B of the *Independent Commission Against Corruption Act 1988* provides:

31B Procedural guidelines relating to public inquiries

[75] See further discussion of the limited nature of this, and the procedure associated with it in David Wilson, *Parliamentary Practice in New Zealand* (2023) 31.9.2.

(1) The Commissioners are to issue guidelines relating to the conduct of public inquiries of the Commission to members of staff of the Commission and counsel appointed under section 106 to assist the Commission.

(2) The guidelines are to provide guidance on the following aspects of the conduct of public inquiries—

(a) the investigation of evidence that might exculpate affected persons,

(b) the disclosure of exculpatory and other relevant evidence to affected persons,

(c) the opportunity to cross-examine witnesses as to their credibility,

(d) providing affected persons and other witnesses with access to relevant documents and a reasonable time to prepare before giving evidence,

(e) any other matter the Commission considers necessary to ensure procedural fairness.

However, weighing against a move to statutory codification include that placing such matters in statute might bring with it the potential for the courts to involve themselves in overseeing and enforcing the procedures and deliberations of the Parliament in a way that infringes on parliamentary privilege. This could be overcome with careful legislative drafting.

Further consideration should therefore be given to the possibility of:

- Statutory codification of the minimum requirements of procedural fairness where witnesses appear before the Parliament and its committees, and how those minimum requirements are to be enforced. These minimum requirements can be supplemented by the more detailed procedures in the existing Resolution.
- If statutory codification is not considered desirable, greater clarity around the circumstances when the Procedural Fairness Resolution provisions will not be applied, to increase the consistency and transparency of its application.

2. Review of procedural protections in Resolution

The Procedural Fairness was adopted in 2018 following a significant inquiry by the Privileges Committee. More than five years have passed since its initial adoption, giving rise to an opportune time for considering whether amendment, including expansion, to the procedural protections in the Resolution is warranted.

Options that might be considered in such a review include, for instance:

- allowing a legal representative (where leave has been granted) for a witness to object to answering a question, particularly if potential penal consequences for failing to answer are retained (see **Issue 1**);

- giving a person against whom the Committee intends to make an adverse finding in a report, an opportunity to respond to that finding.

3. **The role of Committee Chairs**

   As discussed above, under the Procedural Fairness Resolution, committee chairs have an important role; yet, this is nowhere clearly stated, and their obligations to act impartially in the course of their functions is not articulated. A question, therefore, that arises is whether there is benefit in clarifying this role. This might be done:

   - In statute, and in particular, the *Parliamentary Evidence Act 1901* (NSW). This option might be particularly appropriate if the minimum requirements of procedural fairness where witnesses are appearing before Parliaments and their Committees are also included in this legislation.
   - In the Procedural Fairness Resolution, which might be considered appropriate if this remains the only source for the procedural protections provided to witnesses. Setting out the role of the Chair in this Resolution, where the fair hearing protections are also set out, would provide witnesses with greater clarity in relation to their expectations as to the process that will be followed when appearing before a Committee.

4. **Codification of the Privileges Committee special procedure when dealing with contempt**

   Particularly, if the New South Wales Parliament retains its penal jurisdiction in relation to failure to answer (see **Issue 1**), the special procedures that should be afforded to witnesses appearing in contempt proceedings before the Privileges Committee could be codified. Codification could achieve the desired transparency and fairness, and public perception of it, that has been achieved with the general protections in the Procedural Fairness Resolution.

5. **Codification of special procedures directed to accord fairness to vulnerable witnesses**

   Where there are, or it is considered desirable that there should be, special procedures for different groups of vulnerable witnesses appearing before committees to ensure they are accorded fairness given their circumstances, these may be codified in a similar form to the Procedural Fairness Resolution. These groups might include minority and vulnerable groups, such as child witnesses, those from a CALD or Indigenous background, people with disabilities, as well as professionally vulnerable groups such as junior public servants and whistleblowers. This would achieve the desired transparency and fairness, and public perception of it, that has been achieved with the general protections in the Procedural Fairness Resolution. It would also be responsive to the objectives of promoting greater diversity and inclusion in parliamentary inquiries.

6. Clarification of consequences for breach of Procedural Fairness Resolution

In 2018, the Privileges Committee noted the codification of procedural fairness provisions 'gives rise to the question of how any complaint from a witness about their treatment by a committee in possible contravention of the resolution would be dealt with.'[76] While complaints might arise rarely, when they do, they must be dealt with in a fair and impartial way. The current practice is for the Committee to consider the matter and make a determination. This reflects the procedure adopted also in the Senate and House of Representatives at the Commonwealth level.

The current procedure therefore raises a number of further matters for consideration as part of the Committee's current inquiry, including:

- whether there should be an explanation in the Resolution for witnesses regarding how a complaint can be made regarding the application of the Resolution, and how it will be determined;
- whether there should be a way to escalate the resolution of the complaint if the witness is not satisfied with the way in which it has been dealt with by the Committee, for instance, to the House or the Privileges Committee.

[76] Legislative Council Privileges Committee, *Procedural Fairness for Inquiry Participants* (Report 75 - June 2018) 15.

2.3 Issue 3. Power to compel attendance

Questions asked by the Committee

- *Sections 7-9 of Parliamentary Evidence Act provide a mechanism for witnesses to be brought before a House or a committee. What alternative mechanisms are available, including mechanisms used in other jurisdictions?*

The position in NSW

2.3.1 Sections 7-9 of the *Parliamentary Evidence Act* provides for a mechanism for witnesses to be brought before a House or a committee where they fail to attend on a summons issued by the Presiding Officer. Engagement of this mechanism involves both the Parliament and the Supreme Court. Sections 7-9 provide:

> **7 Non-attendance of witness to be certified to a Judge**
>
> If any witness so summoned fails to attend and give evidence in obedience to such notice or order, the President or the Speaker, as the case may be, upon being satisfied of the failure of such witness so to attend and that the witness's non-attendance is without just cause or reasonable excuse, may certify such facts under the President's or the Speaker's hand and seal to a Judge of the Supreme Court, according to the form in Schedule 2, or to the like effect.
>
> **8 Issue of warrant**
>
> Upon such certificate any Judge of the said Court shall issue a warrant in the form in Schedule 3, or to the like effect, for the apprehension of the person named in such certificate, for the purpose of bringing the person before the Council, Assembly, or Committee to give evidence.
>
> **9 Warrant and order of President or Speaker to be sufficient authority for acts thereunder**
>
> (1) Such warrant shall be a sufficient authority for all persons acting thereunder to apprehend the person named in such warrant, and to retain the person in custody, to the intent that the person may from time to time be produced for the purpose of giving evidence, or be remanded and finally be discharged from custody, pursuant to any order under the hand and seal of the President or Speaker, as the case may be.
>
> (2) Every such order shall be a sufficient warrant for all persons acting thereunder.

2.3.2 Under this scheme, s 7 retains a discretion as to whether to issue a certificate by the President or the Speaker, in that they must be satisfied not only that the witness failed to appear, but that there is no just cause or reasonable excuse. This discretion was exercised, for instance, where witnesses failed to appear at the 'Gentrader' inquiry, on the basis the President was

satisfied that they held genuine concerns about whether they would be protected by parliamentary privilege if they appeared before the Committee because of the prorogation of the Parliament.[77]

2.3.3 There have been conflicting legal opinions in the past regarding whether committees may continue to undertake their functions during prorogation.[78] The position of the Legislative Council is that committees are able to continue to operate, with a number of precedents supporting this position. The issue was raised by some witnesses during the Hills Shire Inquiry, where the Committee reaffirmed the Council's position.[79] In March 2023, then Premier Dominic Perrottet also indicated the Government's agreement that Committees continue to operate during the prorogation period.[80] The window for prorogation has been limited since the introduction of s 10A of the *Constitution Act 1902* (NSW) in 2011; nonetheless, the window still remains. In a general modernisation of the *Parliamentary Evidence Act 1901* (NSW), it may be beneficial to put beyond doubt the power of committees during prorogation to continue to transact business, at least in relation to the taking of evidence and the application of privilege.[81]

2.3.4 The form of the warrant issued under s 8 of the *Parliamentary Evidence Act* is set out in Schedule 3, and is directed to 'the Sheriff of New South Wales, the Sheriff's deputy and assistants, and to all constables and other His Majesty's officers and ministers of the peace whom it may concern'.

2.3.5 The benefits of this procedure include:

- The issue of the warrant by a judge of the Supreme Court engages the machinery usually deployed to enforce warrants of the Court, including the Sheriff and their staff and the police.
- The issue of the warrant by a judge of the Supreme Court means that the warrant can be executed interstate (see discussion of this below at **Issue 7**). As is explained below, the issue of summons and warrants other than by a judge (such as by the Presiding Officer) would not be picked up by the *Service and Execution of Process Act 1992* (Cth).
- The warrant allows for the person to be produced before the Houses and their committees for the purpose of giving evidence, rather than imprisonment (or other punishment) for failing to attend (see discussion in relation to comparative practice, below).

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77 See further General Purpose Committee No 1, *The Gentrader transactions* (Report 36, February 2011) [1.60], 12

78 As discussed in Frappell and Blunt (n 15) 788-794. See also 677-679. (Putting to one side statutory committees that generally have a statutory mandate to transact business during prorogation.)

79 Hills Shire Council Report, xi-xii.

80 See statement of the Premier in Alexandra Smith and Lucy Cormack, 'NSW inquiries to continue despite parliament being shut down from Monday', *Sydney Morning Herald* (23 February 2023).

81 Such an amendment was raised during the passage of the 2011 Bill but not considered: see further Frappell and Blunt (n 15) 793, fn 314.

2.3.6 The potential issues with the procedure, however, might be:

- The current procedure might be considered cumbersome in its application, in that it involves certification of factual matters by the Presiding Officer followed by the issue of the warrant by a judge of the Supreme Court.
- The current provisions also raise a question as to whether there is the potential for the judge of the Supreme Court to review the matters certified by the Presiding Officer, and in particular, whether there was just cause or reasonable excuse. While s 8 provides that the Court 'shall issue' the warrant, and parliamentary privilege would generally prevent the courts from inquiring into such matters, the courts have been reluctant to remove discretion from judges, particularly where this might involve incursions into their independence and integrity.[82]

The practice in other jurisdictions

2.3.7 New South Wales is unique in the procedure it adopts for enforcing a summons where a witness fails to attend.

2.3.8 At the Commonwealth level, as in most other Australian jurisdictions, failure to appear is considered a contempt, and dealt with by the relevant House accordingly (which may determine that a punishment will be imposed). This means:

- There is no mechanism by which the machinery of the courts – including the sheriff and their staff, and police – are deployed to enforce a summons.
- There is the possibility of punishing the individual for failing to appear, but there is no mechanism for bringing a recalcitrant witness before the Houses and their Committees to give evidence.

2.3.9 There are two notable exceptions to this. Under the *Public Accounts and Audit Committee Act 1951* (Cth)[83] and the *Public Works Committee Act 1969* (Cth),[84] special provision is made for the issue of a warrant by the Chair or Deputy Chair where a witness has failed to appear in accordance with a summons. For instance, s 14 of the *Public Accounts and Audit Committee Act* provides:

> **14 Warrant in case of disobedience of summons**
>
> (1) If a person upon whom a summons under the last preceding section has been served and to whom reasonable expenses of conveyance have been tendered fails to appear, or, having appeared, fails to continue in attendance, in obedience to the

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82 Under the *Kable* principle, which requires that State courts retain their independence and impartiality. See further in relation to the retention of judicial discretion, for instance, *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532. These standards also apply to judges acting persona designata: *Wainohu v New South Wales* (2011) 243 CLR 181.

83 Section 14.

84 Section 22.

summons, the Chair or the Deputy Chair may issue a warrant for his or her apprehension.

(2) The warrant may be in accordance with Form D in the Schedule.

(3) The person executing a warrant under this section may:

(a) apprehend the person in respect of whom it is issued;

(b) bring that person before the Committee; and

(c) detain that person in custody until he or she is released by order of the Chair or the Deputy Chair.

(4) The warrant may be executed by the person to whom it is addressed or by a person appointed by him or her to assist him or her in its execution, and the person executing the warrant may break and enter a building, place or ship for the purpose of executing the warrant.

Options and discussion

2.3.10 There are two key issues that arise for consideration.

1. Retention of warrant mechanism

The threshold question that arises for the New South Wales Parliament is whether to retain its current system for enforcing attendance by witnesses. There are a number of reasons why its retention might be desirable. Chief among these is that it provides a mechanism not just for punishing a recalcitrant witness, but in achieving the objective of bringing the witness before the Parliament or its committees to give evidence, and thus assist it with its inquiries.

However, it engages a relatively cumbersome process, and one that may bring the courts into reviewing parliamentary decisions regarding just cause or reasonable excuse. Finally, even if a recalcitrant witness is brought before the Houses or their Committees, there is a likelihood that they would refuse to answer questions put to them by the Committee, (and potentially by liable to a penalty, see **Issue 1**). So, while it gives the Committee a further opportunity to conduct its inquiries, punishment may ultimately be the only consequence for the individual involved.

2. If the warrant mechanism is maintained, process for issuing warrant

If the warrant mechanism is retained, further questions arise as to whether ss 7-9 have adopted the most appropriate process for its issue.

The process in these provisions is relatively cumbersome, compared, for instance, to that under the Commonwealth *Public Accounts and Audit Committee Act 1951*, which involves the Chair or the Deputy Chair issuing the warrant. The New South Wales process could be streamlined, so that the Chair/Deputy Chair, or the Presiding Officer

of the House, was responsible for issuing the warrant. However, a number of disadvantages can arise from that option, including:

- Removing the certification role of the Presiding Officer removes a possible safeguard in the process for the individuals involved.
- Removing the Supreme Court judge from issuing the warrant means that the warrant would not be able to be applied interstate under the *Service and Execution of Process Act 1992* (Cth). (It should be noted that this issue is not one that arises under the Commonwealth *Public Accounts and Audit Committee Act 1951* as it applies across the Commonwealth and is not limited to state borders.)
- Removing the Supreme Court judge from issuing the warrant raises questions as to whom the warrant will be directed: would be it directed to the parliamentary officers to execute, or the usual officers of the Supreme Court (the sheriff and police), who would seem better equipped to execute the warrant.

2.3.11 In addition to these issues, the above discussion has also raised the potential desirability of confirming the Legislative Council's position and clarifying the powers of Committees during prorogation – including the power to compel the attendance of witnesses.

2.4 Issue 4. Application of witness privileges (self-incrimination, legal professional privilege, public interest immunity):

Questions asked by the Committee

- *The penalty in section 11 applies to refusal to answer a 'lawful question'. Is the concept of a 'lawful question' still helpful?*
- *Should the meaning of lawful question be defined to exclude the interpretation in Crafter v Kelly?*

The purpose of witness privileges

2.4.1 The application of the witness privileges against self-incrimination and legal professional privilege raises squarely the tension between the two competing constitutional principles set out in **Part 1.B** of this Discussion Paper. On the one hand is the need to ensure the Houses and their Committees have the necessary coercive powers to fulfil their constitutional inquiry and executive oversight role on behalf of the wider community.

2.4.2 On the other is the importance of providing appropriate protections for individuals appearing before the Houses and their Committees. The rights of individuals to claim witness privileges (against self-incrimination and for legal professional privilege) when they appear before state-sanctioned inquiries has a long pedigree and these are considered fundamental common law rights. They each have, however, a slightly different justification.

2.4.3 *Privilege Against Self-Incrimination:* The privilege against self-incrimination allows a person to refuse to answer any question or produce any document if doing so would tend to expose the person to criminal liability. It is closely associated with ensuring the rights of individuals appearing in criminal trials, and it developed alongside the adversarial system of justice, the presumption of innocence and the prosecution's burden of proof.

2.4.4 However, there is increasing recognition that the privilege against self-incrimination can obstruct the conduct of investigatory inquiries, and there are many instances now where the privilege has been abrogated in the public interest to ensure matters of public concern can be fully investigated. Generally where the privilege is abrogated, there is immunity provided regarding the use of answers provided in the investigatory context in subsequent proceedings (this can be direct, or derivative immunity, that is, immunity from using other evidence that has been obtained as a result of the person giving evidence). This has occurred, for instance, in relation to s 128 of the *Evidence Act 1995* (NSW), which provides a partial abrogation of the privilege against self-incrimination where the individual might be liable for a civil or criminal penalty, and a procedure for both direct and derivative immunity. The Independent Commission Against Corruption, similarly, has modified the application of the privilege (as well as other privileges). Section 37(2) of the *Independent Commission Against Corruption Act 1988* (NSW) provides:

(2) A witness summoned to attend or appearing before the Commission at a compulsory examination or public inquiry is not excused from answering any question or producing any document or other thing on the ground that the answer or production may incriminate or tend to incriminate the witness, or on any other ground of privilege, or on the ground of a duty of secrecy or other restriction on disclosure, or on any other ground.

2.4.5 An immunity is provided in (3):

(3) An answer made, or document or other thing produced, by a witness at a compulsory examination or public inquiry before the Commission … is not … admissible in evidence against the person in any civil or criminal proceedings or in any disciplinary proceedings.

2.4.6 *Legal professional privilege:* Legal professional privilege protects communications between an individual and their lawyer on the basis that the administration of justice is better served where individuals have a free and uninhibited channel of communication with their legal representatives. Again, however, there is increasing recognition that the privilege can obstruct investigatory inquiries, and there are a number of examples of its abrogation (such as s 37(2) of the *Independent Commission Against Corruption Act 1988* (NSW), set out above).

2.4.7 In the parliamentary context, the New South Wales Court of Appeal has held that legal professional privilege would not apply to documents required to be produced to a House by a Minister under the requirements of 'necessity'.[85] This power is separate from that in s 11 of the *Parliamentary Evidence Act,* which is in question here, and applies to members of the public appearing as witnesses.[86]

2.4.8 *Public interest immunity:* Public interest immunity raises a tension between a different set of interests. It is not strictly a 'witness privilege', but, rather, a privilege that attaches to the Executive. It exists to protect certain government information on the grounds that the public interest is better served by retaining its confidentiality than its disclosure. It extends to information that might prejudice security, defence or international relations; damage relations between the Commonwealth and the States, or between the States; prejudice the investigation or prosecution of an offence that might disclose confidential law enforcement information; or prejudice the proper functioning of the government of the Commonwealth or the State, such as Cabinet documents.[87]

2.4.9 The tension in relation to this category of information is of a different nature: rather than raising the tension between the public interest in parliament undertaking its inquiries and

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85 *Egan v Chadwick* (1999) 46 NSWLR 563, [86] (Spigelman CJ), [135] (Priestley JA).

86 Note Twomey (n 37) 517, fn 198.

87 See, eg, *Evidence Act* (NSW) s 130(4) for a list of circumstances that public interest immunity might apply to.

the rights of individuals, it raises a tension between the public interest in parliament undertaking its inquiries and the public interest in ensuring government can undertake its constitutional functions effectively. In *Egan v Chadwick*, the New South Wales Court of Appeal held that only public interest immunity as it applies to cabinet confidentiality can apply in the face of a parliamentary request for documents.[88] The majority's position has been the subject of criticism, however, by Sir Anthony Mason, as placing an unwarranted imposition on the Parliament's 'high constitutional function of reviewing Executive activity'.[89]

The position in NSW

2.4.10 The application of witness privileges in the New South Wales Parliament has been defined, if by anything, by a *lack* of clarity.[90] This lack of clarity has affected both the application of privileges, and the procedures to be applied if privilege is claimed.

2.4.11 Section 11 of the *Parliamentary Evidence Act* relevantly provides:

> **11 Penalty for refusal to answer**
>
> (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….

2.4.12 The sanction of imprisonment that attaches to failing to answer a lawful question in s 11 (see **Issue 1**) has never been invoked. Nonetheless, the concept of 'lawful question' has created significant confusion as to the availability of witness privileges. The reason for this ambiguity is twofold. First, because there is little helpful judicial precedent clarifying the meaning of the term 'lawful' in the parliamentary context. The case that has been most extensively relied upon, *Crafter v Kelly*, a 1941 South Australian decision, provides the following statement:

> 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.[91]

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88 *Egan v Chadwick* (1999) 46 NSWLR 563. The Legislative Council's views as to whether documents disclose the 'actual deliberations of Cabinet', as required by the case, are set out in Frappell and Blunt (n 15) 702-3.

89 Anthony Mason, 'The Parliament, the Executive and the Solicitor-General' in Gabrielle Appleby, Patrick Keyzer and John M Williams (eds) *Public Sentinels: A Comparative Study of Australian Solicitors-General* (Edward Elgar, 2014) 50.

90 Russell Grove (ed) *New South Wales Legislative Assembly Practice, Procedure and Privilege* (1st ed, 2007) 27.4.

91 [1941] SASR 237, 242 (Parsons J, with whom Murray CJ agreed).

2.4.13 Napier J in that case explained that the language of 'lawful question' implies that there is a limit to the power to question: if the purpose were to allow for any question, why qualify the term with 'lawful'.[92]

2.4.14 The term 'lawful question', and the statements in this case, have raised more questions than they have answered.

2.4.15 For some, the language of 'lawful question' and the statement in *Crafter v Kelly* import the idea that a question is not lawful if it would infringe the common law privileges, as are available at law in the courts. There is a general presumption of statutory interpretation that these privileges, as fundamental common law rights long respected in the courts, will not be abrogated unless by clear language or necessary intent (an application of the statutory interpretation 'principle of legality').[93] In the *Parliamentary Evidence Act*, with the exception of religious confessions, there is no *express* reference to or abrogation of the privileges. However, there is an argument that Parliament's inquiry power is of such fundamental importance, it is necessarily intended that these privileges are abrogated.[94]

2.4.16 Another line of argument is made that the statements in *Crafter v Kelly* means that what is lawful will simply depend on the pre-existing limits of the power of the institution. The NSW Parliament's power is sourced in the common law doctrine of what is reasonably necessary to allow the Houses to fulfil their constitutional functions – of inquiry and holding the executive to account.[95] And while the position is not dictated by the practice of the House of Commons, it has long been established in the House of Commons in the UK that to perform these functions, the House requires the power to compel answers even in the face of claims of privilege.[96]

2.4.17 These different approaches have given rise to a number of different views as to the correct legal position in New South Wales. These have been summarised elsewhere:[97]

- The privileges are available: this is the view that has been consistently taken by the New South Wales Executive, and is based on advice that has been received by the government over a number of years, including from the Crown Solicitor,[98] Solicitors-

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92 Ibid 246.

93 See, eg, in the specific context of self-incrimination *Reid v Howard* (1995) 69 ALJR 863, 870 (Toohey, Gaudron, McHugh and Gummow JJ).

94 See discussion of the constitutional importance of the inquiry power, and its relevance to the claims of privilege in the orders for documents, in *Egan v Willis* (1998) 195 CLR 424.

95 *Egan v Willis* (1998) 195 CLR 424.

96 See discussion of these UK precedents in Duffy and Ohnesorge (n 30) 41-42.

97 Frappell and Blunt (n 15) 809-811; Duffy and Ohnesorge (n 30) 41-44.

98 See, eg, Assistant Crown Solicitor, 'Power of Standing Committee on State Development to Require Production of Documents and Things' (16 March 1990) p 4, cited in Frappell and Blunt (n 15) 809.

General Mary Gaudron and Keith Mason.[99] It is the position taken by Anne Twomey.[100]

- The privileges are not available: this is the view that has been taken by the New South Wales Legislative Council,[101] and is based on advice received by the Council from Bret Walker SC.[102] It is the position taken by Enid Campbell.[103]

2.4.18 While it will be initially a question for the presiding officer to determine whether a witness has failed to answer a 'lawful question', should the penalty of imprisonment ever be imposed, the exercise of jurisdiction may be subject to review in the courts.[104]

2.4.19 Importantly, the non-application of the privileges does not necessarily mean that the House or Committee will not respect privilege claims if they are made by witnesses, but that this will be done in the exercise of discretion, and that the Parliament is not bound by a valid privilege claim.

The practice in other jurisdictions

2.4.20 Many jurisdictions are silent in relation to the applicability of witness privileges in parliamentary inquiries.

2.4.21 Queensland is the most notable jurisdiction that has set out in statute a clearly articulated regime in relation to the privilege against self-incrimination. Under s 34 of the *Parliament of Queensland Act 2001* (Qld), witnesses may object to answering a question on the basis of the privilege against self-incrimination. If the witness objects, and the Committee finds that they ought to answer the question, the matter is referred to the Legislative Assembly.[105] The Assembly may override the privilege claim, but must weigh up the competing public interests in the parliament's power of inquiry, and the individual's rights to privacy and against self-incrimination in doing so.[106]

2.4.22 At the Commonwealth level, the Houses take the view that privilege claims for privilege against self-incrimination, legal professional privilege and even public interest immunity are to be dealt with as claims only, and are not legally enforceable against the Houses should they insist on a question being answered.[107] However, the Senate's Privilege Resolution (1)

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99 Mary Gaudron QC, Solicitor General of NSW, 'Parliamentary Evidence Act' (8 September 1983); Keith Mason QC, Solicitor-General of NSW, 'Powers and procedures of joint select committees' (20 September 1992), cited in Frappell and Blunt (n 15) 810.

100 Twomey (n 37) 517.

101 Although noting the doubt expressed as to the clarity of this position in Frappell and Blunt (n 15) 812.

102 Bret Walker SC, 'Parliament of New South Wales – Legislative Council: Select Committee on Ombudsman's "operation Prospect"' 14 January 2015, 4-5, cited in Frappell and Blunt (n 15) 810-811.

103 Enid Campbell, *Parliamentary Privilege* (Federation Press, 2003) 164, where she states "As houses of parliaments and their committees are not bound by the rules of evidence, witnesses who appear before them cannot, unless there is some statutory provision to the contrary, rely on the privileges which would be available to them were they witnesses before a court.'

104 Frappell and Blunt (n 15) 808. Note Campbell (n 103), 166 as to the likely limited scope of this review.

105 Section 33.

106 Section 35.

107 See, eg, *Odgers* (n 73) 644, 662-667; D R Elder (ed), *House of Representatives Practice* (7th ed, 2018) 698.

provides a level of clarity for witnesses as to how claims will be considered. It provides at clause 10:

> Where a witness objects to answering any question put to the witness on any ground, including the ground that the question is not relevant or that the answer may incriminate the witness, the witness shall be invited to state the ground upon which objection to answering the question is taken. Unless the committee determines immediately that the question should not be pressed, the committee shall then consider in private session whether it will insist upon an answer to the question, having regard to the relevance of the question to the committee's inquiry and the importance to the inquiry of the information sought by the question. If the committee determines that it requires an answer to the question, the witness shall be informed of that determination and the reasons for the determination, and shall be required to answer the question only in private session unless the committee determines that it is essential to the committee's inquiry that the question be answered in public session. Where a witness declines to answer a question to which a committee has required an answer, the committee shall report the facts to the Senate.[108]

2.4.23 As referred to above, this reflects the position of the House of Commons in the UK. The current edition of *Erskine May* states:

> Witnesses are bound to answer all questions which the committee sees fit to put to them, and cannot excuse themselves, for example, on the ground that they may thereby subject themselves to a civil action, or that they have taken an oath not to disclose the matter about which they are required to testify, or that the matter was a privileged communication, as where a solicitor is called upon to disclose the secrets of a client; or on the ground that they are advised by counsel that they cannot do so without incurring the risk of self-incrimination or exposure to a civil suit, or that it would prejudice them as defendant in litigation which is pending, some of which would be sufficient grounds of excuse in a court of law. Nor can a witness refuse to produce documents in their possession on the ground that, though in their possession, they are under the control of a client who has given instructions not to disclose them without express authority. …
>
> However, a witness who is unwilling to answer a question, after stating their reasons, may ask the Chair either to be excused from answering or to answer in private. Where evidence is taken in private, a witness may also request that the whole or part of their evidence should not be published ….[109]

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108 Parliamentary Privilege Resolution No 1, adopted by the Senate on 25 February 1988.

109 References omitted. *Erskine May* (n 52) [38.36]. See also at 38.40 in relation to discretion to not publish certain material where the witness has requested on the grounds of the public interest, distress to an individual, commercial confidentiality or similar grounds.

2.4.24 The position in relation to public interest immunity is more complex, with *Erskine May* stating that the power to send for persons is limited where it conflicts with privileges of the Crown.[110]

2.4.25 A decision has been taken in New Zealand to statutorily *confirm* the application of privileges that can be claimed in a court of law under s 25 of the *Parliamentary Privilege Act 2014* (NZ).

Options and discussion

2.4.26 There are two key matters that require consideration: the clarification as to the application of witness privileges, and any procedure that attaches to a claim of privilege.

1. Clarification of application (or non-application) of witness privileges

It would appear highly desirable for all parties involved in parliamentary inquiry – the Houses and their Committees, members of the Executive, and members of the public – for there to be clarification in the *Parliamentary Evidence Act* as to the application, or non-application of witness privileges. Retaining the reference to 'lawful question', with its ambiguous precedent and disputed meaning would appear to serve nobody's interests.[111] The threshold question, therefore, is whether to apply or not apply witness privileges. Three options arise for consideration here:

(a) Clarify in the statute that witnesses can claim privilege against of self-incrimination, legal professional privilege, and public interest immunity in a parliamentary inquiry, and that the powers of the Houses and their Committees are limited by such claims. This position would accord with that adopted in New Zealand, which weighs in favour of the individual's rights over that of the constitutional function of parliamentary inquiries.

(b) Clarify in the statute that witnesses cannot claim privilege against self-incrimination, legal professional privilege, and public interest immunity in a parliamentary inquiry, and that the powers of the Houses and their Committees are not limited by such claims. This position would accord with that adopted at the federal level, weighing in favour of the importance of the constitutional function of parliamentary inquiries.

(c) Clarify in the statute that witnesses can claim some but not all witness privileges (for instance, that they can claim public interest immunity but not the privilege against self incrimination or legal professional privilege) in a parliamentary inquiry, and that the powers of the Houses and their Committees are limited accordingly.

If it is decided that witnesses should not be able to claim all or some of the witness privileges, further questions arise. The first is whether the Houses and Committees should, nonetheless, have a process by which a witness may raise an objection based on a witness privilege, for the House or Committee to determine whether such an objection

110 Ibid [38.33].

111 Duffy and Ohnesorge (n 30) 46, 52.

is reasonable, and whether to insist that the question be answered in the circumstances. This is considered next. The second is the extent to which parliamentary privilege provides an immunity for the witnesses from the use of evidence given. This is addressed in relation to the application of parliamentary privilege to parliamentary evidence, in **Issue 5**, below.

2. Procedure for privilege claims

If it is decided that witness privileges should apply in the New South Wales Parliament, clarity should be provided in relation to how a claim is determined in relation to such privilege. Options for determining such claims include:

- Where a claim for privilege is made in a Committee, it may be dealt at first instance by the Committee, which can be referred to the House if it is determined there is no valid claim and the Committee insists on the question being answered.
- Where a claim for privilege is made in the House, the claim is dealt with by the House.
- The House may refer the matter to receive a report to assist it in its determination: for instance, refer matters for inquiry and report by the privileges committee, or to an independent legal arbiter (as occurs in relation to disputes regarding privilege claims in relation to orders for production of documents).

There should also be consideration given not just to the procedure for determining a claim, but to expressly setting out the matters that must be considered in determining the claim.

If it is decided that witnesses cannot claim all (or some) witness privileges, there should be a clear procedure in place for determining where, nonetheless, the Houses or Committees will consider whether there exist reasonable grounds for objection and whether they will press the question in the face of such grounds. Such a procedure is currently provided for in clause 12 of the Legislative Council's *Procedural Fairness Resolution* (2018), which states:

> **12. Objections to answering questions**
>
> Where a witness objects to answering a question, they will be invited to state the grounds for their objection. If a member seeks to press the question, the committee will consider whether to insist on an answer, having regard to the grounds for the objection, the relevance of the question to the inquiry terms of reference, and the necessity to the inquiry of the information sought. If the committee decides that it requires an answer, it will inform the witness of the reasons why and may consider allowing the witness to answer the question on notice or in private (in camera).

Witness appearing by invitation

(a) If a witness who appears by invitation continues to refuse to answer the question, the committee may consider summoning the witness to reappear later, and will advise the witness that as they will be under oath and so subject to section 11 of the *Parliamentary Evidence Act 1901*, they may be compelled to answer the question.

Witness appearing under summons

(b) The continued refusal by a witness, having been summoned, to answer the question while under oath, may constitute a contempt of Parliament under the *Parliamentary Evidence Act 1901*, and the committee may report the matter to the Legislative Council.

Clause 12 provides direction for witnesses as to when and how objections will be considered by Committees. However, consideration should be given as to whether further clarity can be provided ,for instance:

- in relation to the type of matters the committee will consider should a claim of privilege be made;
- in relation to the reasons why other options, such as an *in camera* hearing, might be appropriate; and
- whether information taken *in camera* or where there is a reasonable objection, will be published.

2.5 Issue 5. Application of Parliamentary Privilege to Witnesses

Questions asked by the Committee:

- *Does the protection in section 12 add anything over and above the existing protections of witnesses under Article 9 of the Bill of Rights?*

Article 9 of the Bill of Rights of 1689 and its purpose

2.5.1 Article 9 of the Bill of Rights provides:

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

2.5.2 It is generally accepted that Article 9 of the *Bill of Rights* became the law of New South Wales in 1828 under the *Australian Courts Act 1828* (UK);[112] and has been continued under the *Imperial Acts Application Act 1969* (NSW).[113] However, as the *New South Wales Legislative Council Practice* notes: 'at that time, Article 9 was of no legal or judicial notice whatsoever, and continued as such for over 150 years'.[114] In an 1881 defamation case, the privilege of freedom of speech was upheld not on the basis of Article 9, but necessity.[115] Today, the privileges of the New South Wales Parliament (as with other Westminster parliaments), are often framed through Article 9.[116]

2.5.3 The privilege that attaches by virtue of Article 9 attaches to the members of the Houses, officers of the Houses, witnesses before inquiries and committees and other participants in the 'proceedings' of Parliament. It prevents any legal reprisal based on statements made in the course of parliamentary proceedings. These include civil or criminal proceedings, including but not limited to defamation. Its scope is wide, and it is not negatived by the presence of malice, fraudulent purpose or falsity, there is no overriding public interest test. The justification for Article 9 has been stated by Lord Browne-Wilkinson as follows:

> … the need to ensure as far as possible that a member of the legislature and witnesses before committees of the House can speak freely without fear that what they will say will later be held against them in courts. The important public interest protected by such privilege is to ensure that the member of witness *at the time he speaks* is not inhibited from stating fully and freely what he has to say. If there were any exceptions which permitted his statements to be questioned subsequently, at the time when he speaks in Parliament he would not know whether or not there would subsequently be a challenge to what he is saying. Therefore he would not have the confidence the privilege is designed to protect.[117]

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112 Frappell and Blunt (n 15) 82.
113 Section 6; schedule 2.
114 Frappell and Blunt (n 15) 82.
115 *Gipps v McElhone* (1881) 2 LR (NSW) 18.
116 Frappell and Blunt (n 15) 83-84.
117 *Prebble v Television New Zealand Ltd* [1995] 1 AC 321, 333-334 (Lord Browne-Wilkinson).

In addition to the protections in Article 9, privilege has been extended in s 27 of the *Defamation Act 2005* (NSW) to the publication of the records of debates and proceedings as authorised by the House, such as through Hansard and the Minutes of Proceedings, the publication of papers tabled and ordered to be printed by the House, and the broadcast of proceedings by the House.[118]

Section 12 of the Parliamentary Evidence Act

2.5.4 Witnesses before Committees receive protection under s 12(1) of the *Parliamentary Evidence Act*. Section 12 provides:

> **12 Privilege of witness**
>
> (1) No action shall be maintainable against any witness who has given evidence, whether on oath or otherwise, under the authority of this Act, for or in respect of any defamatory words spoken by the witness while giving such evidence.
>
> (2) This section operates in addition to, and not in derogation of, any defence available to any such witness under the *Defamation Act 2005* for the publication of defamatory matter.
>
> ***Note—***
>
> *For example, section 27 (2) (a) (iii) of the Defamation Act 2005 provides that the publication of defamatory matter while giving evidence before a parliamentary body attracts the defence of absolute privilege in defamation proceedings. Section 4 of that Act defines a* ***parliamentary body*** *to include a parliament or legislature, a house of a parliament or legislature and committees of any such parliament, legislature or house.*

2.5.5 The *New South Wales Legislative Council Practice* states that the privilege in s 12(1) operates *in addition to* that afforded by Article 9 and necessity. It explains its existence as follows:

> While essentially replicating the immunity under Article 9, it is readily apparent why this provision exists. It was adopted by the Parliament in 1881 in the *Parliamentary Evidence Act 1881* as part of the Parliament's attempt to firmly establish its power to call and compel evidence from witnesses. At the same time, the Parliament had to provide those witnesses with the assurance of full protection against legal reprisal.[119]

2.5.6 Further, it should be remembered that the basis on which these privileges rested in 1881 were not as clear as today: the application and role of Article 9 not having been fully realised, and the privilege resting on the doctrine of necessity. It has subsequently been amended in 2005 to clarify the relationship between the provision and the protections to published and broadcast proceedings now afforded in the *Defamation Act 2005*.

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118 This extension addresses the limits of Article 9 identifed in *Stockdale v Hansard* (1839) 112 ER 1112.

119 Frappell and Blunt (n 15) 94-95

Options and discussion

2.5.7 The inclusion of s 12 in the *Parliamentary Evidence Act 1901* is explained by its historical context, but its continued existence in the modern Parliament, with the renewed attention paid to Article 9, presents as somewhat of an anomaly. Its continued existence raises a number of questions, including:

- Whether the protections in s 12(1) are simply replicating the protections granted to witnesses under Article 9 and thus achieving no operational purpose?
- Whether the included clarification between the *Parliamentary Evidence Act* and the *Defamation Act* in s 12(2) is necessary?
- Whether the inclusion of the express immunity against defamation actions impliedly excludes the broader protections of Article 9?

2.5.8 There are three main reform options that should be considered:

1. Clarification of section 12 as applying the privileges of Article 9

One option would be to retain section 12, but clarify the application of the broader protections that Article 9 offers witnesses, including the protections against defamation that are already referred to in s 12(1). This would clarify that there is no intent to *limit* the protections available to witnesses under Article 9, and also maintain the clarification as to the relationship with the *Defamation Act 2005*.

2. Clarification of section 12 as applying and extending the privileges of Article 9

In **Issue 4**, above, the question of the availability of witness privileges was discussed. It may be desirable, should witness privileges be clearly abolished, for the immunities that attach to an individual, particularly in relation to the privilege against self-incrimination, to be clarified. At present, Article 9 would provide immunity from direct use of such evidence, but not derivative use of it. As discussed above, derivative immunity is an immunity from using other evidence that has been obtained as a result of the person giving evidence. This would prevent, for instance, any documents or evidence from other possible witnesses referred to in the course of a witness' evidence, being admissible against the person in a future civil or criminal proceeding. If it is considered desirable, an amendment to section 12 that clarified the application of Article 9 could offer an opportunity to consider the extension of the immunity to derivative use immunity.

3. Repeal of section 12

Given the potential danger of an implied reduction of the immunity of witnesses under Article 9, it might be considered desirable to simply remove section 12. Its inclusion occurred at a time when the basis for the immunity of free speech was uncertain, and it no longer appears to serve any operational purpose.

2.6 Issue 6. Special procedure for members

Questions asked by the Committee:

> - *Apart from the matters under consideration in the separate Public Accountability and Works Committee inquiry into the Parliamentary Evidence Amendment (Ministerial Accountability) Bill, are there any other amendments regarding the appearance of Members before committees that should be considered?*

The position in NSW

2.6.1 Sections 4 and 5 of the *Parliamentary Evidence Act 1901* currently provide for a special procedure for the appearance of Members of Parliament. This is the only group for which a special procedure is set out. Section 4, which relates to the general power to summons witnesses, is expressly stated not to apply to 'a Member of the Council or Assembly'. Section 5 then provides:

> **5 Members of Parliament**
>
> The attendance of a Member of the Council or Assembly to give evidence before the Council or Assembly or a committee shall be procured in conformity (so far as practicable) with the mode of procedure observed in the British House of Commons.

2.6.2 Houses may be seeking Members from their own House to attend and give evidence, or from the other House. Each scenario raises slightly different issues.

2.6.3 *Attendance of Members from the House:* In the House of Commons, Members of the Commons (including Ministers) may not be formally summoned to attend to give evidence before Commons Select Committees. Rather, they may be requested to attend by the Committee Chair. Failure to attend is referred to the House, which may order the Member to attend. Erskine May records no example of a Member refusing to give evidence once ordered by the House to do so.[120] This practice respects the exclusive authority of the House over its Members, while also reflecting the mutual respect between the House and Members.

2.6.4 *Attendance of Members from the other House:* The current procedure in the House of Commons is that Members of the Lords may not be summoned to attend as witnesses before the Commons, but they may be requested to do so by a Committee Chair, and there is a Standing Order of the Lords giving them leave to attend as they see fit.[121]

2.6.5 This provision strikes a balance between two constitutional principles: the accountability of Ministers to Parliament on the one hand, and the principle of comity, or respect between the Houses of their right to control their own proceedings (sometimes referred to as 'exclusive cognisance').

2.6.6 In New South Wales, there is no Standing Order that governs how a Member of the Assembly might be requested to attend a Council Committee. Rather, the matter is governed by the

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120 *Erskine May* (n 52) [38.34].

121 Ibid See also, Legislation Review Digest 4/58 (2023) 40.

practice of invitation from a Committee. There are, however, Standing Orders in the Assembly that allow a Member to attend a Council committee if the member agrees.[122] The long-standing practice has been that these invitations are complied with, including through numerous appearances by Assembly Ministers in budget estimates inquiries.

Findings of the Public Accountability and Works Committee inquiry into the Parliamentary Evidence Amendment (Ministerial Accountability) Bill

2.6.7 As explained in **Part 1** of this Discussion Paper, the Hills Shire Council Report provided the immediate factual context for the current inquiry, as well as a further inquiry by the Public Accountability and Works Committee into the Parliamentary Evidence Amendment (Ministerial Accountability) Bill 2023. That Bill sought to address the failure of the Minister for Transport, a member of the Legislative Assembly, to appear to give evidence before the Committee. It did so by seeking to amend ss 4 and 5 the *Parliamentary Evidence Act* to provide that Ministers of the Crown could be summoned to give evidence. There were also amendments to s 6 in relation to the payment of witness expenses to Ministers. The Bill was introduced to strengthen the powers of the Legislative Council 'to undertake its constitutional duty – holding the executive of the day to account.'[123]

2.6.8 That inquiry reported on 27 November 2023.[124] The Committee accepted that the current position strikes a balance between the role of the Legislative Council in holding the Executive to account, and the principle of comity. This balance was achieved through a wide array of mechanisms, including questions with and without notice, orders for the return of State papers, as well as the voluntary attendance at committee inquiries including the annual budget estimates inquiries.[125] However, the Committee accepted that a watching brief should be maintained. As the Chair explained in her forward:

> Given the general preparedness of Assembly ministers to appear before Council committees, the need for change is not pressing. I genuinely hope that the non-attendance of the Minister for Transport was an unfortunate 'one off'. However, should governments seek to frustrate efforts by Council members to undertake their accountability functions in future, there may be reason to revisit this conclusion.[126]

2.6.9 Suggestions and options for possible future reform that the Committee considered included:

- Enabling a Committee to put questions on notice to ministers in the Legislative Assembly; and

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122 Standing Order 328. Note also Standing Order 327 that provides a procedure for the Assembly requesting the attendance of a Council member.

123 Hansard, NSW Legislative Council, 13 September 2023 p 4 (Damien Tudehope).

124 Public Accountability and Works Committee, 'Parliamentary Evidence Amendment (Ministerial Accountability) Bill 2023 (Report 1, 27 November 2023).

125 Ibid [2.56-2.58] 18.

126 Ibid vi.

- The introduction of Standing Orders in the Legislative Council to govern the appearance of members, including Ministers, of one House before another.

2.6.10 In addition, the committee noted the 'creative' responses that could be deployed against a recalcitrant Minister:

- the Chair making a statement to the media about a Minister declining to give evidence, which may influence the minister to re-consider the invitation and attend;
- a member moving a censure motion in the House in relation to the Minister's refusal to attend and give evidence;
- pursuing further evidence relating to the inquiry through orders for papers in the House; and
- raising the inquiry issues with the Minister during Budget Estimates.[127]

The practice in other jurisdictions (with bicameral legislatures)

2.6.11 In most jurisdictions, Members are not able to be summoned to attend to give evidence, but the House from which they come may order them to do so.[128] Generally speaking, the procedure by which Members, and in particular, Ministers, from another House, can be asked to appear before a House or committee is governed by Standing Orders.[129]

2.6.12 In New Zealand, a distinction is drawn between Members and Ministers generally (who are not subject to coercive powers including the issue of a summons), and a Minister responsible for presenting the budget, who *must* attend the Finance and Expenditure Committee if requested.[130]

Options and discussion

2.6.13 The current inquiry should consider the following options that appear from the Public Accountability and Works Committee into the Parliamentary Evidence Amendment (Ministerial Accountability) Bill 2023. It should be noted that these options do not involve amendment to the *Parliamentary Evidence Act*.

1. Questions on Notice from Committees

The Public Accountability and Works Committee considered the possibility of the adoption of Sessional or Standing Orders to enable a Committee to put questions on notice to ministers in the Legislative Assembly. The current Clerk of the Parliaments,

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127 Ibid [2.58] 18. These were suggestions provided by Mr David Blunt, Clerk of the Parliaments, in Submission 1, Attachment, 7.

128 This is provided for in Standing Orders and legislation: see, for instance, Senate Standing Order 177; House of Representatives Standing Order 249; Victorian Legislative Council Standing Order 17.02 and Legislative Assembly 188(2); s 28 of the *Parliament of Queensland Act* (Qld) and Standing Orders 221 and 222. For further information on the UK practice (already detailed above), see *Erskine May* (n 52) [38.34].

129 See, for instance, *Senate Standing Orders* 178-179; *House of Representatives Standing Orders* 251-252.

130 Standing Order 340(3).

David Blunt, expressed some concern that such a practice would need to be carefully considered to ensure it was not infringing unduly on the principle of comity.[131] The former Clerk, John Evans suggested that this could be first adopted as a Sessional Order to trial its operation.[132] Note the risk identified by Mr Blunt that such a mechanism might be seen as a stand in for actually appearing before Committees to give evidence, which could undermine, rather than strengthen, ministerial accountability to the Council.[133]

2. Standing Orders to govern the appearance of Members

Another option that should be considered is formalising the current process through which a Member of the Assembly is invited to attend and give evidence before the Council or one of its Committees. (This is already formalised in Standing Orders of the Assembly). At present, this relies on practice, and the issue of an invitation. Formalising this arrangement through Standing Orders would not only clarify the process for issuing a request, but provide a reference point for failure to cooperate with such a request, that might be then leveraged by the Council (through the more 'creative' means set out above).

3. Ongoing monitoring of cooperation between the Houses

As a matter of ongoing concern, the Privileges Committee should review the cooperation between Assembly Ministers and requests from Council committees that they attend and give evidence. Should there be concerning trends in the cooperation between the Houses, further consideration may be warranted to the introduction of a statutory power to compel Ministers to appear and assist the Houses undertake their constitutional functions.

131 [2.50] 16.
132 [2.51] 17.
133 [2.52] 17.

2.7 Issue 7. Witnesses outside of jurisdiction

Questions asked by the Committee:

- *It is generally agreed that the Parliamentary Evidence Act should be amended to apply in other Australian jurisdictions. How would this best be achieved?*
- *If the Act were amended in this way, are there some categories of witnesses in other jurisdictions who should be specifically excluded (e.g. members of other Parliaments?)*

The position in NSW

2.7.1 Section 4(1) of the *Parliamentary Evidence Act* provides for the service of a summons on a person, not being a Member of the Council or Assembly. While the New South Wales Parliament has the constitutional power to legislate extra-territorially,[134] provided there is some connection, relationship of nexus with the State,[135] this will only occur where there are express words, or by necessary implication.[136] There is no express application of s 4 of the *Parliamentary Evidence Act* to a person outside of the State of New South Wales (but still in Australia). It might be argued that there is a necessary implication to ensure witnesses are not able to avoid the jurisdiction of the New South Wales Parliament and its committees, and thus undermine its constitutional functions of legislating and overseeing the executive government. However, this position does not reflect current practice. The general view is that witnesses appearing interstate are not subject to s 4, and can only appear voluntarily.[137]

2.7.2 Further, even if s 4 did apply to service outside of the State, there are practical issues that are unaddressed by the legislation:

1. there is no practical mechanism to provide for the service of summons outside of the state;
2. there is no indication as to the extent to which parliamentary privilege might apply to protect a witness from the application of interstate legislation;
3. there are no provisions that exclude particular categories of witnesses that might be critical to the functioning of the governments of other jurisdictions.

The practice in other jurisdictions

2.7.3 The question of summoning witnesses outside of jurisdiction is not dealt with comprehensively in any other Australian jurisdiction. The separate question of whether privilege attaches to evidence that is given by witnesses overseas is considered. *Odgers*

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134 Now sourced in s 2(1) of the *Australia Acts 1986* (Cth and UK).

135 *Union Steamship v King* (1988) 166 CLR 1, 14.

136 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 363 (O'Connor J) ('*Jumbunna*'). See also *MacLeod v Attorney-General (NSW)* [1891] AC 455.

137 Frappell and Blunt (n 15) 807.

Senate Practice indicates that while persons can give evidence from overseas, they would not be protected by parliamentary privilege in another country. Odgers then states:

> Because of this lack of protection, it would not be fair for a committee to summon a witness to give evidence from overseas, or to seek to take action against them in Australia for any lack of co-operation.[138]

2.7.4 In the UK, Erskine May indicates that witnesses are not summoned from outside of the jurisdiction, but may be invited.[139]

Options and discussion

2.7.5 The following options need to be considered in applying the provisions, or part of the provisions, of the *Parliamentary Evidence Act* interstate.

1. Amend s 4(1) to apply elsewhere in Australia

The immediate question is whether the *Parliamentary Evidence Act* should be amended to extend extra-territorially (but within Australia). The current statutory provisions are ambiguous as to this extension, and in practice are not applied out of the State. If it is considered desirable and necessary to facilitate the functions of the New South Wales Parliament and its committees, an express amendment to this effect should be made to s 4, or elsewhere in the *Parliamentary Evidence Act*.

If this is done, consideration must be given to how to deal with the practical issues canvassed at (2)-(4), relating to service, privilege (where evidence is given interstate), and exclusion of certain interstate witnesses, below.

2. Providing for service of summons

There is currently no mechanism for service of a summons to be executed outside of New South Wales. There are a number of ways that this could be achieved if s 4 were amended to apply outside of the State (as per (1), above):

(a) Part 3 of the *Service and Execution of Process Act 1992* (Cth) could be engaged: Non-attendance of a person summoned under s 4 is certified by the Presiding Officer to a Judge of the Supreme Court,[140] who shall issue a warrant for the apprehension of the person,[141] which provides authority for their apprehension and retention in custody.[142] The issue of a warrant by a Judge of the Supreme Court under s 8 of the *Parliamentary Evidence Act* likely engages Part 5 of the *Service and Execution of Process Act 1992* (Cth), which provides for the execution of warrants issued by courts

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138 *Odgers* (n 73) 570.
139 *Erskine May* (n 52) [38.39] (Commons) [40.17] (Lords).
140 Section 7.
141 Section 8.
142 Section 9.

interstate.[143] It does not, however, extend to the issue of processes that require the attendance of witnesses by authorities that are not judicial,[144] as is contemplated by the issue of summonses to witnesses to appear under s 4 of the *Parliamentary Evidence Act*.

There is, however, contemplation of the interstate service of subpoenas under the *Service and Execution of Process Act* in Part 3. One option to provide for a service of summons interstate, therefore, is to amend the *Parliamentary Evidence Act* so as to engage this Part of the *Service and Execution of Process Act*, which requires:

- a 'subpoena', which means a process that requires a person to either give oral evidence before a tribunal or produce a document or thing to a tribunal. Tribunal is defined to mean:

  > (a) a person appointed by the Governor of a State, or by or under a law of a State; or
  >
  > (b) a body established by or under a law of a State;
  >
  > and authorised by or under a law of the State to take evidence on oath or affirmation, but does not include:
  >
  > (c) a court; or
  >
  > (d) a person exercising a power conferred on the person as a judge, magistrate, coroner or officer of a court.

- the subpoena to be issued by a court or authority (as defined) (s 28).

It would appear that parliamentary inquiries (including committee inquiries) fall within the definition of a tribunal in the *Service and Execution of Process Act*. Therefore, amending the *Parliamentary Evidence Act* so as to allow for the issue of summons interstate by the Supreme Court would seem to engage the *Service and Execution of Process Act*.

A similar scheme is created, for instance, under the *Independent Commission Against Corruption Act 1988* (NSW), which provides in s 35 for the Commissioner to issue a summons, but then also provides:

> (6) A Judge or Magistrate may, on the application of a Commissioner, issue any summons that the Commissioner is authorised to issue under this section.

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143 See also *Ex parte Iskra* (1962) 63 SR (NSW) 538 as to the operation of an earlier version of the *Service and Execution of Process Act,* and its intersection with the State's extra-territorial limits on legislative power.

144 Part 3 of the Act applies to such processes, but they are limited to those issued by a Court or 'authority, defined to mean a 'judge, magistrate, coroner or officer of a court appointed or holding office under a law of a State'.

(7) The purpose of subsection (6) is to enable the summons to be given the character of a summons issued by a judicial officer, for the purposes of the *Service and Execution of Process Act 1901* of the Commonwealth and any other relevant law.

(b) *Private process servers:* It might be that this practical challenge could be overcome through the engagement of private process servers, as have been engaged within the State itself. This would require the engagement of these providers on a case-by-case basis by the Houses.

It is important to note that the interstate service of a summons issued under s 4 intersects with issues as to whether the reasonable expenses of a witness must be paid at the time of service of the summons (see s 6 of the *Parliamentary Evidence Act*), which is discussed separately at **Issue 11**, below.

3. Application of privilege

Where an interstate witness gives evidence to the New South Wales Parliament, the privilege that applies to them by virtue of Article 9 of the Bill of Rights and s 12 of the *Parliamentary Evidence Act* (see discussion at **Issue 5**, above) is unlikely to extend to providing immunity from liability in other jurisdictions. This will be particularly problematic for witnesses who might be living interstate (as opposed to a New South Wales resident briefly located interstate). As the *New South Wales Legislative Council Practice* states:

> Whilst fully protected in NSW in respect of evidence they may give, they cannot be protected by the NSW law of privilege in their own jurisdiction.[145]

While occurring in a slightly different constitutional context, *Odgers Senate Practice* sets out a similar position in relation to evidence taken from either Australian citizens or residents overseas, or foreigners giving evidence from overseas.[146]

This raises a more difficult question as to whether the New South Wales Parliament *could* legislate to extend parliamentary privilege to witnesses appearing interstate from prosecution under the laws of another jurisdiction. While the State Parliament has the constitutional power to legislate extra-territorially where there is a connection back to its jurisdiction, the extension of privilege to individuals in another jurisdiction against the laws of another jurisdiction is likely to infringe principles of comity. At a constitutional level, in terms of the application of federal laws, because of the operation of s 109 of the Constitution (which deems any State law that is inconsistent with a Commonwealth law to be invalid), it is unlikely that the New South Wales Parliament could provide an immunity from federal laws.

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145 Frappell and Blunt (n 15) 807.

146 *Odgers* (n 73) 570.

In terms of the application of the laws of another state or territory, extension of privilege and immunity might raise questions of interference with the constitutional powers of another government in the federation. While the High Court has not developed specific a constitutional doctrine limiting state powers in this way, there is a vertical immunity, where the Commonwealth cannot legislate in ways that significantly curtail or interfere with the constitutional powers of the states, based on their continued existence under the Commonwealth Constitution.[147]

Such schemes might, however, be able to be achieved co-operatively across the Australian jurisdictions. For instance, under the uniform defamation scheme, absolute privilege is extended to the publication of matter in the course of the proceedings of a 'parliamentary body', including giving evidence.[148] 'Parliamentary body' is defined to mean a parliament or legislature, a house of a parliament or legislature, a committee of a parliament or legislature or a committee of a house of houses of a parliament or legislature, in any country.[149] Thus, through a national uniform statutory scheme that is underpinned by a comity between the jurisdictions, inter-state protection of witnesses appearing before parliamentary committees is achieved.

There is therefore a question as to whether it is desirable to extend the protections afforded in Article 9 and s 12 of the *Parliamentary Evidence Act* to exclude liability under the laws of another Australian jurisdiction, which would appear to constitutionally require cooperative arrangements and negotiations with the other Australian jurisdictions.

4. Exclusion of certain categories of interstate witnesses

Finally, with any extension of the power to summons a witness outside of New South Wales in another jurisdiction, arises a question as to whether there should be groups of witnesses that are excluded from this extended operation. This might include those officers that are fundamental to the constitutional functioning of another jurisdiction (state, territory or federal government).

Summoning federal officers, who may or may not be within the New South Wales: There is first a question as to whether s 4 purports to bind the Commonwealth and its members and officers. Then there is a question as to the constitutional capacity to do so.[150] New South Wales cannot legislate in a way that affects the capacities of the Commonwealth, but laws of general application may regulate the exercise of those capacities;[151] and the State cannot direct laws at the Commonwealth in a way that

147 Known as the 'Melbourne Corporation principle' after *Melbourne Corporation v The Commonwealth* (1947) 74 CR 31, and the most recently stated test for the principle in *Clarke v Commissioner of Taxation* (2009) 240 CLR 272; *Austin v Commonwealth* (2003) 215 CLR 185.

148 See, eg, *Defamation Act 2005* (NSW) s 27; *Defamation Act 2005* (Vic) s 27.

149 See eg, *Defamation Act 2005* (NSW) s 4; *Defamation Act 2005* (Vic) s 4.

150 Twomey (n 37) 527.

151 *Re Residential Tenancies Tribunal; Ex parte Defence Housing Authority* (1997) 190 CLR 410

would create a special disability or burden on the exercise of the Commonwealth's constitutional functions.[152] The New South Wales legislation cannot interfere with the operation of the federal *Parliamentary Privileges Act 1987* (Cth), which provides that federal Members cannot be compelled to appear before a tribunal, which Twomey notes 'would appear to include a State parliamentary committee'.[153] Reflecting these constitutional restrictions and ambiguities, the *New South Wales Legislative Council Practice* notes that 'members of the Commonwealth Parliament and Commonwealth public officials are only ever invited to appear before Council committees. They are never summoned or attempted to be summoned.'[154]

Summoning state or territory officers: While the High Court has not considered the issue of horizontal constitutional immunities, there are limitations that apply to Commonwealth laws purporting to apply to State officials; and limitations on the State Parliaments' power to bind the Commonwealth and its officials.

Applying such principles, the following exclusions of officeholders from Commonwealth, another State or Territory jurisdiction should be considered:[155]

- Ministers;
- Parliamentarians;
- Parliamentary officeholders such as Clerks;
- Statutory officeholders;
- Higher-level public employees, such as departmental secretaries;
- Judges;
- Higher-level judicial administrative officers such as Registrars.

152 *Spence v Queensland* [2019] HCA 15, [108] (Kiefel CJ, Bell, Gageler and Keane JJ).

153 Twomey (n 37) 528.

154 Frappell and Blunt (n 15) 807.

155 These categories are developed from those categories of exclusions considered under the *Melbourne Corporation Principle* in *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188 and *Clarke v Commissioner of Taxation* (2009) 240 CLR 272; *Austin v The Commonwealth* (2003) 215 CLR 185.

2.8 Issue 8. Excluded categories of witnesses

Questions from the Committee:

- *Should the Act be amended to specifically exclude members of the judiciary from its operation?*

Please note: The exclusion of judicial officers only is considered here. The question of exclusion of Commonwealth and interstate and territory officials is considered in **Issue 7**, above.

The position in NSW

2.8.1 The power to summons and compel the attendance of witnesses under the *Parliamentary Evidence Act* applies to 'any person not being a member of the Council or Assembly'. On its face, it applies to all other persons, including judicial officers. There are historical precedents of a judge being summoned and compelled to produce notes before a Select Committee of the Legislative Council back in 1889.[156] However, as the *New South Wales Legislative Council Practice* now states:

> However, in modern times, under the doctrine of the separation of powers and the constitutional provisions which recognise the independence of the judiciary, it may be argued that it would not be appropriate for the House or a committee to seek to summon the attendance of a judicial officer to give evidence. Nor would it be appropriate for committees to seek to question judges about the merits of individual cases, the merits of judicial appointments, or the merits of proposed bills or government policy.[157]

2.8.2 This paragraph requires some unpacking, as it contains a number of important statements of applicable constitutional principle.

2.8.3 While there is no separation of powers in New South Wales,[158] there are a number of important protections of the independence of the New South Wales judiciary. The New South Wales judiciary is an essential branch of government of the State, constitutionally protected in Part 9 of the *Constitution Act 1902* (NSW). Its institutional integrity, that is, its minimum requirements of independence and impartiality, is also protected under the Commonwealth Constitution under what is known as the *Kable* principle, developed in 1996 by the High Court.[159] There are no cases in which the power of the parliament to compel the attendance of judicial officers has been considered by the High Court. Nonetheless, the constitutional protections for the independence of the judiciary provide a caution to State parliaments considering the exercise of such powers. This is particularly the case in relation

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156 'Report from the Select Committee on the case of On Ling', *Journals*, NSW Legislative Council, 1889, vol 45(1) pp 381-398, referred to in Frappell and Blunt (n 15) 806.

157 Frappell and Blunt (n 15) 806.

158 *Kable v DPP (NSW)* (1996) 189 CLR 51.

159 Ibid.

to those types of inquiries set out in the *Legislative Council Practice* that might raise concerns regarding the potential independence and impartiality of judges, such as:

- seeking the views of judges regarding the merits of individual cases, which might undermine the finality of judicial decision making and the appeal process;
- seeking the views of judges in relation to the merits of particular judicial appointments, which might undermine public confidence in judicial officers;
- seeking the views of judges as to government bills or policy, which might require the judge to engage in policy and political discussions, or to express views on matters that might come before them in future litigation.
- seeking the views of sitting judges on hypothetical matters that might come arise in future litigation.

2.8.4 Each of these concerns arise in relation to sitting judges; but some of them also apply to former judicial officers, such as seeking their views in relation to the merits of individual cases or particular judicial appointments.

2.8.5 There might, however, be some circumstances in which it may be appropriate for the Houses to summon and compel the attendance of judicial officers before them. For instance, the Houses of the New South Wales Parliament are constitutionally responsible for seeking the removal of judicial officers, in that no judicial officer can be removed except by the Governor on address of both Houses of Parliament in the same session, seeking removal on the ground of proved misbehaviour or incapacity.[160] The Houses are now assisted in determining whether there has been conduct that might justify consideration of removal by the Judicial Commission of New South Wales (Conduct Division).[161] The question of whether to consider the matter, and how that is done, is for the Parliament to determine, and there are very few precedents as to how the Houses might proceed. In 1998, upon a motion to remove Justice Bruce from the Supreme Court, the New South Wales Legislative Council invited Justice Bruce to be heard in his defence. While Justice Bruce ultimately appeared before the Bar of the House, no questions were asked of him, on the basis that the resolution calling him to speak did not provide for them.[162]

The practice in other jurisdictions

2.8.6 *Odgers Senate Practice* considers the compellability of judges as witnesses. It notes that there are no precedents at the federal level of the Houses or their committees attempting to exercise such a power. Odgers is inconclusive on this matter, noting that while there are older precedents in the United Kingdom where judges have been summonsed by the House of Commons to appear where there is a question as to whether there are grounds for removal, there are constitutional arguments in the Australian context, drawing from the separation of

160 Section 53 of the *Constitution Act 1902* (NSW).
161 Sections 28, 29 and 41.
162 See full discussion in Twomey (n 37) 738-740.

judicial power and the independence of the judiciary, that might point against the existence of such power.[163] Odgers concludes:

> Even if the separation of powers argument had general validity, it probably could have no application to inquiries into the conduct of judges and hearings of evidence for the purposes of determining whether action is warranted under section 72 [power to remove judges]. Such inquiries and hearings may be effective only if the Houses have the power to compel witnesses, including judges. If this were not so, a judge could prevent a proper inquiry and hearing preceding an address by refusing to appear. Even if the accused judge is not to be a compellable witness, a matter which will be further mentioned below, other judges may be essential witnesses, especially in the case of alleged misbehaviour on the bench.[164]

2.8.7 Odgers notes that compellability of a judicial officer in relation to an inquiry as to whether there are grounds that might warrant removal from office raises further questions of procedure that ought to apply in such constitutionally extraordinary circumstances, such as the availability of the privilege against self-incrimination, legal representation, and costs.

2.8.8 The *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (Cth) provides for a standing mechanism for the Houses of the Commonwealth Parliament to refer matters to a parliamentary commission relating to the conduct of a judge, but the coercive powers of the commissions established under this statute do not apply to current or former Commonwealth judicial officers.[165]

2.8.9 Across Australia, legislation and standing orders are generally silent regarding the compellability of judicial officers, although in South Australia, a special procedure for providing for judges to be introduced and announced by the Black Rod/Serjeant-at-Arms and have chairs placed for them within the Bar of the House are provided for.[166]

Options and discussion

2.8.10 The above discussion gives rise to two possible options for reform.

1. Clarification of the position of members of the judiciary

The threshold question is whether the position of members of the judiciary and their compellability by the Houses and their committees requires clarification, and if so, how. Clarification may seem desirable, as the current position is constitutionally ambiguous. However, it is untested because of the prevailing practice of not calling members of the judiciary – which itself might point against the need for change.

Clarification might be through amendment to the *Parliamentary Evidence Act* itself, or in the form of the introduction of Standing Orders that could then provide in more detail for

163 *Odgers* (n 73) 687-8.
164 Ibid 688.
165 Section 25(5).
166 *South Australian Legislative Council Standing Order* 443; *House of Assembly Standing Order* 396.

the circumstances in which current and former judicial officers might be summonsed to appear and give evidence before the Houses and their Committees.

If the *Parliamentary Evidence Act* is amended, consideration should be given to whether a blanket immunity from the power to compel a witness is to be given to members of the judiciary, or whether it is desirable to maintain the power to compel a member of the judiciary where there is an investigation undertaken to assist the Houses in the exercise of their constitutional function of determining whether to seek the removal of a judge from office.

2. Special procedures for appearance of members of the judiciary

It might also be desirable to consider whether there should be Standing Orders introduced that provide for the procedures to govern the situations where judicial officers do appear before the Houses and their Committees (whether that be voluntarily or if the power to compel is maintained even if in limited circumstances, as is discussed above).

2.9 Issue 9. Mode of service

Questions asked by the Committee:

- *It is generally agreed that the Parliamentary Evidence Act should be amended to enable summonses to be served electronically. How would this best be achieved?*

The purpose of service of summons/subpoenas

2.9.1 Service is an important process protection for those brought before judicial and other proceedings. Service ensures that individuals who are required to do something (such as respond, attend, or produce documents) are aware of their obligations. Where service is of a summons or subpoena (that is, to attend and give evidence or produce documents), service ensures that an individual has a reasonable opportunity to comply with the requirements, particularly where there are adverse consequences that might follow from failure to comply.

2.9.2 Service of an order to appear is also often required to be accompanied by costs, or 'conduct money', either at the time of service, or prior to the date of attendance, so as to allow individuals required to attend the financial means by which to do so. This related question of expenses is considered generally in **Issue 11**, below.

2.9.3 Because of the importance of service in relation to subpoenas to bring the obligations to appear to the attention of individuals, personal service is generally required. This is the practice, for instance, under the *Uniform Civil Procedure Rules 2005* (NSW) ([33.5]). This avoids the possibility that an individual might fail to appear (and thereby possibly be liable to arrest and a penalty) because they were not aware of their obligations.

2.9.4 However, it is also recognised that in some instances, personal service is not able to be achieved because of bad faith on the part of the individual involved, that is, there is an intentional avoidance of personal service. This possibility is dealt with in the judicial sphere with the possibility of 'substituted service', for instance, service effected by post, fax or email. The *Uniform Civil Procedure Rules 2005* (NSW) Rule [10.14] allows for 'such steps [to] be taken as are specified in the order for the purpose of bringing the document to the notice of the person concerned'. Substituted service is only granted rarely, in circumstances where:

- personal service is impractical (for instance, because an individual is intentionally attempting to avoid service);
- reasonable efforts have already been made to personally serve the document; and
- the proposed method of substituted service will bring the document to the attention of the individual.

Electronic service

2.9.5 With the modern ease of electronic communication, the possibility of electronic service has arisen. This has been provided for in judicial proceedings, for instance, in the *Uniform Civil Procedure Rules 2005* (NSW) ([3.7]), electronic service is permitted, but 'only with the consent of the other party'. This reflects a responsiveness to the objectives of service: that it is brought to the attention of the other party. In substituted service, electronic service might be permitted where there is evidence that the email address is regularly used by the individual.

2.9.6 In 2017, the New South Wales Parliament amended a number of pieces of legislation to allow for various government notices to be served electronically through the *Electronic Transactions Legislation Amendment (Government Transactions) Act 2017* (NSW). This legislation did not amend the *Parliamentary Evidence Act*. The amendment to the service requirements under that legislation permits service by sending the notice or document to an email address specified by the intended recipient or by other means as may be prescribed by the regulations. These requirements continue to ensure the objectives of service: that an individual has, by prior consent, agreed for the email address to be used for this purpose. It does, also, introduce some flexibility through the regulations. However, in the context of the issue of a summons – where individuals are unlikely to otherwise have an ongoing relationship with the Houses or Committee – it seems unlikely that a legislative change in the form of the 2017 amendments would be of assistance.

The position in NSW

2.9.7 Section 4(1) and (2) of the *Parliamentary Evidence Act* require that summons issued under those provisions must be 'personally served'. Failure to comply with a summons can result in the issue of a warrant for arrest (although see discussion in **Issue 3** in relation to the retention of the power to compel witnesses).

The practice in other jurisdictions

2.9.8 *Odgers Senate Practice* notes that in the rare event they are issued, a summons is generally served personally, but it can also be delivered by alternative methods such as fax or service through a legal representative. However, reflecting the objectives of service, *Odgers* states: 'The important element is not the means of delivery but the certainty of receipt.'[167] Under the statutory schemes in the *Public Works Committee Act 1969* (Cth)[168] and the *Public Accounts and Audit Committee Act 1951* (Cth)[169] service of summons can be done personally or 'by being left at, or sent by post to, his or her usual place of business or of abode'.

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167 *Odgers* (n 73) 560.

168 Section 21(3).

169 Section 13(c).

2.9.9 In Western Australia and South Australia, which have legislation dating back to the 19th century, a summons can be served by personal service or 'by leaving a correct copy with some adult person at his usual or last known place of abode in the colony.'[170]

2.9.10 In New Zealand, service of summons is to be as directed by the Speaker.[171] This procedure allows for some flexibility as to the mode of service, and so the individual circumstances of any particular instance of service might be taken into account in that direction.

Options and Discussion

2.9.11 Whether to permit electronic service of processes such as a summons raises important procedural rights for individuals who might face penal consequences for failing to comply. It should not be undertaken lightly. The objective of personal service (as is currently required under s 4 of the *Parliamentary Evidence Act*) is to ensure that the obligations in the summons are brought to the attention of the individual. Electronic service, that is, through sending an email to an individual's email, is not necessarily a reliable manner through which this is achieved. Email addresses may be incorrect; emails may be placed in 'junk' folders by systems; individuals may simply not check any or all of their emails. The question, therefore, should be framed not as how electronic service can be achieved, but the circumstances under which electronic service is appropriate, and where those circumstances arise, how it would can be achieved.

2.9.12 Electronic service might be introduced:

- *In all circumstances where a summons is issued under s 4:* this option would, however raise serious concerns that individuals might not be aware of their obligations under a summons.
- *In circumstances where there is consent of the other party, or where receipt is acknowledged by the other party:* this would allow for the ease of electronic communication, but maintain the objective of ensuring the summons is brought to the attention of the individual involved.
- *In circumstances where personal service has not been able to be achieved:* where the Presiding Officer or the Chair of the Committee provides permission for substituted service such as through electronic service, or an alternative method (such as by post or fax, or a last known agent or legal representative).

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170 See s 5 of the *Parliamentary Privileges Act 1891* (WA) and s 2 of the *Parliamentary Privilege Act 1858* (Tas).

171 See Standing Orders 157, 199 and 200.

2.10 Issue 10. Electronic signatures

Questions asked by Committee

- *Can a summons be issued under s 4 of the Parliamentary Evidence Act with a Chair's electronic signature?*

The position in NSW

2.10.1 Sections 4(1) and (2) state that a summons must be by order that is signed either by:

- where attendance is required before the Legislative Council or the Assembly: 'signed by the Clerk of the Parliaments or the Clerk of the Assembly, as the case may be' (s 4(1));
- where attendance is required before a committee: 'signed by the Chair thereof' (s 4(2)).

2.10.2 The explicit reference to the signature of the Chair in s 4(2) raises practical questions if the Chair is not available to sign the summons physically, or in the case where they may be unavailable both physically and electronically. One option is for the Deputy Chair to sign the summons in lieu of the Chair. Section 48(2) of the *Acts Interpretation Act 1987* (NSW) provides that where an Act confers a function on a particular officer, the function may be exercised by the person for the time being occupying or acting in the office concerned. However, Deputy Chairs of Committees only fufil the role of Acting Chair in limited circumstances relating to the conduct of meetings. Legislative Council Standing Order 218 provides for the appointment of Chairs and Deputy Chairs, and for Deputy Chairs to act as Chair during meetings where the Chair is absent or in some circumstances where the Chair is appearing remotely. There is no general provision for the Deputy to act as Chair where the Chair is unavailable between meetings, and thus the Deputy Chair would only be able to sign for the Chair in very limited circumstances.

2.10.3 Another option is for the signature to be provided by the Chair in electronic form, given that technology now allows for the use of electronic signatures, on both physical and electronic copies of documents. Does s 4 allow for an electronic signature to be used in lieu of a physical signature, particularly where there are extenuating circumstances where it is logistically difficult to obtain a written signature, and the inquiry is being conducted under time pressure?

2.10.4 In New South Wales, the *Electronic Transactions Act 2000* (NSW) provides in Part 2, Division 2, s 9, for electronic signatures to be used where there are otherwise statutory requirements to have a signature. It is not a simple substitution of a physical signature for an electronic one; it contains a number of safeguards to ensure an electronic signature is appropriate in the circumstances, that is, where the sender's intention is still clear, and the recipient's consent to the electronic form. Section 9 provides:

9 Signatures

(1) If, under a law of this jurisdiction, the signature of a person is required, that requirement is taken to have been met in relation to an electronic communication if—

(a) a method is used to identify the person and to indicate the person's intention in respect of the information communicated, and

(b) the method used was either—

(i) as reliable as appropriate for the purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement, or

(ii) proven in fact to have fulfilled the functions described in paragraph (a), by itself or together with further evidence, and

(c) the person to whom the signature is required to be given consents to that requirement being met by way of the use of the method mentioned in paragraph (a).

…

2.10.5 However, this provision does not apply to the requirements of a written signature in ss 4(1) and (2) of the *Parliamentary Evidence Act 1901* (NSW) as they are excluded under the *Electronic Transactions Regulation 2017*. Regulation 5(e) of the Electronic Transaction Regulation 2017 specifically excludes a number of circumstances from the use of electronic signatures, including documents which are required to be personally served. In particular, it states:

5 Certain requirements excluded from Division 2 of Part 2 of the Act

Division 2 of Part 2 of the Act does not apply to the following requirements and classes of requirements:

…

(e) any requirement under a law of this jurisdiction for a document to be served personally or by post.

2.10.6 Because of the current requirement of personal service under s 4 of the Act for any summons (although note consideration of options for reforming this requirement in **Issue 9**, above), these documents are excluded from the Part of the *Electronic Transactions Act* that includes s 9 (signatures). The justification for the exclusions in Regulation 5(e), which predominantly refer to requirements related to judicial proceedings, appears to be to ensure the authenticity

and integrity of such documents given their importance, and the possible consequences that flow from them, and thus they perform a cautionary and protective function as well.[172]

The practice in other jurisdictions

2.10.7 The electronic transactions legislation in New South Wales was enacted as a 'uniform scheme' across the Commonwealth, States and Territories to provide greater certainty for electronic transactions conducted across the federation. In the other States, almost exactly the same regimes exist which provide for electronic signatures to be under specified circumstances, with exemptions that include requirements that are served personally.[173]

2.10.8 The Commonwealth has a similar regime that allows for electronic signatures to be used under specified circumstances, as set out in s 10 of the *Electronic Transactions Act 1999* (Cth). However, the *Electronic Transactions Regulations 2020* (Cth) do not create a blanket exemption for documents required to be served personally, but, rather, list specific exemptions to the scheme. The exemptions that have been listed do not apply to summons issued by the Houses under s 49 of the *Constitution*, or under the *Public Accounts and Audit Committee Act 1951* (Cth) or the *Public Works Committee Act 1969* (Cth).

2.10.9 In 2023, the Commonwealth commenced a review of the uniform scheme to consider a number of issues, including uncertainty around the 'consent' requirements in the legislation, inconsistency between the Commonwealth, State and Territory laws, and exemptions.

Options and discussion

2.10.10 It would seem desirable that, with appropriate safeguards, greater flexibility be given for the use of electronic signatures for summons issues under s 4 of the *Parliamentary Evidence Act*. At present, summons may only be issued in hard copy (personally) under s 4. The use of electronic signatures on summons might be achieved in three possible ways:

1. Amend the service requirements in s 4

If the service requirements in s 4 of the *Parliamentary Evidence Act* were changed (so as to allow for service other than personally, as contemplated in **Issue 9**), this would remove s 4 from the exemptions in the *Electronic Transactions Regulations 2017* (NSW). Section 9 of the *Electronic Transactions Act,* and the use of electronic signatures in the circumstances set out therein (which include the requirement for consent from the person summoned), would then apply. This would allow for electronic signatures in some circumstances, and would apply to physical as well as electronic documents (served electronically).

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172 See further Mark Sneddon, 'Legislating to Facilitate Electronic Signatures and Records: Exceptions, Standards and the Impact of the Statute Book' (1998) 21(2) *University of New South Wales Law Journal* 334

173 See, eg, *Electronic Transactions (Victoria) Act 2000* (Vic) s 9; *Electronic Transactions (Victoria) Regulations 2020* (Vic) Regulation 7; *Electronic Transactions Act 2011* (WA) s 10; *Electronic Transactions Regulations 2012* (WA) Regulation 4(2); *Electronic Transactions (Queensland) Act 2001* (Qld) ss 14 and 15 and Schedule 1.

2. Amend the *Electronic Transactions Regulations*

An explicit carve out for s 4 of the *Parliamentary Evidence Act* could be introduced to the generally framed exemptions in the *Electronic Transactions Regulations 2017* (NSW). This would allow for the application of s 9 of the *Electronic Transactions Act,* and the use of electronic signatures on summons under s 4 in the circumstances set out therein (noting, again, the requirement for consent from the person summoned). However, without amendment to s 4, summons must still be issued in hard copy and served personally.

3. Amend the signature requirements in s 4

It might be desirable to have an express indication in s 4 of the *Parliamentary Evidence Act* that electronic signatures are able to be used on orders issued under that section. The benefits of this approach may be:

- The provision for electronic signatures will be in the same place as other requirements for the summons, giving greater clarity regarding what is permitted.
- The circumstances under which electronic signatures are able to be used (for instance, requirements of consent) will be able to be set for the specific circumstances of the Houses and their Committees.

For clarity, an express allowance for the use of an electronic signature should also explicitly override the provisions in the *Electronic Transactions Act*.

Another benefit of amending s 4 directly would be that an amendment might also be introduced that clarified when the signature of a Deputy Chair might be permitted.

2.10.11 Under any of these options, attention should continue to be paid to the federal review of the electronic transactions legislation. If, for instance, there is introduced a national scheme through federal legislation, it might override any position that has been introduced in New South Wales with respect to s 4 of the *Parliamentary Evidence Act*.

2.11 Issue 11. Expenses

Questions asked by the Committee:

- *Should the Act be amended in relation to expenses of witnesses?*
- *Should there be different rules for different categories of witnesses (e.g. public servants)?*

2.11.1 The justification for requiring payment of witness expenses is clear: an individual who is legally compelled to give evidence to assist the Parliament in its work should not have to do so at their own expense, and thus reasonable expenses should be payable. This also ensures that individuals who may not have independent means to attend are not placed in a disadvantaged position and potentially liable for imprisonment for failing to attend. Public payment of witness expenses also ensures that witnesses' expenses are not paid for by others, which brings with it concerns about the impartiality of the witness and raises integrity issues.[174]

The position in New South Wales

2.11.2 Witnesses summoned to appear under s 4 of the *Parliamentary Evidence Act* are entitled to have their expenses paid. This is provided for in s 6:

> **6 Expenses of witnesses**
>
> (1) Every witness summoned as aforesaid shall be entitled to be paid at the time of service of such notice or order the witness's reasonable expenses consequent upon the witness's attendance in obedience thereto according to the witness's condition or profession, to be calculated in accordance with the scale in force for the time being for the payment of witnesses in actions in the Supreme Court.
>
> (2) The expenses of any witness summoned at the instance of a party shall be defrayed by such party; but if the witness be summoned for any public inquiry to be examined either by the Council or Assembly or by a committee, the witness's expenses shall be paid by the Colonial Treasurer out of the Consolidated Revenue Fund on the receipt by the Treasurer of a written authority in that behalf signed by the Clerk of the Parliaments or Clerk of the Assembly or Chair of the Committee respectively, according to the nature of the summons.

2.11.3 There are a number of elements of this provision that should be noted:

- The reasonable expenses must be paid 'at the time of service'. This has, as a matter of practice, necessitated the use of a cheque to accompany the service of a notice of summons. This has created some difficulty, particularly where service is required urgently and remotely (as occurred, for instance, in the Hills Shire Inquiry, where process servers were engaged across the State, and cheques were couriered to them to facilitate service).

[174] See reference to these concerns in *Odgers* (n 73) 559.

Further, the Australian government has announced that cheques will be phased out by 2030, to be replaced by forms of digital payment. Finally, should an amendment be introduced that allowed for electronic or other service of a summons (see **Issue 9**, above), this would make the delivery of a cheque upon service impossible.

- The expenses must be calculated in accordance with the scale in force for the payment of witnesses in actions in the Supreme Court. This scale is published in the *Government Gazette* from time to time. The current scale is that published on 27 June 2014. The scale includes:
    - Fees, loss of income, salary or wages;
    - Meals; and
    - Travel.

  It is not entirely clear as to whether the reference in s 6 to 'expenses' would include the payment of fees/loss of income/salary or wages, or whether it is limited to meals and travel.
- Witnesses do not have to accept the payment, but the New South Wales Crown Solicitor has advised that failure to pay or at least offer reasonable expenses would likely constitute 'just cause or reasonable excuse' for a witness not to attend and give evidence within the meeting of s 7 of the *Parliamentary Evidence Act*.[175]
- All witnesses summoned under s 4 must be offered reasonable expenses, with no exceptions for certain groups, such as public servants.

2.11.4 Even where it is not required, that is, where witnesses are not formally summoned, the Legislative Assembly Standing Orders provide that committees may at their discretion pay witnesses for attendance at the Supreme Court rate, as certified by the Chair.[176] In the Legislative Council, committees may resolve to meet reasonable travel and accommodation expenses. In those instances, the *New South Wales Legislative Council Practice* states that, rather than direct payment or reimbursement of reasonable expenses at the Supreme Court scale, 'travel and accommodation are arranged by the secretariat.'[177]

2.11.5 Other investigative bodies in New South Wales are also required to pay expenses . For instance, under s 51 of the *Independent Commission Against Corruption Act 1988* (NSW), expenses of witnesses summoned to attend are paid through reimbursement:

> **51 Reimbursement of expenses of witnesses**
>
> A witness appearing before the Commission shall be paid, out of money provided by Parliament, in respect of the expenses of the witness's attendance an amount

175 Crown Solicitor, 'Plain English Summons to be issued by Parliamentary Committees', Advice to the Clerk of the Legislative Assembly, 28 March 2001, 3, referred to in Frappell and Blunt (n 15) 800.

176 NSW Legislative Assembly Standing Order 308.

177 Frappell and Blunt (n 15) 827.

ascertained in accordance with the prescribed scale or, if there is no prescribed scale, such amount as the Commission determines.

The practice in other jurisdictions

2.11.6 In the Senate, there is no statutory requirement to pay expenses for any witnesses, but this can be done by agreement with the Committee.[178] Under statutory committees, expenses are required to be paid. Under the *Public Accounts and Audit Committee Act 1951* (Cth), witnesses are entitled to be paid fees and travelling expenses as the Chair allows in accordance with the prescribed scale,[179] and a warrant for non-compliance with a summons is not able to be issued until reasonable expenses have been paid.[180] A similar provision operates under the *Public Works Committee Act 1969* (Cth).[181]

2.11.7 Some other jurisdictions have general legislative requirements for the payment of witness expenses. For instance, s 27 of the *Parliament of Queensland Act 2001* (Qld) provides an entitlement for a person other than a Member ordered to attend before the Assembly or authorised committees to the payment of 'a reasonable amount for expenses of attendance as decided by the Speaker.'[182] In other jurisdictions, this is dealt with through Standing Orders and the discretion of the committee.[183] In New Zealand, committee witnesses are not able to be paid expenses except with the permission of the Speaker.[184]

Options and discussion

2.11.8 There are a number of practical challenges that arise under s 6 that could be alleviated through the adoption of a different mechanism of payment of expenses, while still fulfilling the objectives of the public payment of expenses for witnesses.

1. Retention of payment of witness expenses

A threshold question that arises in relation to this issue is whether the requirement for the payment of witness expenses should be retained. There are strong justifications for this requirement, particularly where a witness is compelled to attend under a summons. It accords with ideas of fairness, ensures those without financial means are not treated discriminatorily, and promotes the integrity of evidence before the Parliament. If the requirement for the payment of expenses is retained, this then raises questions as to the most appropriate timing and form, and calculation of witness expenses, as well as

178 *Odgers* (n 73) 559.
179 Section 20.
180 Section 14(1).
181 Section 22(1).
182 See also s 5(4) of the *Parliamentary Privileges Act 1891* (WA); and limited requirement to pay expenses to witnesses appearing before parliamentary joint committees in Victoria under s 28(7) of the *Parliamentary Committees Act 2003* (Vic).
183 See, eg, South Australian Legislative Council SO 413; House of Assembly SO 347; Tasmanian Legislative Council SO 242; Legislative Assembly SO 335.
184 SO 224.

whether certain categories of witnesses should be exempt from the requirements. These are considered below.

However, another option that might still achieve these objectives would be to remove the statutory requirement to pay witness expenses, and replace this with a discretionary power (governed by Standing Orders) to pay reasonable expenses upon application by a witness. This would create greater flexibility in determining which witnesses require public assistance to attend, but it would also raise questions as to the criteria for the exercise of the discretion, and the potential barrier that is created by the need for witnesses to apply for expenses (rather than having them automatically provided).

2. Timing, form and calculation of witness expenses

The practical challenges that have been identified with the retention of s 6 of the *Parliamentary Evidence Act* relate to the required timing, form and calculation of witness expenses. At present, they must be paid at the time of service, in practice by cheque, calculated in accordance with the Supreme Court scale. However, there are a number of alternatives set out below that should be considered. Many of these would still provide for reasonable payment of expenses, while reducing the logistical challenges posed by the current provision. Further, it is not necessary that only one option is selected: flexibility might be considered desirable, and thus a number of options as to timing, form and calculation might be available at the election of the witness.

Timing: Expenses may be paid:

- *At the time of service:* this raises practical challenges as to how these expenses are to be paid at the time of service, which has traditionally been done in NSW through cheques accompanying the personal service of the summons.
- *Prior to the required date of attendance:* as this does not have to be done at the time of service, it can be facilitated by agreement.
- *After the date of attendance:* this would be most appropriate where an individual is seeking direct reimbursement for expenses incurred.

Should the power to compel attendance through the issue of the warrant under s 7 remain, it would be appropriate that payment of reasonable expenses occurs prior to the issue of any warrant.

Form: Expenses may be paid in a number of forms:

- *Cash:* This requires the cash be physically given, or sent, to a witness.
- *Cheque:* This not only necessitates the physical transmission of the cheque, but raises logistical issues in relation to obtaining the cheque, and what to do when cheques are phased out in 2030.

- *Electronic Funds Transfer:* This requires the individual's bank details to be provided to the Parliament, and so cannot occur at the time of service, but must be by arrangement.
- *Direct payment of expenses:* Again, by arrangement, the Parliament may directly arrange for expenses – and in particular travel, accommodation and meals. This might be more easily achievable for some forms of travel (such as by aeroplane) than others (such as bus fares).

Calculation: There are a number of options by which to calculate reasonable expenses. These include:

- *"Reasonable" expenses that are set by reference to a scale, such as the Supreme Court scale:* This might seem to have the advantage of transparency. However, unless the scale is specifically calculated for the Parliament, this means that the Scale must be looked up from time to time, and there can be ambiguity as to which parts of any scale apply to witnesses appearing before the Parliament.
- *"Reasonable" expenses:* That are set at the discretion of the presiding officer or the committee chair, likely to be based on evidence of actual or likely cost. Transparency would require that the basis for determining what is reasonable is set out.
- *Actual expenses:* likely to be appropriate either where reimbursement is sought, or where the Parliament directly pays the expenses.

3. Categories of witnesses

Finally, there is a question as to whether there are categories of witnesses where the public might expect that their expenses are met not by the Parliament. For instance, in its attempt to extend the power to summons Ministers, the Parliamentary Evidence Amendment (Ministerial Accountability) Bill 2023,The Bill included a provision that Ministers not have their expenses paid. The public might expect that public servants appearing to assist the Parliament undertake its oversight role are paid expenses by the Executive government. However, there is, of course, no guarantee that this will occur, (for instance, where a public servant might appear as a whistleblower). Excluding such categories of witnesses might place some individuals in situations of financial hardship and disadvantage.

2.12 Issue 12. Oath

Questions asked by the Committee:

- *Noting that not all witnesses before committees are sworn in (see New South Wales Legislative Council Practice, pp 764-765), should the terms of section 10 be modified? If so, how?*

The purpose of sworn testimony

2.12.1 When a witness gives evidence under oath, declaration or affirmation, they pledge to tell the truth. In doing so, they are reminded of the importance of giving testimony, and responding to the best of their ability to the questions put to them, as well as the possible consequences that might follow from failing to answer a question, or giving misleading evidence.

The position in NSW

2.12.2 Section 10 of the *Parliamentary Evidence Act* provides:

> **10 Administration of oath**
>
> (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 Chair of such Committee.
>
> (3) Provided that in any case where a witness, if examined before the Supreme Court, would be permitted to make a solemn declaration or to give evidence in any other way than upon oath, a witness summoned under this Act shall be in like manner allowed to give evidence upon declaration or otherwise, as aforesaid.

2.12.3 In the Legislative Council, this provision is supplemented by the Procedural Fairness Resolution for Inquiry Participants:

> **Witnesses to be sworn**
>
> At the start of their hearing a witness will, unless the committee decides otherwise, take an oath or affirmation to tell the truth, and the provisions of the *Parliamentary Evidence Act* will then apply.

2.12.4 Despite the mandatory language of s 10, witnesses are on occasion not sworn in – either by oath or declaration. The *New South Wales Legislative Council Practice* states that this occurs where, for instance, evidence is taken in public forums, or where it is considered that it may be intimidating for the witness.[185] Witnesses may request not to be sworn, and the *New South Wales Legislative Council Practice* indicates that such requests are considered by the

[185] Frappell and Blunt (15) 764-5.

committee, and if the committee considers it necessary for the witness to be sworn, this to be advised and explained to the witness.[186]

2.12.5 However, there has been legal advice from Bret Walker SC that unless a witness is sworn in as required in s 10, the potential penal jurisdiction set out in s 11 does not apply to them. The advice is extracted in the *New South Wales Legislative Council Practice*:

> 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 House 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.[187]

2.12.6 Mr Walker's advice turns on the reference to 'examination' in s 11. Section 13 creates an offence for any witness making a false statement – with the possible penalty of five years imprisonment. However, that provision does not make reference to 'examination'. There is therefore ambiguity as to whether this provision applies to witnesses who have not been sworn. The Procedural Fairness Resolution seems to presume that it does not (as it indicates unless a witness is sworn in, the *Parliamentary Evidence Act* provisions do not apply to them).

The practice in other jurisdictions

2.12.7 The practice in other jurisdictions tends to differ depending on the consequences for failing to answer questions truthfully (see further discussion in **Issue 1**, above).

Where such matters are dealt with as a possible contempt of Parliament, the taking of an oath or affirmation is generally optional, and it does not necessarily affect the consequences for failing to answer questions or giving false evidence. For instance, *Odgers Senate Practice* indicates that the swearing of witnesses is optional. It performs no function in terms of consequences for the testimony:

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186 Ibid 765.

187 Bret Walker SC, 'Legislative Council: Parliamentary privilege and witnesses before General Purpose Standing Committee No. 4' (2 November 2000) 15, extracted in Frappell and Blunt (n 15) 808.

> The swearing in of a witness has no effect on the witness's obligation to provide truthful answers to a committee or on the Senate's ability to deal with a recalcitrant or untruthful witness. Nor does it affect the privileged status of committee proceedings. A witness who gives false or misleading evidence, or evidence which the witness does not believe on reasonable grounds to be true or substantially true, may be guilty of a contempt regardless of whether the witness was sworn.[188]

2.12.8 In contrast, where there are statutory penal consequences for failing to answer, or failing to answer truthfully, witnesses are required to take an oath or affirmation. For instance, at the federal level, under s 17 of the *Public Accounts and Audit Committee Act 1951* (Cth) and s 30 the *Public Works Committee Act 1969* (Cth), which create specific offences for failing to answer questions and giving false evidence, require that witnesses are sworn, and it is an offence to refuse. In Victoria, s 19A of the *Constitution Act 1975* (Vic) provides the power to swear witnesses under oath or affirmation. The provision also creates an offence for giving false evidence, but this applies only to a sworn witness.[189] Similarly in Tasmania, in s 2A(2) of the *Parliamentary Privilege Act 1858* (Tas), a witness called before a committee 'is to make a declaration … that the evidence given by the witness is the truth'. Subsection (3) then states 'A witness who wilfully gives false evidence is guilty of perjury', implying that this applies only to a sworn witness (perjury being giving false evidence under oath).

2.12.9 In the United Kingdom, a similar position exists. The *Parliamentary Witnesses Oaths Act 1871* (UK) empowers the House of Commons and its committees to administer oaths, as well as creating an offence of perjury for giving false evidence. However, *Erskine May* goes on to state:

> The power of either House to punish for false evidence is not, however, superseded by this Act. Where evidence is not given upon oath, the giving of false evidence is punishable as a contempt.[190]

2.12.10 A similar position exists in the Lords.[191] Erskine May notes that it is unusual in either House for witnesses to be sworn.[192]

Options and discussion

2.12.11 The current position in New South Wales described above indicates that the practice of the Legislative Council is not necessarily clearly reflected in s 10 of the *Parliamentary Evidence Act*. Two key issues should be clarified within the provision: *when* an oath will be required and the *consequences* of an oath.

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188 *Odgers* (n 73) 571.
189 Section 19A(8).
190 *Erskine May* (n 52) [38.47].
191 Ibid [40.28].
192 Ibid [38.47]; [40.28].

1. *When* an oath or affirmation is required

The language of s 10 is mandatory. However, as set out above, this does not reflect the current practice. There appear to be good policy reasons for not administering the oath in circumstances where the committee is taking evidence through a public forum, or with vulnerable witnesses who might find the taking of an oath or affirmation too intimidating, and thus the quality of the evidence may be affected.

However, for transparency and fairness to witnesses appearing, there should be greater clarity given to *when* an oath will be required under s 10, and the *consequences* of that oath (see (2), below). This might be able to be achieved by:

- Making the administration of the oath in s 10 optional, rather than mandatory, such as:

  (1) ~~Every w~~Witnesses attending to give evidence before the Council, Assembly, or a Committee of the Whole ~~shall~~ may 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 w~~Witnesses attending to give evidence before a Committee other than a Committee of the Whole ~~shall~~ may be sworn by the Chair of such Committee.

- The adoption of language in s 10 similar to that in the *Procedural Fairness Resolution* (which indicates the Committee has a discretion as to when an oath will be administered with the words 'unless the committee decides otherwise').

In addition, a more detailed indication of when an oath will be required could be inserted into the provision, including the factors that should be taken into account in determining that. This would allow greater clarity for the witnesses and consistency in determining when sworn evidence is required. Alternatively, this type of detail could be provided for in greater depth in the *Procedural Fairness Resolution*.

2. *Consequences:* the application of ss 11 and 13 to evidence

The advice of Mr Walker SC is that s 11 of the *Parliamentary Evidence Act* does not apply unless a witness is sworn under oath or affirmation, although this is not clear on the face of the provision. Further, as set out above, there is some ambiguity as to whether s 13 applies to unsworn testimony. It would therefore seem desirable to amend s 10 to clearly indicate the effect of an oath or affirmation in engaging these provisions and protections.

This then raises the question as to when it would be most desirable to apply the provisions.

Whether the operation of ss 11 and 13 of the *Parliamentary Evidence Act* should be limited to those circumstances where an oath or affirmation has been administered will turn upon the assessment of different factors, including:

- The purpose of the oath or affirmation: to remind a witness of the solemnity of the testimony, and their obligations to answer questions truthfully. Where there are consequences that flow from failing to answer truthfully, the oath or affirmation also reminds the witness of these consequences (this is, of course, subject to any amendments made to the penal consequences, as discussed in **Issue 1**, above).
- The desirability of having witnesses answer questions truthfully before the Houses and their committees. This is, as discussed in **Issue 1**, the purpose of the penal provisions in ss 11 and 13. Sections 11 and 13 could be extended where an oath or affirmation has not been administered. Alternatively, noting the purpose of the oath, where a witness is being difficult, they could be sworn, and reminded at that time of the possible consequences.

2.13 Issue 13. Other inquiry powers of Committees: e.g. power to compel papers

Questions asked by the Committee:

- *Noting the discussion in New South Wales Legislative Council Practice at pp 779-788, should the Act be amended to enable committees to order the production of state papers?*

2.13.1 This section considers the power of committees to compel the production of documents. In **Issue 6**, above, the possibility of Committees having the power to ask questions on notice is also considered.

Committees' power to compel papers

The position in NSW

2.13.2 Legislative Council Standing Order 208(c) and Legislative Assembly Standing Order 288 explicitly provide that committees' powers include the power to send for papers. Despite these clear statements, there is currently disagreement between the Houses (most prominently the Legislative Council) and the Executive Government as to the power of Committees to order the production of documents. Standing Orders themselves will not be sufficient to provide the power to compel production: that must be sourced elsewhere. Both the Legislative Council and the Executive agree that the Houses have the power to compel the production of State papers under the common law doctrine of necessity,[193] but the disagreement arises as to whether this power extends to Committees (other than those specifically empowered to compel the production of documents under statute[194]). The *New South Wales Legislative Council Practice* sets out the relevant positions in detail, and how these have evolved over time.[195]

2.13.3 A number of legal opinions have been sought across the course of this debate, including from Bret Walker SC, the Solicitor-General, the Acting Crown Solicitor, and Anna Mitchelmore SC (as she then was, now a Judge of Appeal of the New South Wales Supreme Court). While there is some disagreement as to the source of the power (whether that be in the *Parliamentary Evidence Act* or the common law doctrine of necessity), by 2018, there appears consensus in the legal opinions that, should the matter go to court, it is likely that a court would find the committees possess the power to compel the production of documents.[196]

2.13.4 On 8 May 2019, the New South Wales Legislative Council adopted a sessional order specifying:

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193 As was confirmed in *Egan v Willis* (1998) 195 CLR 424.

194 Including the Committee on the Independent Commission Against Corruption under s 69(1) of the *Independent Commission Against Corruption Act 1988*; and the Committee on the Ombudsman, the Law Enforcement Conduct Commission and the Crime Commission under s 31G(1) of the *Ombudsman Act 1974*.

195 Frappell and Blunt (n 15) 780-788.

196 Ibid 786.

Sessional order – Order for production of documents by committees

…

(2) That this House notes that Portfolio Committee No. 4 – Legal Affairs in its report on the Budget Estimates 2018-2019, published the following legal advices in relation to the power of Legislative Council committees to order the production of State papers:

> (a) Crown Solicitor, "Section 38 Public Finance and Audit Act and powers of parliamentary committees", 10 August 2018,
>
> (b) Crown Solicitor, "Section 38 Public Finance and Audit Act and powers of parliamentary committees – Advice 2", 12 September 2018,
>
> (c) Acting Crown Solicitor, "Draft report of Inspector of Custodial Services", 24 October 2018,
>
> (d) Mr Bret Walker SC, "Initial advice documented in email from Clerk of the Parliaments to Clerk Assistant – Committees and Director – Committees", 25 October 2018,
>
> (e) Acting Crown Solicitor, "Request by Committee for draft report of Inspector of Custodial Services", 29 October 2018,
>
> (f) Solicitor General, "Question of powers of Legislative Council Committees to call for production of documents from witnesses", Advice SG 2018/23 (redacted), and
>
> (g) Ms Anna Mitchelmore SC, "Powers of Legislative Council Portfolio Committee No 4 in the context of its Inquiry into Budget Estimates 2018-2019", 19 November 2018.

(3) That this House notes that the Solicitor-General in his advice SG 2018/23 stated:

> I should add, however, that it is more likely than not, in my view, that, if this question of the powers of a parliamentary Committee were to be the subject of a decision of a court, a finding would be made that a Committee of the NSW parliament has the power to call for a witness to attend and give evidence, including by the production of a document, subject to claims of privilege, such as public interest immunity and legal professional privilege, that might be made by the witness. There may be some argument as to whether such a power resides in the Parliamentary Evidence Act, Standing Order 208(c) of the Legislative Council or a power based on reasonable necessity but, if the power does exist, it would be likely to emerge in any court proceedings on the basis that such proceedings would be difficult to confine to the limited question of the construction of the Parliamentary Evidence Act.

(4) That this House welcomes and endorses the opinion of the Solicitor-General as an acknowledgement of the power of Legislative Council committees to order the production of documents.

(5) That this House further affirms that whilst in the first instance Legislative Council committees will seek to obtain access to necessary documents by request, they do possess the power to order the production of documents which may be exercised in the event a request is declined.

(6) That this House calls upon the Premier to reissue Premiers memorandum C2011-27 "Guidelines for Appearing before Parliamentary Committees" and M2017-02 "Guidelines for Government Sector Employees dealing with the Legislative Council's Portfolio Committees" in accordance with the Solicitor-General's opinion, and the procedures set out in this resolution.

…

2.13.5 The Sessional Order goes on to set out the procedure for returning documents and determining any disputed claims of privilege. The *New South Wales Legislative Council Practice* notes that the key difference between the power of the House and the power of Committees to order the production of documents is that if it is resisted, committees must refer any refusal to the House for response if it interfered with the Committee's capacity to perform its functions.[197]

2.13.6 The government has not recalled the circulars that are referred to in (6) of the Sessional Order (the Premiers memorandum C2011-27 'Guidelines for Appearing before Parliamentary Committees' and M2017-02 'Guidelines for Government Sector Employees dealing with the Legislative Council's Portfolio Committees'). The Department of Premier and Cabinet's 'Guidelines for Government Sector Employees dealing with the Legislative Council's Portfolio Committees' continues to state:

- The *Parliamentary Evidence Act 1901* does not give committees the power to send for documents. This power is claimed by Legislative Council Standing Order 208. While the High Court has held that the Legislative Council has the power to compel the Executive Government to produce State papers (*Egan v Willis* (1998)), it is arguable that it is not 'necessary' to give such a power to a committee. The extent of this power is therefore uncertain and may be challenged where necessary.
- Where a Committee requires the production of a document which is likely to be subject to privilege or where it is anticipated that at the Committee's hearing the production of documents will be required in relation to potentially privileged matters, advice should be sought from the Crown Solicitor as to whether privilege can be claimed. If so, the Minister should be advised and a determination will need

197 Frappell and Blunt (n 15) 787-88.

to be made as to whether privilege should be claimed in the particular circumstances.

- Officers should also appreciate that any document brought to a Committee hearing, or referred to in the course of the hearing, could be called upon for production. If a Committee requires an officer to hand over documents at a hearing, the officer should request that the Committee refer the matter to the relevant House for a formal order to be made pursuant to the Standing Orders. *Production without such an order would be voluntary and would not protect the officer from breaching relevant secrecy or privacy provisions.*

2.13.7 The Executive Government has continued to contest the power of committees to order the production of state papers.[198]

The practice in other jurisdictions

2.13.8 Given the unique basis of parliamentary privilege in New South Wales in the doctrine of necessity and the *Parliamentary Evidence Act*, the source of committees' power to compel the production of documents in other jurisdictions is of limited assistance. In Tasmania, the closest analogy to New South Wales, s 1 of the *Parliamentary Privilege Act 1858* (Tas) provides a clear statutory source of power, as it provides not only for calling of witnesses, but the power to order production of documents:

> **1. Power to order attendance of persons**
>
> Each House of Parliament, and any committee of either House duly authorized by the House to send for persons and papers, is hereby empowered to order any person to attend before the House or before such committee, as the case may be, and also to produce to such House or committee any paper, book, record, or other document in the possession or power of such person; and all persons are hereby required to obey any such order

Options and discussion

2.13.9 Given the current disagreement, still unresolved, between the Houses and the Executive as to the power of committees to compel the production of State papers, it would appear desirable for this to be clarified in the *Parliamentary Evidence Act*. Indeed, it would appear, at least from the 2017 'Guidelines for Government Sector Employees dealing with the Legislative Council's Portfolio Committees', that the Executive Government's main concern regarding the lack of certainty as to the power of committees to compel the production of documents relates to the application of secrecy and privacy provisions.[199] Statutory clarification would address these concerns.

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198 Frappell and Blunt (n 15) 788.

199 See further discussion in Frappell and Blunt (n 15) 173-5.

2.14 Issue 14. Other issues

Questions asked by the Committee:

- *Do you have any observations on the process for accepting of evidence, particularly whether evidence should be accepted where an author is unknown or the evidence cannot be sourced for authenticity?*
- *Do you have any observations on the desirability of having these issues covered specifically and separately as they are in the* Parliamentary Evidence Act*, as compared to dealing with them in a comprehensive Privileges Act that could cover a broader range of privilege-related issues in a consistent and coherent way?*

2.14.A *14(A) Accepting Evidence*

2.14.A.1 It should be noted that this question does not strictly relate to the revision of the *Parliamentary Evidence Act* and the appearance of witnesses, but rather to the receipt of evidence. However, it arose in the context of the Hills Shire Council Inquiry, and therefore has been raised by the Privileges Committee for consideration. In the Hills Shire Council Inquiry the Committee resolved to receive and publish a number of anonymous (in the sense that the author was unknown) documents that contained serious allegations relating to branch stacking in the NSW Liberal Party. The Committee noted that the publication of documents where the author is unknown is 'highly unusual', and that Committees will generally take 'a cautious approach to the publication of any document where the author is unknown and the credibility of the document cannot be tested with its author'.[200] However, the Committee found weighing in favour of publication was the frustration of efforts to gain information from key witnesses, and that the level of detail in the documents seemed to indicate a level of veracity to the information. In accepting the evidence, the Committee sought the advice of the Clerk of the Committee, who wrote that while it was 'unusual for this to occur', it 'has happened on the rare occasion'. It was:

> Up to the committee to weigh up a range of factors, which could include transparency and public interest, the credibility of information, any sensitivity/confidentiality of the content and the reputation of the committee and Parliament in accepting/using unsourced evidence.[201]

2.14.A.2 Having resolved to accept and publish the unsourced evidence, the Committee provided procedural fairness in the following form:

> … the Committee resolved to provide certain individuals named in these documents with an opportunity to respond to the potential adverse mention the documents contained. A number of individuals wrote to the committee refuting the allegations

200 Hills Shire Council Report, xii.

201 Email from Clerk of the Committee to the Chair of the Hills Shire Council Inquiry (16 February 2023).

made against them, and these responses were later published on the committee's webpage.[202]

2.14.A.3 The receipt of information from unknown sources requires careful consideration in relation to a number of stages, including whether to accept the information, whether, if accepted, to publish the information, how to accord procedural fairness for individuals adversely mentioned in the information, and how to weigh the information in the Committee's deliberations.

2.14.A.4 Accepting, publishing and deliberating about unknown information will be affected by a number of factors. These factors mirror, in some respects, the assessment of the probative value of evidence in a judicial setting. Building on the factors identified by the Committee Clerk in the Hills Shire Council Inquiry, these might include:

- *The relevance of the information:* Any anonymous information must be assessed strictly for relevance to the terms of reference of any inquiry.
- *The credibility of the information:* This will be relevant to acceptance, publication and deliberation by the Committee. It should be assessed to the extent possible at each stage, in light of the nature of the information, the seriousness of any allegations made in it, its reliability (such as whether it relies on second-hand accounts of events) and the extent of evidence provided to support any allegations, and any further surrounding circumstances, including any further information or responses gained in the course of an inquiry.
- *Transparency and the public interest:* Transparency would dictate that any information accepted by the Committee be published. This would allow the public to understand the full information relied on by the Committee in their deliberations, as well as procedural fairness to be accorded to individuals involved (see below). However, there might be counterveiling factors (such as lack of credibility, sensitivity and confidentiality) that weighs against transparency in any given instance.
- *Any sensitivity/confidentiality of the content:* This might relate to sensitivity of information weighing in favours of publishing information that has been accepted, for instance where the content relates to allegations of sexual harassment that the individual wanted raised and considered by the Committee (and potentially publish), but for obvious and compelling reasons, wanted to remain anonymous. Similar considerations may arise where the individual involved is a public service whistleblower and has legitimate fears in relation to reprisals. Sensitivity and confidentiality might also weigh against publication, where, for instance, the evidence discloses sensitive and confidential information relating to third parties who have not consented to the publication of this information (such as personal details or commercial in confidence).

202 Hills Shire Council Report, xii.

- *The vulnerability of the individual who may be responsible for providing the information*: Where information that would not be known to many people is provided by a potentially vulnerable individual, this may weigh in favour of the Committee acting, with care, on that information. This may arise, for instance, where the information relates to matters involving sexual assault or harassment, or where it has been provided by a potential whistleblower with fear of reprisal. However, the Committee should deal with any such information with care, particularly in relation to whether to publish the information, and how to accord procedural fairness to individuals subject to adverse comment in the information.
- *The reputation of the Committee and Parliament*: This relates to the perception of the integrity and robustness of the Committee's deliberations, findings and recommendations, and ultimately any actions taken by Parliament, in accepting/using unsourced evidence, and how they deal with it.

2.14.A.5 A Committee may, based on an assessment of the above factors, decide to accept information from an unknown source, but not publish it, or to accept *and* publish it. Either way, if the Committee accepts the information, and it therefore may affect its deliberations, **procedural fairness** should be accorded to any individual adversely named in the information. If the information is accepted *and published*, additional procedural fairness may be required, such as a published right of reply. The Hills Shire Council Inquiry's approach to accord procedural fairness to the extent possible has much to commend it. The following principles build on that approach, together with best practice as outlined in **Issue 2**:

- Where information from an unknown source is accepted (whether published or not), any individuals subject to adverse comment in that information should be contacted, provided with the information, and given an opportunity to respond to the information.
- Where information from an unknown source is accepted (whether published or not), and the Committee relies upon that information to make findings that are adverse to an individual, the individual should be provided with a copy of those findings and given an opportunity to respond
- Where information from an unknown source is accepted *and published*, any responses received from individuals adversely mentioned in that information should be published (where permission to publish is given).

2.14.B *14(B) Comprehensive Privileges Act*

2.14.B.1 New South Wales has been described as an 'outlier in the degree to which it does not codify its privileges in statute'.[203] Rather, it relies on the adoption of Article 9 of the Bill of Rights, and the common law of necessity, as well as the statutory codification of some matters of privilege in the *Parliamentary Evidence Act*, and in other statutory schemes.

2.14.B.2 Codification of parliamentary privilege may take a number of forms:

- *Comprehensive codification:* replacing the current amalgam of Article 9 of the Bill of Rights, the common law and statute with a single statutory source of privilege.
- *Partial, supplementary codification:* extending or clarifying the operation of parliamentary privilege in areas in which this is seen as necessary or desirable.

  The *Parliamentary Evidence Act* and the current review of it is an example of partial, supplementary codification in one particular area that raises acutely duelling constitutional principles thus making codification desirable.

2.14.B.3 Codification of parliamentary privilege in New South Wales has been attempted previously, but never successfully. The first attempt occurred in the second half of the nineteenth century and into the early twentieth century (the period after the introduction of responsible government between 1856-1912, during which the *Parliamentary Evidence Act 1881* was first adopted).[204] More recently, there have been recommendations and attempts to adopt more comprehensive privileges legislation since the mid-1980s. The most recent attempts were in 2010 with the tabling of the Parliamentary Privileges Bill 2010, and correspondence between the Premier and the Presiding Officers in 2016, in relation to the introduction of parliamentary ethics or standards commissioner together with a proposal to codify some aspects of parliamentary privilege.[205]

2.14.B.4 The political challenge of any codification of parliamentary privilege is significant. It requires significant political consensus: it requires agreement across both houses, and agreement between the government and the Parliament on matters that often involve tense issues around the parliament's powers of oversight over the government.

2.14.B.5 There has been some contemporary consideration given to the desirability of codifying in statute parliamentary privilege in New South Wales.[206] The focus has been on partial codification that could achieve clarity around ongoing issues of contest (see further what these might be, below), and greater accessibility. However, there are also concerns that codification will reduce desirable flexibility, and invite the courts into a larger oversight role.

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203 Frappell (n 30) 11.

204 Frappell and Blunt (n 15) 75-77; Clune & Griffith (n 16) 132-135.

205 See the more recent attempts set out in Frappell and Blunt (n 15) 81-82.

206 See, eg, Frappell (n 30); and see also Gareth Griffith, *Parliamentary Privilege: Major Developments and Current Issues* (NSW Parliamentary Library Background Paper No 01/2007) 20-22.

2.14.B.6 While a number of jurisdictions statutorily set the adoption of the privileges of the Houses of Commons, there are only a small number of jurisdictions with more comprehensive codification, and in particular the Commonwealth *Parliamentary Privileges Act 1987* (Cth)), and Queensland (*Parliament of Queensland Act 2001* (Qld)). New Zealand has also enacted privileges legislation (*Parliamentary Privileges Act 2014* (NZ)).

2.14.B.7 Whether a comprehensive, or more partial/supplementary codification of parliamentary privilege is desirable in New South Wales will turn on a number of considerations. These include:

- The practice of the New South Wales Parliament has revealed no immediate crisis relating to the source or operation of parliamentary privilege in New South Wales. Indeed, served well by the Clerks and their officers, the New South Wales Parliament has an extensive and highly accessible set of practices and precedent that govern most matters.
- Where there are instances of disagreement as to the source or exercise of parliamentary privilege, these have been well documented and can be addressed through considered amendment to standing orders or statute (as appropriate). Such an incremental approach is reflective of the current approach to the review of the *Parliamentary Evidence Act.*
- Any change to the source of parliamentary privilege in New South Wales – for instance, shifting it from the common law doctrine of necessity and Article 9, to the practice of the House of Commons at a particular date – could cause more confusion than certainty. This is because the significant and sophisticated law, practice and procedure of the New South Wales parliament has been developed on the basis of the doctrine of necessity and Article 9. Any shift to a statutory basis should be alive to this history and context, and amendents should be carefully drafted to capture this.
- Any attempt to cover the field and create a 'comprehensive' piece of parliamentary privileges legislation of New South Wales (as opposed to carefully targeted partial and supplementary codification) carries with it dangers of creating unintended gaps (because issues are not considered at the time of drafting that subsequently arise) as well as creating unintended rigidity (where more flexible doctrines such as necessity are more suitable for adaptation).
- Comprehensive codification can provide clarity, in a single source, of the nature, scope and extent of parliamentary privilege, which can assist parliamentarians, their staff, the government, as well as members of the public. Codification can lead to more transparent and consistent application of important concepts, such as the extent of 'proceedings in parliament' for the purposes of Article 9. Codification can also deliver greater consistency in the operation of parliamentary privilege across the

country – where, for instance, the jurisdictions adopt the same approach (such as the definition of 'parliamentary proceedings').

- Codification will impact the relationship between the Parliament and the Courts. It can ensure that the Parliament's interpretation of a particular term (such as 'parliamentary proceedings') is interpreted in the manner Parliament intended. It might also invite greater judicial oversight of the exercise of parliamentary privilege. This can, however, be managed through careful drafting.

2.14.B.8 Acknowledging both the advantages and dangers of codification, for instance, the New Zealand *Parliamentary Privileges Act 2014* was a partial codification, aimed at 'reaffirming and clarifying' the 'nature, scope and extent of the privileges, immunities, and powers exercisable by the House of Representatives, its committees and its members' while avoiding comprehensive codification.[207] In 2013, the UK Joint Committee on Parliamentary Privilege stated that codification should be seen as a 'last resort' but could be beneficial to 'resolve uncertainty' and to 'confirm the existence or extent of specific privileges'.[208]

2.14.B.9 Areas that could be the subject of codification have previously been identified by Stephen Frappell as:

- Clarification of the interpretation of 'proceedings in Parliament' for the purposes of Article 9, bringing New South Wales into line with the position at the Commonwealth level and in Queensland;
- Clarification of the immunity of members and officers of Parliament from arrest and attendance before the Courts;
- The application of the general law to Parliament;
- The power of the New South Wales houses to punish members for contempt, or discipline powers.[209]

2.14.B.10 The political and logistical dimensions of adopting a codified (comprehensive or partial) parliamentary privileges legislation should not be underestimated. Considering the current review, limited to a review of a fundamental aspect of parliamentary privilege in the form of the power to take evidence, as part of a larger project to introduce a Parliamentary Privileges Act would require significantly more time to develop, and, as already outlined, will raise sensitive political issues making a larger project not just longer to develop and achieve, but politically far more difficult to realise.

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207 Section 2.
208 Frappell (n 30) 17.
209 Ibid 15-22.

Appendix 1 – Committee Questions and Summary of Options from Discussion Paper

(**Note:** Numbering of issues correspond to the relevant section of the Discussion Paper)

1. Consequences for failing to appear/answer questions/false evidence (offences & penalties)

Questions set by the Committee

- Sections 11 and 13 of the PE Act adopt significant penalties for refusal to answer a question and for provision of false evidence. Are these penalties in keeping with societal standards and expectations?
- Should the Parliament retain a penal jurisdiction in these matters?

Summary of options raised for discussion

1.1: Retention of penalties: Is it desirable to retain any penalty for conduct amounting to failure to answer or giving false evidence?

1.2: Forum: If penalties are retained, which forum should hear and determine these matters? Options include:

- Transfer of jurisdiction over both forms of conduct to the Parliament.
- Transfer jurisdiction over both forms of conduct to the courts for all witnesses.
- Retain the status quo, with failure to answer being dealt with by the Parliament and false evidence to be dealt with by the courts.
- Conferring jurisdiction on either the Parliament or the courts, with a procedure in place to avoid double punishment or double jeopardy.
- Conferring jurisdiction on the Parliament for members, while conferring jurisdiction on the courts in relation to non-members.

1.3: Appropriate penalties: If penalties are retained, should there be included the possibility of a fine or imprisonment for conduct amounting to failure to answer or giving false evidence, and when should these be available?

1.4: Procedure for contempt If the Parliament's penal jurisdiction is retained, should further procedural matters be introduced, including:

- specifying the procedure by which contempt is determined; and
- clarifying how penalties are imposed.

2. Protections for witnesses

Questions set by the Committee

- Noting the significant penal powers given to the Parliament in sections 11 and 13, do the procedural protections adopted by the House for witnesses before committees – including notably the Procedural Fairness Resolution adopted by the House – accord with modern standards of procedural protection for witnesses in quasi-judicial proceedings?
- Should the recognition in section 22G(1) of the Constitution Act 1901 of the President as the 'independent and impartial representative' of the Council be extended to committee chairs in the PE Act? Alternatively, would such a measure be more appropriately considered as an amendment to the Procedural Fairness Resolution?

Summary of options raised for discussion:

2.1: Adoption of minimal procedural protections in statute. Should there be:

- Statutory codification of the minimum requirements of procedural fairness where witnesses appear before the Parliament and its committees, and how those minimum requirements are to be enforced? Or
- If statutory codification is not considered desirable, greater clarity around the circumstances when the Procedural Fairness Resolution provisions will not be applied, to increase the consistency and transparency of its application?

2.2: Review of procedural protections in Resolution. Should there be additional protections included in the Procedural Fairness Resolution, such as:

- allowing a legal representative (where leave has been granted) for a witness to object to answering a question;
- giving a person against whom the Committee intends to make an adverse finding in a report, an opportunity to respond to that finding.

2.3: The role of Committee Chairs. Is there benefit in clarifying this role, in statute or the Procedural Fairness Resolution?

2.4: Codification of the Privileges Committee special procedure when dealing with contempt. Should special procedures afforded to witnesses appearing in contempt proceedings before the Privileges Committee be codified?

2.5: Codification of special procedures directed to accord fairness to vulnerable witnesses. Should special procedures for different groups of vulnerable witnesses appearing before committees to ensure they are accorded fairness given their circumstances be codified?

2.6: Clarification of consequences for breach of Procedural Fairness Resolution. Should there be greater clarification regarding how to make a complaint regarding the application

of the Resolution, and how it will be determined? Should there be a way to escalate the resolution of the complaint to the House or Privileges Committee?

3. Power to compel attendance

Questions set by the Committee

- Sections 7-9 of Act provide a mechanism for witnesses to be brought before a House or a committee. What alternative mechanisms are available, including mechanisms used in other jurisdictions?

Summary of options raised for discussion:

3.1: Retention of warrant mechanism: Should the warrant system be retained for enforcing attendance by witnesses?

3.2: If the warrant mechanism is maintained, process for issuing warrant: Should the process for issuing a warrant under ss 7-9 be retained, or should it be replaced with a system whereby the Chair or Deputy Chair can issue a warrant?

3.3 Powers of Committees during prorogation: A further option discussed in this part was whether the powers of Committees during prorogation – including the power to compel the attendance of witnesses – be clarified?

4. Application of witness privileges (self-incrimination, LPP, public interest immunity)

Questions set by the Committee

- The penalty in section 11 applies to refusal to answer a 'lawful question'. Is the concept of a 'lawful question' still helpful?
- Should the meaning of lawful question be defined to exclude the interpretation in *Crafter v Kelly*?

Summary of options raised for discussion:

4.1: Clarification of application (or non-application) of witness privileges: Should there be clarification in the *Parliamentary Evidence Act* as to the application, or non-application of witness privileges? Three options are raised:

(d) Clarify in the statute that witnesses can claim privilege against of self-incrimination, legal professional privilege, and public interest immunity in a parliamentary inquiry, and that the powers of the Houses and their Committees are limited by such claims.

(e) Clarify in the statute that witnesses cannot claim privilege against self-incrimination, legal professional privilege, and public interest immunity in a parliamentary inquiry, and that the powers of the Houses and their Committees are not limited by such claims.

(f) Clarify in the statute that witnesses can claim some but not all witness privileges (for instance, that they can claim public interest immunity but not the privilege against self incrimination or legal professional privilege) in a parliamentary inquiry, and that the powers of the Houses and their Committees are limited accordingly.

4.2: Procedure for privilege claims: If it is decided that witness privileges should apply in the New South Wales Parliament, how should such a claim be determined? Options for determining such claims include:

- Where a claim for privilege is made in a Committee, it may be dealt at first instance by the Committee, which can be referred to the House if it is determined there is no valid claim and the Committee insists on the question being answered.
- Where a claim for privilege is made in the House, the claim is dealt with by the House.
- The House may refer the matter to receive a report to assist it in its determination: for instance, refer matters for inquiry and report by the privileges committee, or to an independent legal arbiter (as occurs in relation to disputes regarding privilege claims in relation to orders for production of documents).

4.3: Where privileges are not retained in New South Wales, but nonetheless witnesses are able to object to answering questions and the Committee has discretion as to whether to require the questions to be answered, should Clause 12 of the Procedural Fairness Resolution be clarified as to how these objections are determined?

5. Application of parliamentary privilege to witnesses

Questions set by the Committee

- Does the protection in section 12 add anything over and above the existing protections of witnesses under Article 9 of the Bill of Rights?

Summary of options raised for discussion:

5.1: Clarification of section 12 as applying the privileges of Article 9: Should s 12 be retained but its relationship to Article 9 be clarified?

5.2: Clarification of section 12 as applying and extending the privileges of Article 9: Should s 12 be retained but its protections extended beyond that of Article 9, such as in relation to providing a derivative immunity?

5.3: Repeal of section 12. Should s 12 be repealed?

6. Special procedure for members

Questions set by the Committee

- Apart from the matters under consideration in the separate Public Accountability and Works Committee inquiry into the Parliamentary Evidence Amendment (Ministerial Accountability) Bill, are there any other amendments regarding the appearance of members before committees that should be considered?

Summary of options raised for discussion:

- **6.1: Questions on Notice from Committees.** Should Sessional or Standing Orders be amended to enable a Committee to put questions on notice to ministers in the Legislative Assembly?
- **6.2: Standing Orders to govern the appearance of Members:** Should the current process through which a Member of the Assembly is invited to attend and give evidence before the Council or one of its Committees be formalised in the Standing Orders of the Legislative Council?

7. Witnesses outside of jurisdiction

Questions set by the Committee

- It is generally agreed that the PE Act should be amended to apply in other Australian jurisdictions. How would this best be achieved?
- If the Act were amended in this way, are there some categories of witnesses in other jurisdictions who should be specifically excluded (e.g. members of other Parliaments?)

Summary of options raised for discussion:

7.1: Amend s 4(1) to apply elsewhere in Australia. Should s 4(1) of the *Parliamentary Evidence Act* be amended to extend extra-territorially (but within Australia)?

7.2: Providing for service of summons. If the *Parliamentary Evidence Act* is amended to extend extra-territorially, how might a summons be served outside of New South Wales? Options include:

(a) Engaging Part 3 of the *Service and Execution of Process Act 1992* (Cth)

(b) Engaging private process servers.

7.3: Application of privilege. If the *Parliamentary Evidence Act* is amended to extend extra-territorially, should the privilege that applies to witnesses extend to providing immunity from liability in other jurisdictions? How might this be achieved?

7.4: Exclusion of certain categories of interstate witnesses. If the *Parliamentary Evidence Act* is amended to extend extra-territorially, should there be groups of witnesses that are excluded from this extended operation? If so, which groups?

8. Excluded categories of witnesses

Questions set by the Committee

- Should the Act be amended to specifically exclude members of the judiciary from its operation?

Summary of options raised for discussion:

8.1: Clarification of the position of members of the judiciary. Should the position of members of the judiciary and their compellability by the Houses and their committees be clarified in either statute or the Standing Orders, and if so, how? Options include:

- a blanket immunity from the power to compel a witness for members of the judiciary;
- maintenance of the power to compel a member of the judiciary where there is an investigation undertaken to assist the Houses in the exercise of their constitutional function of determining whether to seek the removal of a judge from office.

8.2: Special procedures for appearance of members of the judiciary. Should special procedures be introduced in Standing Orders to govern the situations where judicial officers do appear before the Houses and their Committees?

9. Mode of service

Questions set by the Committee

- It is generally agreed that the PE Act should be amended to enable summonses to be served electronically. How would this best be achieved?

Summary of options raised for discussion:

9.1: Should electronic service be introduced:

- In all circumstances where a summons is issued under s 4?
- In circumstances where there is consent of the other party, or where receipt is acknowledged by the other party?
- In circumstances where personal service has not been able to be achieved, and permission is given by the Presiding Officer or the Chair of the Committee?

10. Electronic signatures

Questions set by the Committee

- Can a summons be issued under s 4 of the Parliamentary Evidence Act with a Chair's electronic signature?

Summary of options raised for discussion:

- **10.1: Amend the service requirements in s 4.** Should the service requirements be amended to allow for electronic service as contemplated in Issue 9 so as to remove s 4 from the exemptions in the *Electronic Transactions Regulations 2017* (NSW)?
- **10.2: Amend the *Electronic Transactions Regulations***. Should an explicit carve out for s 4 of the *Parliamentary Evidence Act* could be introduced to the generally framed exemptions in the *Electronic Transactions Regulations 2017* (NSW)?
- **10.3: Amend the signature requirements in s 4.** Should s 4 of the *Parliamentary Evidence Act* be amended to indicate that electronic signatures are able to be used on orders issued under that section?
- **10.4: Signature of Deputy Chair.** Should an amendment also be introduced to s 4 to clarify when the signature of a Deputy Chair might be permitted?

11. Expenses

Questions set by the Committee

- Should the Act be amended in relation to expenses of witnesses? Should there be different rules for different categories of witnesses (e.g. public servants)?

Summary of options raised for discussion:

11.1 Retention of payment of witness expenses. Should the requirement for the payment of witness expenses be retained, or should it be replaced with a discretionary power (governed by Standing Orders) to pay reasonable expenses upon application by a witness?

11.2: Timing, form and calculation of witness expenses. If witness expenses are retained, when should they be required (timing), in what form should they be payable, and how should they be calculated? Options include:

Timing:

- At the time of service
- Prior to the required date of attendance
- After the date of attendance

Form:

- Cash
- Cheque

- Electronic Funds Transfer
- Direct payment of expenses

Calculation:

- "Reasonable" expenses that are set by reference to a scale, such as the Supreme Court scale
- "Reasonable" expenses
- Actual expenses

11.3: Categories of witnesses. Are there categories of witnesses where expenses should not be met by the Parliament, such as public servants?

12. Oath

Questions set by the Committee

- Noting that not all witnesses before committees are sworn in (see NSW LC Practice, pp 764-765), should the terms of section 10 be modified? If so, how?

Summary of options raised for discussion:

12.1: *When* an oath or affirmation is required. Should s 10 of the *Parliamentary Evidence Act* be clarified to indicate the circumstances when should an oath or affirmation will be required? Options include:

- Making the administration of the oath/affirmation in s 10 optional, rather than mandatory.
- Adopt language in s 10 similar to that in the *Procedural Fairness Resolution*, which indicates the Committee has a discretion as to when an oath will be administered with the words 'unless the committee decides otherwise'.

12.2: *Consequences:* the application of ss 11 and 13 to evidence. Should s 10 be amended to indicate the effect of an oath or affirmation in engaging sections 11 and 13?

13. Other inquiry powers of Committees: e.g. power to compel papers

Questions set by the Committee

- Noting the discussion in NSW LC Practice at pp 779-788, should the Act be amended to enable committees to order the production of state papers?

Summary of options raised for discussion:

13.1: Power to compel papers. Should the power of committees to compel the production of State papers be clarified in the *Parliamentary Evidence Act*, and address any concerns relating to the application of secrecy and privacy provisions?

14. Other issues

Questions set by the Committee

> 14(a) Do you have any observations on the process for accepting of evidence, particularly whether evidence should be accepted where an author is unknown or the evidence cannot be sourced for authenticity?
> 14(b) Do you have any observations on the desirability of having these issues covered specifically and separately as they are in the Parliamentary Evidence Act, as compared to dealing with them in a comprehensive Privileges Act that could cover a broader range of privilege-related issues in a consistent and coherent way?

Summary of options raised for discussion:

14.A Anonymous information/information from an unknown source

14.A.1: What factors should be considered in determining whethera Committee should accept, publish or deliberate about anonymous information/information from an unknown source?

14.A.2: How can procedural fairness be accorded if the Committee accepts, publishes or accepts anonymous information/information from an unknown source?

14.B Privileges legislation

14.B.1: Should there be comprehensive or partial codification of parliamentary privilege in New South Wales? If partial, what areas would benefit from codification?