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Can I Get A Witness?: Should the NSW *Parliamentary Evidence Act 1901* be amended?

Introduction

A key function of Parliaments in the Westminster system is that of conducting inquiries into public affairs, including the administration of government. In order to do this effectively, it is necessary for Parliaments to be able to call for witnesses to offer expert opinion or advice. While there have been examples of witnesses being called to give evidence at the Bar of the House, this is becoming increasingly infrequent and it is much more common for a Parliament's investigative function to be carried out by its committees.¹ This paper will largely focus on the relevant powers of committees to compel the attendance of witnesses and to punish non-compliance with a summons.

Committees are delegated powers by the House which appoints them and both houses in New South Wales have standing orders which give their committees the power to send for persons, papers, records and other relevant exhibits.² In conjunction with the relevant standing orders and resolutions of each House, the power to summon a witness in New South Wales is provided by the *Parliamentary Evidence Act 1901* [the Act].

The Parliamentary Evidence Act 1901

Section 4 of the Act states that:

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

As stated, a summons is issued by a chair on an order from the committee and it is therefore practice that this is done by way of committee resolution. The summons is then served by an officer of the House (usually the Usher of the Black Rod in the Legislative Council or the Serjeant-at-Arms in the Legislative

¹ A number of examples are given in Russell D Grove, ed. *New South Wales Legislative Assembly Practice, Procedure and Privilege*, (New South Wales, 2007), pp 247-248, but none since the 19th century.

² Parliament of New South Wales, *Standing Orders*, Legislative Assembly No. 288, Legislative Council No. 208(c).

Assembly), along with an offer of conduct money and travel costs.³

In addition, the Act contains provisions for the punishment of a witness who fails to obey a summons. If the Presiding Officer of the House which issued the summons finds that a witness' failure to attend is "without just cause or reasonable excuse" then the person can be apprehended under a warrant issued by a judge of the Supreme Court.⁴ The intention of detaining the witness is so that they can be produced "from time to time for the purpose of giving evidence, or be remanded and finally be discharged from custody" but the legislation does not specify a limit to the duration of the detention.⁵

The Act also gives committees the power to take evidence under oath, the power to compel answers and bestows privilege upon the witness.⁶ It is therefore a very important tool for committees conducting inquiries to gather accurate evidence and ensure that witnesses speak freely without fear of recrimination.

Current practice

Before 2000, it was the usual practice for committees to serve all witnesses who were appearing to give evidence, other than members, with a summons either prior to or on arrival at a hearing. This was done regardless of the cooperation of the witness on the assumption that the protections mentioned earlier regarding a witness' evidence relied upon whether they had been summoned. Advice received by the Clerk of the Parliaments from Mr Brett Walker SC, however, stated that this was not the case.⁷ As such, committees issuing summons have become much rarer in recent times and committees are advised to avoid the process where possible. In the Legislative Assembly, the practice approved by the Speaker suggests that "In the normal course of events no summonses are issued to witnesses" and "The use of a summons is reserved as a last resort to compel a person's attendance before a committee on a case by case basis".⁸ Similarly, in the Legislative Council, it is advised that: "The issuing of a summons is an exercise of significant coercive power and should only occur after careful consideration of the repercussions and alternatives".⁹

This practice appears to be common across other jurisdictions, with Odgers' Practice noting that:

"The use by committees of inquiry powers through the issuing of a summons for a person to appear or a

³ Lovelock and Evans note that prior to 1931, summons were delivered by the police but advice received from the Assistant Law Officer said that 'the proper person to effect service [of a summons] would be a messenger or other officer of House of Parliament'. Lynn Lovelock & John Evans, *New South Wales Legislative Council Practice* (The Federation Press, 2008), n. 50 p 495.

⁴ *Parliamentary Evidence Act 1901*, s 7 & 8.

⁵ *Parliamentary Evidence Act* s 9.

⁶ *Parliamentary Evidence Act* s 10, 11 & 12.

⁷ Brett Walker SC, 'Legislative Council: Parliamentary privilege and witnesses before General Purpose Standing Committee No. 4', (authorised to be published by resolution of the Committee on 6 November 2000), 2 November 2000, pp 15-17.

⁸ Grove, ed, above n 1, pp 233-234.

⁹ Lovelock & Evans, above n. 3, p 490.

document to be produced is the exception rather than the rule. Committees usually invite witnesses to attend and give evidence, and witnesses usually attend voluntarily”.¹⁰

Since this change of practice in New South Wales some witnesses still ask to be summoned. This request is often due to a belief that a summons provides greater legal protection or the witness may wish to be compelled to attend for other reasons. The committee concerned usually accedes to such requests but as was advised by Mr Walker SC and also supported by Odgers' Practice, a summoned witness gains no greater legal protection.¹¹

It is worth noting that in all cases during the period when summonses were routinely issued, this was done under the Act but the penalties provided under the Act have never been invoked. Indeed, there are very few recorded instances of witnesses failing to attend when summoned under the Act. One recent occurrence, however, merits examination.

A recent occurrence

On 23 December 2010, the Legislative Council's General Standing Purpose Committee No. 1, resolved to conduct an inquiry into certain transactions for the trading rights to the electricity generation of nine State-owned power stations to the private sector (the Gentrader transactions inquiry). The Parliament had been prorogued by the Governor, on the advice of the Executive Council, the day before but the Clerk of the Parliaments advised the Chair that the Committee could continue to meet and transact business. This contradicted advice from the Crown Solicitor issued in 1994 and a press release from the Government which reflected this advice and indicated that, amongst other things, committees were not able to sit during prorogation. The Government received updated advice from the Crown Solicitor in January 2011 which reiterated that committees could not function during prorogation without legislative authority to do so. The Clerk also sought independent legal advice which supported the position that the Committee could continue to transact business.¹²

As part of the inquiry the Committee held several hearings. A number of senior members of Parliament, including the Premier, the Treasurer and the Leader of the Opposition, all appeared to give evidence. Eight directors of the boards of the State-owned corporations who had resigned in protest, however, declined the invitation to appear citing the uncertainty of the legality of the proceedings due to the conflicting advice

¹⁰ Harry Evans, ed. *Odgers' Australian Senate Practice*, (Canberra, 12th ed, 2008), p 543.

¹¹ *Ibid.* p 416.

¹² This paper does not intend to examine the effects of prorogation on committee business or the intricate details of the Gentrader inquiry which are looked at in depth in the paper, Teresa McMichael, 'Prorogation and principle: The Gentrader Inquiry, Government accountability and the shutdown of Parliament' (Paper presented at the ASPG 2011 National Annual Conference, Melbourne, October 2011).

regarding the powers of the committee.¹³

The Committee deliberated, decided that these were key witnesses and resolved to issue summonses under the Act. These summonses were served but correspondence received by the Chair of the Committee from legal representatives of the former directors advised that the summons would not be answered due to the uncertainties of the legal protection afforded to them. The Committee resolved to grant the directors three more days to reconsider their decision not to comply with the summonses but they again declined to appear. The Committee then resolved to report the matter to the President under section 7 of the Act and request that the President seek a warrant from a Judge of the Supreme Court for the apprehension of the former directors.

Section 7 of the Act provides that “the President or the Speaker, as the case may be, [should be] satisfied of ... the witness's non-attendance is without just cause or reasonable excuse”. The President considered the matter and advised the Chair, and released a statement, that, in her view, there was just cause and reasonable excuse for the non-attendance given the uncertainty surrounding the legal standings of the inquiry. At this point, the Committee took no further action and the former directors did not appear to give evidence.

This recent use of the Act was further complicated by the issue of prorogation but it appears that there was a reluctance to pass the matter on to the courts for resolution. In addition to these complications involving prorogation, it should also be noted that, in the Parliament of New Zealand, a review of the standing orders in 1999 raised concerns that the general power of committees to summon witnesses was a significant infringement on civil liberties and should be used carefully. Select committees in New Zealand, other than the Privileges Committee, are generally not delegated the power to send for persons and must apply to the Speaker for a summons or obtain one from the House by special report.¹⁴

Given the decreasing use of the summons by committees, this recent example of witnesses declining a summons and avoiding sanction, and a reluctance to fully exercise punitive powers and potentially further involve the courts; is the Parliamentary Evidence Act still a relevant tool in New South Wales?

Parliament as the Grand Inquest

As stated earlier, the power to compel the attendance of witnesses is key to the functions of a Parliament. The concept of the Parliament as the 'Grand Inquest of the Nation' was seminally invoked by Patteson J in

¹³ General Purpose Standing Committee No. 1, Parliament of New South Wales, *The Gentrader transactions* (2011), pp 9-12, 303, 306, 316-318, 320.

¹⁴ David McGee, *Parliamentary Practice in New Zealand*, (Dunmore Publishing Limited, 3rd ed, 2005) pp 428-431.

the case of *Stockdale v Hansard* when he stated that the House of Commons was: "... the grand inquest of the nation, and may inquire into all alleged abuses and misconduct in any quarter, of course in the Courts of Law, or any of the members of them".¹⁵

Therefore, as stated by Lovelock and Evans: "It is generally accepted that the inquiry powers of the House of Commons derive not from statute or any other written instrument but by virtue of ancient usage and practice (*the lex et consuetudo Parliamenti*)".¹⁶

Of additional relevance to the matter of compelling witnesses, as highlighted by Neil Laurie, is the case of *Howard v Gossett* involving the Sergeant-at-Arms of the House of Commons being sued in trespass for executing a Speaker's warrant to bring the plaintiff before the Bar of the House.¹⁷ Lord Coleridge, on the topic of the powers of the House of Commons said that:

"That the Commons are, in the words of Lord Coke, the general inquisitors of the realm, I fully admit: it would be difficult to define any limits by which the subject matter of their inquiry can be bounded: ... I would be content to state that they may inquire into everything which it concerns the public weal for them to know; and they themselves, I think are entrusted with the determination of what falls within that category. Coextensive with the jurisdiction to inquire must be their authority to call for the attendance of witnesses, to enforce it by arrest where disobedience makes that necessary."¹⁸

Similarly on appeal in the case, Barton Parke J stated that:

". . . it cannot be disputed that the House of Commons has by law the particular powers to take into custody which in the three first pleas it is expressly averred to have exercised; and we have nothing to do with any other. First, that House which forms the Great Inquest of the Nation, has a power to institute inquiries and to order the attendance of witnesses, and, in case of disobedience (whether it has not even without disobedience, we need not inquire), bring them in custody to the Bar for the purpose of examination."¹⁹

Most jurisdictions in Australia have legislation conferring on them the powers and immunities of the House of Commons, for example section 49 of the Commonwealth Constitution states that:

"The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament,

¹⁵ *Stockdale v Hansard* (1839) 9 Ad & Ell 96; 112 ER 1112; [1839] EWHC QB J21at 1185.

¹⁶ Lovelock & Evans, above n. 3, p 487.

¹⁷ Neil Laurie, 'The Grand Inquest of the Nation – A notion of the past?' (Spring 2001) 16(2) *The Australasian Parliamentary Review* pp 173-185, pp 173-174.

¹⁸ *Gossett v Howard* (1845) 10 QB 359 at 379-380.

¹⁹ *Gossett v Howard* (1847) 10 QB 411 at 450-451.

and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.”

It can be reasoned, therefore, that these Parliaments can be seen to have the same powers and immunities with respect to inquiries as those highlighted in the cases relating to the House of Commons.

This position is supported by the case of *R v Richards: ex parte Fitzpatrick and Browne* where according to Harris: “the High Court held in unequivocal terms that section 49 is incapable of a restricted meaning and that the House of Representatives, until such time as it declares otherwise, enjoys the full powers, privileges and immunities of the United Kingdom House of Commons”.²⁰ Harris continues to point out that: “If such is the case, either House of the Commonwealth Parliament, or its committees, could be said to have the power to conduct any inquiry into any matter in the public interest and to exercise, if necessary, compulsive powers to obtain evidence in any such inquiry”.²¹

The Parliament of New South Wales, however, does not have specific legislation conferring on it the powers and immunities of the House of Commons and instead relies on the common law principle of 'reasonable necessity'. This means that the New South Wales Parliament has the powers, rights and privileges necessary for the discharge of its functions. As highlighted by Lovelock, these powers can exist in the absence of constitutional or statutory prescription according to the line of reasoning of the United States Supreme Court in *McGrain v Daugherty* in 1927:

“[T]he power of inquiry – with process to enforce – is an essential and appropriate auxiliary to the legislative function ... A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information – which not infrequently is true – recourse must be had to others who do possess it. Experience has taught that mere requests for such information are often unavailing, and also that information which is volunteered is not always accurate or complete, so some means of compulsion are essential to obtain what is needed.”²²

Further to this, there have been specific findings in New South Wales to support the Parliament's powers of inquiry. In his judgement in *Egan v Willis*, Justice McHugh referred to the aforementioned historical cases and their continuing relevance:

“In *Stockdale*, Lord Denman CJ described the House of Commons as “the grand inquest of the nation”.

In *Howard v Gosset*, Coleridge J said that “the Commons are, in the words of Lord Coke, the general

²⁰ IC Harris ed. *House of Representatives Practice* (Canberra, 6th ed, 2005) citing *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 171 at 164-70.

²¹ Harris ed, above n. 20, p. 645.

²² Lovelock & Evans, above n. 3, p 488 quoting *McGrain v Daugherty* 273 US 135 (1927) at 174-175.

inquisitors of the realm". These statements summarise one of the most important functions of a House in a legislature under the Westminster system, namely, that it is the function of the Houses of Parliament to obtain information as to the state of affairs in their jurisdiction so that they can, where necessary, criticise the ways in which public affairs are being administered and public money is being spent."²³

It is the case, therefore, that the Parliament of New South Wales operates with the understanding that:

"The inquiry power of the Parliament of New South Wales is not simply a power incidental to the Parliament's legislative power, it is a fundamental mechanism to assist the Parliament to discharge its broader functions as an integral part of a system of responsible government. As such, [it] has the same inquiry power as the House of Commons – the 'Grand Inquest of the Nation'."²⁴

If the Parliament is to perform this role, it requires the powers to do so. Clearly, the power to summons a witness is an important one and given that the Parliament of New South Wales does not have specific statutes conferring on it the rights and responsibilities of the House of Commons, it seems reasonable to legislate for certain powers regarding the gathering of evidence, including the compulsion of attendance for witnesses and dealing with those who fail to appear before an inquiry. Although the cases of *McGrain v Daugherty* in the US Supreme Court and *Egan v Willis* in New South Wales have been used to prove that New South Wales has an unlimited power of inquiry similar to the Grand Inquest, there are arguments to the contrary.²⁵

The history of the Act

Indeed, the original NSW Parliamentary Evidence Act arose from the cases of *Kielly v Carson* and *Fenton v Hampton*. In the case of *Kielly v Carson* in 1842, concerning the powers of the Newfoundland House of Assembly in Canada to arrest a person for a breach of privilege committed out of the House, a distinction was made between the House of Commons and the 'local' legislatures of what were then British colonies.²⁶

Lovelock explains that:

"The Privy Council decided that these local legislatures could not be said to possess at common law the same inherent punitive powers – of fine or arrest and imprisonment for breach of privilege or contempt – as those of the Houses of the Westminster Parliament, but only those powers of self-protection as were 'reasonably necessary for the proper exercise of their functions and duties'."²⁷

²³ *Egan v Willis* (1998) 195 CLR 424 at p 475.

²⁴ Lovelock & Evans, above n. 3, p 490.

²⁵ See, for example, Gerard Carney, *Members of Parliament: Law and Ethics*, (Prospect Media, 2000), p 182.

²⁶ *Kielly v Carson* (1842) 12 ER 225.

²⁷ Lovelock & Evans, above n. 3, p 52, quoting (1842) 12 ER 225 at 236.

These findings were upheld in the case of *Fenton v Hampton* when²⁸:

“The Privy Council held ... that the Legislative Council of Van Diemen’s Land had no power to arrest and hold in custody a person judged to be guilty of contempt of the House for his refusal to appear as a witness before a select committee and then his failure to appear before the Bar of the House to explain why.”²⁹

During this time, the Parliament of New South Wales relied on its common law power to require the attendance of witnesses but in 1881 the passage of the *Parliamentary Evidence Act 1881* provided statutory power to the House and its committees to send for and examine persons.

Despite the passage of this Act, a number of Legislative Council committees encountered significant difficulties as outlined by Lovelock:

"Four particularly controversial inquiries between 1887 and 1890 – the inquiry into the Law respecting the practice of Medicine and Surgery, the inquiry into Torpedo Defenses of the Colony, the inquiry into On Ling and the inquiry into the Medical Bill – saw repeated instances where witnesses refused to attend hearings, refused to take an oath or affirmation, declined to answer questions and refused to table documents. In one instance where the Select Committee on the Medical Bill sought to press a witness to appear and resolved that if he did not appear a warrant would be issued for his apprehension, the police officer charged with serving the summons was unable to find the witness on two separate occasions."³⁰

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

The case for legislating

There are benefits to the Parliament of New South Wales clarifying its powers with regards to the compulsion of witnesses through legislation. As Campbell notes:

“There is much to be said in favour of enactment of comprehensive legislation which defines offences by and against parliamentary witnesses ... By enactment of legislation of this kind parliaments announce to the public at large what conduct they regard as inimical to the effective discharge of their functions.”³¹

In practical terms, it can also be useful to explain to witnesses clearly what powers are available to the

²⁸ *Fenton v Hampton* (1858) 11 Moo PC 347.

²⁹ Grove, ed, above n 1, p 297.

³⁰ Lovelock & Evans, above n. 3, p 495.

³¹ Enid Campbell, *Parliamentary Privilege* (The Federation Press, 2003), pp 204-205.

committees and what repercussions may occur should they not accept an invitation. More often than not, witnesses appear voluntarily and even those who are hesitant are usually persuaded to attend rather than requiring the serving of a summons. For example, during the Inquiry into the NSW taxi industry, a witness was repeatedly asked to appear before the committee at a public hearing and repeatedly declined until the committee wrote to the witness outlining that it would be forced to summons the witness, and noting the procedures set out in the Act where a witness fails to attend, the witness agreed to appear. This witness then failed to provide answers to several questions taken on notice and the committee again resolved to serve a summons unless the answers were forthcoming. At this stage, the witness provided written responses and the summons was not enforced.³² While not used frequently, this demonstrates the persuasive powers of the Act.

Another benefit of the codification of the Parliament's powers in respect to the summoning of witnesses is that it clearly defines who can be summoned to appear before a committee. As previously noted, section 4 of the Act states that: "Any person not being a Member of the Council or Assembly may be summoned to attend and give evidence before the Council or Assembly ... [or] a committee." The only limitation, other than members of Parliament, is that the witness must be within the jurisdiction of New South Wales. This was confirmed by advice received from the Crown Solicitor in 1990 which concluded that: "there can be little doubt that [a] committee may compel a witness, other than a member of Parliament, to attend before it".³³

This avoids any ambiguity which can sometimes arise when certain people claim immunity from appearing before committees. Harris notes that "Opinions differ over whether the immunity of Members and Senators from compulsion by the other House extends to former Members and Senators", noting that Odgers asserts that it does not citing occasions of a former Treasurer and a former Prime Minister, no longer Members, being summoned to appear before a Senate committee in 1994.³⁴ When the issue again arose in 2002 during the inquiry by the Senate Select Committee on a Certain Maritime Incident, the view of the Clerk of the House was that the immunity probably extended to former Members with the Clerk of the Senate advising that it did not.³⁵ The matter is clearly stated in the New South Wales Legislative Council Practice book:

"While current members and ministers cannot be compelled by a Council committee to appear before it, there is no immunity for former members or ministers from being summoned under the

³² Select Committee on the NSW Taxi Industry, *Inquiry into the NSW Taxi Industry*, Parliament of New South Wales (2010) p 250, 252, 258.

³³ The advice appears in a letter from the Speaker to the Chair of the Standing Committee on Road Safety in Appendix 8 of Committee on Parliamentary Privilege and Ethics, Parliament of New South Wales, *Inquiry into the Attendance of Witnesses Before Parliamentary Committees* (1996)

³⁴ Harris ed, above n. 20, p 681 and Evans ed, above n. 10, p 547.

³⁵ Harris ed, above n. 20, p 681.

Parliamentary Evidence Act 1901. Privilege only attaches to a member while they are a member of parliament and does not apply in perpetuity to former members and ministers. Any person resident in New South Wales other than a current member of either House may be summoned under the Act to give evidence."³⁶

Similarly, ministerial staff receive no immunity against being summoned as is occasionally disputed, although it is generally recognised that they should not be held accountable for the actions or policy decisions of ministers or their departments. As Evans notes:

"From time to time the claim has been made that it is not appropriate for the personal staff and advisers of ministers to appear before parliamentary committees, or it is not appropriate for them to be summoned, depending on which of two versions of the claim is made. ... The suggestion is frequently elevated into a supposed 'convention', which would mean that it must be one of those frequently-breached conventions."³⁷

Indeed, the Legislative Council General Purpose Standing Committee No. 4 invited a number of ministerial staff to give evidence during its Orange Grove Inquiry in 2004.³⁸ Certain witnesses agreed to appear voluntarily, but another Chief of Staff declined the Committee's invitation to appear on the basis that his Minister had not authorised him to appear. The Committee resolved to invite the Chief of Staff a second time but he again declined so the Committee summoned him under the Act. Following the summons, the Chief of Staff appeared before the Committee and a number of other ministerial staff and staff of the Leader of the Opposition, subsequently invited to appear before the Committee, all did so voluntarily.

While members are exempt from being summoned under the Act, it does specify that the attendance of a member of the Council or the Assembly to give evidence before a committee shall be procured in conformity (so far as practicable) with the mode of procedure observed in the House of Commons.³⁹ As such, there is provision in both Houses' standing orders for committees to request the attendance of a member as a witness at a hearing.⁴⁰ Where a committee wishes to hear from a member of the house which administers it, a request is sent in writing to that member by the chair.⁴¹ Should the member refuse to attend, the committee shall take no action other than to report the refusal to the House. Only the House can order the attendance of a member but in practice, the House will leave it to the discretion of the

³⁶ Lovelock & Evans, above n. 3, p 500.

³⁷ Harry Evans, 'The Parliamentary Power of Inquiry: any limitations?' (Spring 2002) 17(2) *The Australasian Parliamentary Review* pp 131-139, p 137.

³⁸ General Purpose Standing Committee No. 4 Parliament of New South Wales *The Designer Outlets Centre, Liverpool* (2004) pp 5, 109, 161-162, 166.

³⁹ *Parliamentary Evidence Act* s 5.

⁴⁰ New South Wales, *Standing Orders*, Legislative Assembly No. 325, Legislative Council No. 208.

⁴¹ New South Wales, *Standing Orders*, Legislative Assembly No. 326; Sir William McKay, ed. *Erskine May's Treatise on The Law, Privilege, Proceedings, and Usage of Parliament*, (Butterworths, 23rd ed, 2004), p 759.

member whether to attend a committee hearing. Should a committee wish to hear from a member of the other House, convention and standing orders provide that a message be sent to the other House requesting that House grant permission for the member to be examined.⁴² Grove notes that:

“A similar courtesy is afforded by other Parliaments, in that they can only request the attendance of a member of the New South Wales Parliament to attend as a witness before another Parliament and/or its committees.”⁴³

As these processes take place outside the Act, the majority of this paper will consider non-members who are summoned as witnesses.

Given the necessity of a house and its committees to have the power to compel the attendance of witnesses, the benefits highlighted of outlining committee powers with regards to summoning witnesses in statute and the situation which led to the creation of the original *Parliamentary Evidence Act 1881*, it would seem unnecessary to repeal or make significant changes to section 4 of the Act. While the power to summons is a significant one, this is recognised by members and it is clearly not exercised lightly. The requirement of a committee resolution ensures that there are checks in place to prevent its abuse. Members will consider all other alternatives first and any potential human rights issues or indeed political ramifications which may arise from their actions.

Possible problems with the punitive aspects

The other part of the Act which was brought into question is that which refers to the punishment of a witness who fails to attend following a summons. As was stated earlier, should a warrant be issued by a Judge of the Supreme Court, a reluctant witness can be taken into custody, to be produced from time to time in order to give evidence but there is no specified limit to the detention. The options considered in the following discussion are: to leave the Act as it is; to repeal the relevant sections; or to amend the Act.

Should the Act remain unamended, it appears to be at odds with a more modern legal framework which seeks to provide fair and reasonable procedures for people accused or convicted of offences. It could be argued that the procedures could be in conflict with Article 9 of the International Covenant on Civil and Political Rights to which Australia is a signatory. Article 9 states that: "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention".

One explanation for the apparent harshness of the punishment appears to be that the legislation has remained largely unamended since it passed into force in 1901 – a very different period in terms of the rights of the public. While examining punishments available to a House of Commons select committee, the

⁴² New South Wales, *Standing Orders*, Legislative Assembly No. 327 & 328; McKay, ed. above n. 41, p 760.

⁴³ Grove, ed, above n 1, p 296.

Clerk of that House highlights the fact that since the late 19th Century: “the world has changed. Modern administrative law has brought with it profoundly different expectations of due process and natural justice, and adherence to the European Convention on Human Rights has buttressed those changes”.⁴⁴

As previously mentioned, the Parliament of New Zealand has removed the general power of committees to summons witnesses due to concerns about infringements on human rights. While New South Wales does have this power, it is very rarely exercised but it is certainly the case that the detention of individuals for an unspecified amount of time, without charge, under section 9 of the Act has human rights implications and affected individuals might seek relief under a writ of *habeas corpus*.

Given these concerns, it is prudent that the Act allows for the involvement of the Presiding Officer before a warrant is sought from the Supreme Court. By including this step, there is an opportunity for further consideration of the situation, and the cessation of escalation as happened in the aforementioned Gentrader inquiry.

Potential amendments

Should the committee not request a warrant under the Act or fail to receive one, there would still be the option of charging the witness with contempt. Similarly this avenue would be available if sections 7, 8 and 9 were repealed.

According to May:

"Generally speaking, any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any Member or officer of such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results may be treated as a contempt even though there is no precedent of the offence."⁴⁵

And more specifically, regarding the powers of committees:

"Disobedience to the order of a committee made within its authority is a contempt of the House by which the committee was appointed. Individuals have been held in contempt who did not comply with orders for their attendance made by committees with the necessary powers to send for persons; as have those who have disobeyed or frustrated committee orders for the production of papers."⁴⁶

The Australian Senate also outlines in its Parliamentary Privilege resolutions that: “A person shall not, without reasonable excuse refuse or fail to attend before the Senate or a committee when ordered to do

⁴⁴ Robert Rogers Powers of Select Committees, SCP36, Session 2012-2013 paragraph 36, accessed at <<http://www.publications.parliament.uk/pa/cm201213/cmselect/cmliain/writev/scp/scp36.htm>>

⁴⁵ McKay, ed. above n. 41 p 128.

⁴⁶ Ibid p 131.

so”.⁴⁷

There are a few considerations surrounding charging a non-member with contempt of the Parliament of New South Wales.⁴⁸

The standing orders of both Houses in New South Wales give the procedure for raising matters of privilege. A member desiring to raise a matter of privilege or contempt must inform the relevant Presiding Officer of the details in writing. The Presiding Officer then determines whether there is a case of privilege and whether the matter should be given precedence. The member is informed of this decision and may then give notice of a motion to refer the matter to that House's privilege committee. Should the Presiding Officer not refer the matter to the relevant privileges committee, the member may raise the matter of contempt by way of a notice of motion which will not have precedence.⁴⁹

The privileges committee will then report its findings to the House, along with recommendations on any action to be taken. While these recommendations are non-binding, they are usually accepted, and should a case be made for someone to be charged with contempt, this would be done by giving a notice of motion outlining the offence.⁵⁰

While the common law principal of reasonable necessity gives the Parliament of New South Wales the power to deal with contempt for reasons of self protection and to function effectively, if a person is judged to be guilty of contempt of the Parliament, it cannot act against them for a punitive purpose. As was stated earlier, the Act arose from the judgements in *Kielly v Carson* and *Fenton v Hampton* which found that “Colonial Parliaments, unlike the Parliament at Westminster, are not considered to be a court of justice and therefore do not have the power to order the arrest of a stranger for actions made outside the House”.⁵¹ Without specific legislation, the Parliament of New South Wales does not have punitive powers such as those of the Parliament of Westminster, which are not seen as being 'reasonably necessary' for the functioning of the Parliament.

By contrast, the Houses of the Westminster Parliament have an unrestricted punitive power and so do the Parliaments of Queensland, South Australia and Victoria, which define their power and privileges by

⁴⁷ Australian Federal Parliament, Senate, *Parliamentary Privilege: Resolutions agreed to by the Senate* on 25 February 1988, 13(a), p 112.

⁴⁸ The matter of charging members of the Parliament of New South Wales with contempt and the powers to discipline them is well covered in NSW in: Grove, ed, above n 1, pp 301-305; Lovelock & Evans, above n. 3, pp 84-94; and more generally in Campbell, above n. 31 pp 208-221.

⁴⁹ New South Wales, *Standing Orders*, Legislative Assembly No. 92, Legislative Council No. 77.

⁵⁰ See, for example, Parliament of New South Wales, *Legislative Assembly Votes and Proceedings* 31/1/1894, pp 45-46.

⁵¹ Grove, ed, above n 1 p 314.

reference to the House of Commons.⁵² Other Houses have adopted the powers of the House of Commons but also enacted specific legislation defining their powers regarding punishment for contempt.⁵³ The Houses of the Commonwealth Parliament, for example, have power to impose a fine or imprisonment on any person found guilty of contempt of parliament under section 7 of the *Parliamentary Privileges Act 1987* (Cth).

In New South Wales, there have been six attempts to codify the privileges, powers and immunities of the Parliament through legislation since 1856. A number of these bills provided specific powers to punish contempt or breaches of privilege with imprisonment. The last of these bills was introduced in 1912 and sought to confer on the Houses of Parliament the same powers as the House of Commons, including the power to punish for contempt and breach of privilege but it did not proceed beyond the second reading before being interrupted by prorogation. More recently, the report of the Joint Select Committee on Parliamentary Privilege, tabled on 26 September 1985, included a recommendation that the *Constitution Act 1902* be amended to place beyond doubt that the powers, privileges and immunities of the Houses of the New South Wales Parliament are those of the House of Commons as at the establishment of responsible government in 1856. This recommendation was not adopted.⁵⁴

Should a recalcitrant witness, therefore, be found guilty of contempt by the Parliament of New South Wales, the forms of punishment are limited. As pointed out by the Clerk of the House of Commons, however, “the finding by the House of Commons, after due inquiry by the Committee on Standards and Privileges, that an individual is in contempt, and making specific criticisms of the individual’s conduct, must be hugely damaging to that individual”.⁵⁵ There is nothing to suggest that this would not also be the case in Australia, and the weight of adverse public opinion or media coverage, with related outcomes, should not be underestimated, both as a form of punishment or as a coercive method. Consideration to amending the Act to remove sections 7 and 8 regarding the detention of witnesses who failed to appear following a summons was given in the aforementioned 1985 report of the Joint Select Committee on Parliamentary Privilege. The report recommended that:

“... the Parliamentary Evidence Act 1901 be amended to provide that –

(1) witnesses who are summonsed to give evidence before a parliamentary committee and who fail to do so without adequate excuse shall be reported forthwith, by the Chairman of the committee to the appropriate Presiding Officer who shall then refer the matter to the appropriate Privileges

⁵² *Parliament of Queensland Act 1901* s 39; *Constitution Act 1934* (SA) s 38; *Constitution Act 1975* (Vic) s 19.

⁵³ See, for example, *Parliamentary Privileges Act 1891* (WA)

⁵⁴ In addition, on 19 March 1991, the Attorney-General tabled a discussion paper entitled ‘Parliamentary Privilege in New South Wales’ and in December 2010 an exposure draft of a Parliamentary Privileges Bill was also tabled in the NSW Legislative Assembly, but no progress was made with the bill.

⁵⁵ Rogers, above n. 44 paragraph 18.

Committee”⁵⁶

Another option, if contempt procedures are deemed to be insufficient and a committee still wishes to pursue a reluctant witness, could be to amend the Act to include a different form of punishment. Given the aforementioned problems of severity in the potential indefinite committal of a witness, it may be worth considering a less stringent punitive power. The Commonwealth *Parliamentary Privilege Act 1987* provides that a House may impose a penalty of imprisonment for a period not exceeding six months or a fine not exceeding \$5,000 in the case of a natural person, and not exceeding \$25,000 in the case of a corporation for an offence against that House.⁵⁷

Odgers notes that in the case of apprehending a recalcitrant witness as is the case under section 9 of the Act, “the purpose is not punishment but to compel the answering of the questions or the production of the documents which the witness has refused to answer or produce”.⁵⁸ It can be argued that detention also has a punitive aspect but since imprisonment in the Federal Parliament is limited to six months and given that it is unlikely for a witness to be required for longer than six months such an amendment may be appropriate.

Alternatively, the *Parliamentary Privileges Act 1987* (Cth) also provides for fines. As Harris states:

“For many years there had been substantial doubt as to whether the Houses had the power to impose fines, the issue turning, because of the provisions of section 49 of the Constitution, on whether the House of Commons had such power in 1901. This was because the House of Commons had not imposed fines on persons found guilty of breach of privilege or contempt since 1666.”⁵⁹

Similarly, both the New Zealand House of Representatives and the Legislative Council of Western Australia have imposed fines, with the Western Australian case involving a witness failing to issue documents when summoned.⁶⁰ As a coercive measure, therefore, there may be benefit in legislating for a monetary penalty.

It should also be noted that following some high profile cases in the House of Commons, there has been debate recently over the powers of the House of Commons in the modern day to deal sufficiently with contempt. The Clerk of the House notes that the traditional methods of punishing someone found guilty of contempt by the House – Calling to the Bar of the House, fining and imprisonment are all questionable in modern times.⁶¹ Calling a miscreant to the Bar of the House to be admonished has largely fallen out of use

⁵⁶ Joint Select Committee Upon Parliamentary Privilege, Parliament of New South Wales, *Parliamentary Privilege in New South Wales* (1985) p 122.

⁵⁷ *Parliamentary Privilege Act 1987* s 7(1), (5).

⁵⁸ Evans, ed. above n. 10, p 70.

⁵⁹ Harris ed, above n. 20, p 763.

⁶⁰ Wilson, David ‘The Power of the New Zealand legislature to fine for breach of privilege’ (Autumn 2011) 26(1) *The Australasian Parliamentary Review*, pp 53-63; Parliament of Western Australia, *Parliamentary Debates*, Legislative Council 24 June 1999 p 9516/1.

⁶¹ Rogers, above n. 44, paragraphs 20-27.

being seen as inappropriate in modern times. The issues of fining and imprisonment are also uncertain for the reasons discussed in this paper. For this reason, there have been calls to clarify the powers of select committees in particular.⁶²

Conclusion

As has been discussed, this is the case in New South Wales with the *Parliamentary Evidence Act 1901*. Although the Act has remained largely unchanged since its original passing, the issues explored in this paper may remain untested. Roberts notes that: "On almost every occasion [that questions surrounding committee powers have arisen] either the committee has got what it wants (possibly after some straight talking) or it has decided not to pursue the matter".⁶³ And the same can probably be said for the majority of committees in Australia and New Zealand.

There are practical reasons for this as Dupont states: "The process of pursuing and prosecuting a witness over their lack of cooperation has the potential to absorb a lot of time and resources and still not produce a result that members seek".⁶⁴ Although "the courts [are] reluctant to intervene in the affairs of the Parliament",⁶⁵ the involvement of the Supreme Court in issuing the warrant may lead the Court to read down these powers and cause problems for the Parliament. Similarly, a committee would be wise not to test the Act too strongly in the face of the potential rights infringed. It is likely, therefore, that uncooperative witnesses will go unpunished.

Nevertheless, the power to summon witnesses is a key one for Parliaments and as highlighted by Grove: "Given that Houses possess the power to conduct inquiries they must also be equipped to deal with witnesses who fail to appear before such inquiry".⁶⁶ Given the primacy of Parliaments these powers can be seen to have ongoing relevance but it may be beneficial to amend the Act to show that refusing a summons is a contempt of Parliament, similar to not answering a question, or by changing the penalty to a fine. This would still hold a coercive element and could be seen as a more reasonable punishment.

Whether the Parliament of New South Wales should enact legislation conferring on it the powers and immunities of the House of Commons or legislate specifically to punish for contempt would require further investigation but it should be noted that the bills introduced in the 19th Century attracted severe criticism from the media and public opinion who argued against the Parliament attempting to expand its punitive

⁶² Richard Gordon QC and Amy Street, *Select Committees and Coercive Powers – Clarity or Confusion?* (The Constitution Society 2012).

⁶³ Rogers, above n. 44, paragraph 10.

⁶⁴ Patrick Dupont, 'The uncooperative witness: the punitive powers of parliamentary committees' (Spring 2011) 26(2) *The Australasian Parliamentary Review* pp 114-123, p 123.

⁶⁵ Harris ed, above n. 20, p 669.

⁶⁶ Grove, ed, above n 1 p 297.

powers and that may well be the case again. Conversely, it is interesting to see that in the UK, Roberts raises concerns that:

"If no action is taken, and the Committee on Standards and Privileges finds that the witnesses named by the Culture, Media and Sport Committee are guilty of contempt – or if in due course a similar finding is made in respect of other witnesses before another committee, it is possible that the House and the wider public will be frustrated at the House's lack of capacity to impose a proportionate penalty."⁶⁷

All Parliaments exercise penal jurisdiction as sparingly as possible and only in very severe matters. There are also political factors to consider before a witness would potentially be charged under the Act or with a case of contempt. Nevertheless, an increasing involvement in large companies in inquiries which can be unwilling to divulge information, even in camera, suggests that the Parliament of New South Wales should retain coercive powers.

⁶⁷ Rogers, above n. 44, paragraph 82.

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