

## Chapter 27 Witnesses

### 27.1 Summoning and calling witnesses

The *Parliamentary Evidence Act 1901*<sup>1</sup> makes provision for the summoning of witnesses, other than a member of Parliament, before the House or a committee. Any summons for a witness to appear before the House is signed by the Clerk,<sup>2</sup> and any summons to appear before a committee is signed by the chair or deputy chair in the chair's absence.<sup>3</sup> However, as noted in section 26.8.2.2 of Part One the vast majority of witnesses appear before parliamentary committees without the need for compulsion and the Legislative Assembly has adopted a practice of summoning only those committee witnesses who would otherwise refuse to attend.

If a person fails to attend without reasonable excuse in response to a summons, the Speaker may send a certificate to a judge of the Supreme Court certifying such.<sup>4</sup> The judge must then issue a warrant for the person's arrest in order for the person to be brought before the House or committee.

There have been a number of occasions where persons have been summoned to give evidence at the Bar of the House.<sup>5</sup>

- 20 October 1864 – Witnesses (Mr Lenehan, Dr Hamilton and Mr Hanson) summoned in relation to a charge against the Secretary for Public Works.<sup>6</sup> The following day, the witnesses were directed to the Bar of the House by the Serjeant-at-Arms where they were examined.<sup>7</sup>
- 14 December 1888 – During debate on a motion regarding the tramways in Sydney, Mr Haynes, Member for Mudgee, rose on a matter of privilege advising the House that he had been offered a bribe to support a proposal to lease the tramways. The House agreed to a resolution that Mr Haynes disclose the name of the person who offered the bribe (Mr Huntley) and the House proceeded to pass a resolution to summon Mr Huntley to give evidence at the Bar. Mr Huntley was sworn under oath but withdrew for a short period as there was an objection by a member as to the course of proceedings. The Speaker stated his opinion as to the proper course to be pursued and Mr Huntley was recalled. The Speaker asked Mr Haynes to repeat his allegation and debate arose requiring the witness to withdraw whilst the Speaker named a member for “interfering with the orderly conduct of the business of the House”. Mr Huntley denied the allegation noting that Mr Haynes was almost “a stranger to him”.<sup>8</sup>

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<sup>1</sup> Advice received from the Crown Solicitor indicates that a committee appointed by a resolution of the House has no greater power to compel the attendance of witnesses before it than is conferred upon it by the *Parliamentary Evidence Act 1901*. The standing orders cannot be regarded as a valid source of any additional power in that regard.

<sup>2</sup> Section 4(1) of the *Parliamentary Evidence Act 1901* and standing order 324 of the Legislative Assembly.

<sup>3</sup> *Parliamentary Evidence Act 1901*, s. 4(2) and standing order 289 of the Legislative Assembly.

<sup>4</sup> See section 7 of the *Parliamentary Evidence Act 1901*.

<sup>5</sup> Prior to the enactment of the *Parliamentary Evidence Act 1901* witnesses were summoned pursuant to the *Parliamentary Evidence Act 1881*, which provided for witnesses to be summoned to appear before the House. The need for a new Act arose when committees appointed by the House had difficulties compelling witnesses to attend under the provisions of the 1881 Act. The 1901 Act was passed to specify that committees appointed by the House also have the power to summon witnesses.

<sup>6</sup> VP 20/10/1864, p. 21.

<sup>7</sup> VP 21/10/1864, pp. 28 and 29.

<sup>8</sup> See VP 14/12/1888, pp. 130-1.

- 4 September 1890 – Mr A. G. Taylor<sup>9</sup>, editor of the newspaper *Truth*, was summoned by the House to give evidence in relation to an article in the newspaper which stated that “bribes have been offered to and asked for by members of Parliament.” Mr Taylor argued that the summons was an impersonal one as it had summoned the editor of *Truth* and not a specific person as required by the Act.<sup>10</sup>
- 30 January 1894 – A member rose on a matter of privilege noting that there had been an article published in the *Evening News* that referred to the refreshment rooms and gambling tables within Parliament House and stated that one member had lost a months salary “during one night’s carouse over the gambling table at the Parliamentary Refreshment room”. A resolution was agreed to by the House to summon Mr Hogue, editor of the *Evening News* to answer as to the truthfulness or otherwise of the article.<sup>11</sup> The following day, Mr Hogue was sworn at the Bar of the House and refused to answer certain questions put to him, whereupon, the House agreed to a resolution deeming Mr Hogue guilty of a contempt of Parliament. A motion was moved to commit Mr Hogue to gaol for one calendar month. However, this was not agreed to by the House. A further attempt to place Mr Hogue in the custody of the Serjeant-at-Arms was also defeated and Mr Hogue was discharged from further attendance.<sup>12</sup>

In the 19th century witnesses from government departments often gave evidence at the Bar of the House in the Committee of Supply (i.e. when the budget for the State was considered). In these incidences the witnesses were not summoned to appear, rather they appeared on a voluntary basis in order to give evidence as to why the departments they represented should receive certain funds.<sup>13</sup>

#### **27.1.1 Examining a member of Parliament before the House or a committee**

Parliamentary practice and convention dictates that a House may direct a member to appear before it but that a committee conducting an inquiry can only request the appearance of a member of Parliament to appear before it. This means that should a member refuse to give evidence to an inquiry no action can be taken against the member. Standing orders 325 and 326 govern this convention in the Legislative Assembly by providing:

*325. The House may direct the attendance of one of its Members for examination and the Speaker shall issue such order.*

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

As previously noted, should a House desire to examine a member of the other House, Parliamentary convention dictates that a request be sent to that House by message requesting the House to grant permission for the member to be examined. Standing orders 327 and 328 provide:

<sup>9</sup> Mr Taylor was the member for Mudgee from December 1882 to his resignation in April 1887. He also served as member for West Sydney from October 1890 until June 1891.

<sup>10</sup> See PD 04/09/1890, pp. 3514-20.

<sup>11</sup> VP 30/01/1894, p. 33.

<sup>12</sup> VP 31/01/1894, pp.45-8.

<sup>13</sup> For examples, see VP 08/03/1859, p. 191; VP 23/03/1870, p. 155; VP 31/03/1870, p. 183; and VP 11/03/1874, pp. 336-7.

327. If the House or a committee, upon request wishes to examine a Member or officer of the Council, a message shall be sent requesting the Council to grant leave.

328. If the Council or one of its committees wishes to examine a Member or officer of the Assembly, the House may authorise the Member to attend if the Member agrees. The House may order an officer to attend.

It has also been the practice for one House to inform the other when it has granted leave for one of its members to appear before a joint committee.<sup>14</sup>

The request for the attendance of a member is based on established principles and practice of Westminster Parliaments, as *May* states “neither House can punish any breach of privilege or contempt offered to it by a Member or officer of the other.”<sup>15</sup> However, while Parliamentary practice requires that one House make a request to the other House for one of its officers to attend, this is not required by the terms of the *Parliamentary Evidence Act 1901*.

On one occasion, a message was received from the Legislative Council advising that leave had been given for the Legislative Council members of a joint select committee to appear before and give evidence to the Legislative Council Committee upon Parliamentary Privilege in relation to the disclosure of *in camera* evidence taken by the committee and requesting that the Assembly pass a similar resolution.<sup>16</sup> However, whilst the message was made an order of the day it was never considered by the House.

The convention that a request must be made in relation to calling a member of another House as a witness is equally applicable to any request for members of the New South Wales Parliament to attend before a parliamentary committee of another Parliament. For instance, the Senate on one occasion communicated with the Legislative Assembly requesting the attendance of the Premier to provide evidence before a Senate select committee. Following advice from the Crown Solicitor, the Speaker advised the House that it should take no further action in relation to the request if it so desired.<sup>17</sup>

For further information on the calling of members of Parliament before a House or a committee see section 2.3 of Part Two.

## 27.2 Swearing of witnesses

Section 10(2) of the *Parliamentary Evidence Act 1901* requires that “Every witness attending to give evidence before a committee...shall be sworn by the chair of such committee.” Section 12 of the Act provides that “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.” Given section 12 it appears that the provisions of the *Parliamentary Evidence Act 1901* in relation to the swearing in of witnesses do

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<sup>14</sup> See for example, VP 03/03/1993, p. 64 where a message was received from the Legislative Council advising that leave had been given for the Legislative Council members of the Joint Select Committee upon Police Administration to appear before and give evidence to the Legislative Council Standing Committee on Parliamentary Privilege in relation to its inquiry into the disclosure of *in camera* evidence taken by the committee.

<sup>15</sup> *May*, p. 172.

<sup>16</sup> See VP 03/03/1993, p. 64 and VP 04/03/1993, p. 70.

<sup>17</sup> VP 19/11/1993, pp. 607-8.

not necessarily apply strictly although by practice almost all evidence taken by a committee is sworn either under oath or an affirmation. For further information see section 2.3 of Part Two.

On this point it is interesting to note that committees of the House of Representatives and House of Commons (UK) rarely swear in witnesses even though they have discretion to administer an oath to witnesses appearing before them.<sup>18</sup>

The requirement to be sworn may be fulfilled by swearing an oath or giving an affirmation.<sup>19</sup> The format for oaths and affirmations are set out in the *Oaths Act 1900*. Some committees have adopted the practice whereby witnesses who have previously given evidence before a committee are deemed to be still on oath and are not required to be sworn again. The principle behind this practice is that the oath or affirmation taken by a witness is in relation to the giving of evidence before the committee but does not specify that it applies for the meeting at which the oath is taken.

### **27.3 Liability of witnesses**

As noted, witnesses are protected from any defamation liability by section 12 of the *Parliamentary Evidence Act 1901*. In addition, section 27(2)(a) of the *Defamation Act 2005* provides a defence of absolute privilege for the publication of defamatory matter published in the course of the proceedings of a parliamentary body, including the giving of evidence before a parliamentary committee.

A witness refusing to give an answer to a lawful question from a committee, except as provided by s. 127 (religious confessions) of the *Evidence Act 1995*, may be deemed to be in contempt of Parliament and may be immediately detained in the custody of the Serjeant-at-Arms and, if the House orders, imprisoned for up to one month.<sup>20</sup> In addition, a witness who knowingly makes a false statement is liable for a period of penal servitude up to five years.<sup>21</sup>

It is not clear whether a witness can be subject to any other criminal liability. Article 9 of the *Bill of Rights 1688* provides that the proceedings of Parliament may not be questioned or impeached in a court or place outside Parliament. Whilst this article has been interpreted elsewhere and statutorily determined by the Commonwealth as preventing witnesses' evidence being used in court for other than determining whether something was said (e.g. the court cannot question the truth of what was said), New South Wales courts have previously admitted committee proceedings as evidence for other purposes, such as:

- to assist the defence in a criminal trial impeach the credit of a prosecution witness;<sup>22</sup>
- to compare evidence given to a committee with that given by the defendant in criminal proceedings;<sup>23</sup> and

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<sup>18</sup> See *House of Representatives Practice*, 5th edition, pp. 668-9 and *May*, p. 763 where it is noted that witnesses are usually only examined under oath when inquiries are of a judicial or other special character.

<sup>19</sup> Section 10(3) of the *Parliamentary Evidence Act 1901*.

<sup>20</sup> Section 11 of the *Parliamentary Evidence Act 1901*.

<sup>21</sup> Section 13 of the *Parliamentary Evidence Act 1901*.

<sup>22</sup> *R v Saffron*, unreported, District Court of NSW, 21/8/1987.

<sup>23</sup> *R v Murphy* (1986) 5 NSWLR 18.

- to compare evidence given to a committee with that given by a prosecution witness in criminal proceedings.<sup>24</sup>

In *R v Murphy*, the distinction was made that a parliamentary proceeding could not give rise to a cause of action itself but it could be used as evidence in proceedings on a matter occurring outside the Parliament and its committees. See section 3.4 of Part Two for a more detailed discussion on the use of evidence taken by committees in court proceedings.

#### **27.4 What is a lawful question?**

As noted, under the *Parliamentary Evidence Act 1901*, a committee may only compel a witness to answer a “lawful question”. If a witness refuses to answer any “lawful question” the witness shall be deemed guilty of a contempt of Parliament and may be committed by warrant under the hand of the presiding officer of the House in which the proposal for the appointment of the committee originated.

“Lawful question” under the Act has not been the subject of judicial interpretation in New South Wales but would appear to mean a question “which calls for an answer according to law, one that the witness is compellable to answering according to the established usage of the law”.<sup>25</sup>

Types of questions which, it has been suggested, would fall outside what is “lawful” include questions that require answers which:

- are not relevant to the committee’s terms of reference, construed broadly;
- would tend to incriminate the witness;
- require giving a non-expert opinion or inference;<sup>26</sup>
- would be against the public interest (public interest immunity);<sup>27</sup>
- are prohibited by law, such as secrecy laws (does not include moral obligations to secrecy, such as that arising from professional oaths or ethical rules);
- would breach parliamentary privilege;
- would breach legal professional privilege; or

<sup>24</sup> *R v Foord*, unreported, Supreme Court of New South Wales, 1985.

<sup>25</sup> *Crafter v Kelly* (1941) SASR 237.

<sup>26</sup> Opinions can be given by experts as it is well established that such a witness may express an opinion in respect of matters which fall within his or her expertise. Advice has also been received that a witness appearing before a committee can be compelled to answer a lawful question which requires that witness to express an opinion and that a question, to be lawful, must be one which is relevant to the inquiry being conducted.

<sup>27</sup> Possible categories of immunity include the identity of informants or the revelation of information that could prejudice ongoing police investigations. In relation to State papers, the decision in *Sankey v Whitlam*, (1979-80) 142 CLR 1 at 41, established that the fundamental principle is that documents may be withheld from disclosure only if and to the extent, that the public interest renders it necessary and that the subject matter of the papers in question and all circumstances related to them must be considered in deciding whether the papers in question are entitled to be withheld from production. It should also be noted that commentators have argued that questions of public interest immunity are ultimately for the House or one of its committees to decide and that an official may not claim an excuse of ministerial direction to not answer a question as there is no excuse of superior orders in Australian law, and that a continued direction by a Minister not to answer questions could be an offence. See comments by Geoffrey Lindell, “Parliamentary Inquiries and Government Witnesses” in *Melbourne University Law Review*, 1995, volume 20, no. 2, pp. 383-422.

- would reveal information for the detection of crime, certain matters relating to the judicial process (e.g. jury deliberations) or communication with a spouse.

In addition, public servants are often called to provide information about government decisions but cannot comment on the merits or otherwise of a particular policy.

The law on this area is uncertain and changing. Different legal opinions have been expressed regarding whether all the above categories are not lawful questions.<sup>28</sup>

Any objection to a question must be considered on its own merits. There is no fixed category of information which is subject to public interest immunity but every case needs to be assessed against the public interest. There is no general privilege to protect candour in the public service and while Cabinet proceedings are often subject to immunity, this is not necessarily the case.

It is for the committee to decide, in the first instance, whether a question is lawful and must be answered, but such a decision would be reviewable by a court if the witness should be detained for refusing to answer.

It should also be noted that in New South Wales there is no statutory application of the rules of evidence to inquiries by Parliament or its committees. It has been argued this means that evidence which would not be admissible in a court of law may be received and acted upon and that parliamentary witnesses may be obliged to answer questions in circumstances in which they would not be so obliged in a court of law.<sup>29</sup>

### **27.5 Power to compel the production of documents**

The *Parliamentary Evidence Act 1901* does not provide a mechanism for either a House or one of its committees to compel the production of documents or other material, as distinct from oral testimony. However, it has been held in both *Egan v Willis*<sup>30</sup> and *Egan v Chadwick*<sup>31</sup> that Houses of Parliament have an inherent power to compel the production of documents from the Executive.

In relation to parliamentary committees, this power is conferred generally under the standing orders of the House, with standing order 288 of the Legislative Assembly providing:

*A committee shall have power to send for persons, papers, records, exhibits and things.*

A number of statutory committees have been empowered to call for documents under the establishing legislation, although this is not always the case. For further

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<sup>28</sup> Cf, "Re: *Parliamentary Evidence Act*", Advice of Mary Gaudron QC, Solicitor General, 8 September 1983; "Re: Power of Standing Committee on State Development to require Production of Documents and things", CS89/2640, Advice of I V Knight, Assistant Crown Solicitor, 16 March 1990; "Powers and procedures of Joint Select Committees", SG 92/145, Advice of Keith Mason QC, Solicitor General, 20 October 1992; "Re: Section 11(1), *Parliamentary Evidence Act 1901*" 92/2271, Advice of G. W. Booth, Acting Crown Solicitor, 20 October 1992.

<sup>29</sup> Advice received from the Crown Solicitor, 16 March 1990.  
<sup>30</sup> (1998) 158 ALR 527.

<sup>31</sup> (1999) NSWCA 176.

information on the power to compel the production of documents see section 2.4 of Part Two.