Out of step? The New South Wales Parliamentary Evidence Act 1901

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The subject of this article is parliamentary privilege, focusing on two aspects of the inquiry power of the New South Wales Legislative Council: first, the applicability of the privilege against self-incrimination in committee inquiries, and secondly, committees' power to deprive a person of his or her liberty under the Parliamentary Evidence Act 1901 (NSW). These issues were raised in the context of the Council's 2015 Select Committee inquiry into "Operation Prospect". This article examines the appropriateness of these powers and explores potential reforms to ensure they are exercised in a manner consistent with contemporary views of the role of Parliament.

INTRODUCTION

A recent and highly controversial inquiry in the New South Wales Legislative Council, "Operation Prospect",[1] highlighted two important aspects of the inquiry power of Legislative Council committees. The first concerns the common law privilege against self-incrimination. While legal advice to the Select Committee suggested that witnesses could be compelled to answer incriminating questions, this article explores whether this is appropriate, given the profound consequences for witnesses on the one hand, and the essential nature of the Parliament's inquiry power, on the other. The second issue relates to committees' penal jurisdiction.[2] In New South Wales, a committee may imprison a recalcitrant or wilfully misleading witness. This article examines whether a modern legislature should be able to deprive a person of his or her liberty, and under what circumstances.

Parliamentary committees undoubtedly require strong coercive powers to ensure they are able to fulfil their oversight role, but as this article argues, reform is required to ensure committees in New South Wales exercise these powers in a manner consistent with contemporary views of the role of Parliament. Such reform may be achieved as part of a larger project to codify the Parliament's privileges and by introducing Senate-style procedural resolutions for the protection of witnesses.

This article is structured in three parts: Part 1 relates to the privilege against self-incrimination; Part 2 discusses committees' penal jurisdiction; and Part 3 examines options to address these issues. By way of background, the article begins by providing a brief summary of the Select Committee inquiry that focused attention on these significant procedural and legal issues in New South Wales.

BACKGROUND

Operation Prospect

In 2012, the New South Wales Ombudsman commenced Operation Prospect, an inquiry into the alleged illegal surveillance of more than 100 New South Wales police officers during several police corruption investigations initiated more than 15 years ago. A few months before the establishment of the Ombudsman's inquiry, questions about an earlier police probe into the alleged illegal bugging

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[1] Legislative Council Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect", Parliament of New South Wales, *The Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect"* (2015).

[2] Lindell and Carney use the term "penal jurisdiction" to refer to the power of a House to impose a fine or imprisonment on any person found guilty of contempt of Parliament. The penal jurisdiction of the New South Wales Parliament, encapsulated in the *Parliamentary Evidence Act 1901*, does not include the power to fine. Thus our discussion of the penal jurisdiction is mainly focused on the power to detain or imprison a non-member. See 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.

were raised at a Legislative Council Budget Estimates hearing. However, the relevant police witness refused to answer these questions on the grounds of statutory secrecy. While the Chair emphasised the power of the Committee to pursue such questions, the Committee desisted, initially to give the witness an opportunity to seek legal advice, and subsequently because the Minister announced that the Ombudsman was going to investigate the allegations. The Government assured the Chair that the Ombudsman would complete his investigation within six months.[3]

Establishment of the Select Committee into Operation Prospect

Almost two years later, in November 2014, a Select Committee was established by the Legislative Council to look at the progress and conduct of the still incomplete Ombudsman's investigation. The Select Committee's report was tabled in February 2015,[4] but the Ombudsman's inquiry is expected to take several more months to complete. The Select Committee inquiry was remarkable for the amount of information provided by witnesses (including senior public servants) which, in any other context, would be prohibited by statutory secrecy provisions, as discussed in a recent paper by Steven Reynolds, Samuel Griffith and Tina Higgins.[5]

Anticipated legal and procedural issues

Given the subject matter and sensitivity of the Operation Prospect inquiry, it was anticipated that, in addition to the power of committees to seek information covered by statutory secrecy provisions, other issues concerning the inquiry power might emerge. With this in mind, at the outset of the inquiry, the Select Committee sought advice from Bret Walker SC about a number of legal issues, including the circumstances in which a witness could exercise a right to silence on the grounds of self-incrimination.[6] The advice was received on 14 January 2015 and published in the Select Committee's report.[7]

In addition, the Clerk of the Parliaments briefed the Committee on, among other things, the penal provisions of the *Parliamentary Evidence Act 1901* (NSW). The Act is one of a handful of statutes which bear on parliamentary privilege in New South Wales (the State is unusual among Australian jurisdictions in its limited codification of its privileges, with both Houses largely relying on the common law concept of necessity).[8] The Act enables the Houses and their committees to compel witnesses to attend and give evidence and authorises the imposition of significant penalties, including imprisonment, for certain offences, such as refusing to answer a lawful question.

This is not the first time a committee of the New South Wales Parliament has reflected on such questions. More than 30 years ago, the Legislative Assembly Select Committee upon Prostitution and the Joint Select Committee upon Parliamentary Privilege also grappled with the power to require answers to incriminating questions and to imprison witnesses.[9]

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[3] Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect", n 1, x.

[4] A second, related inquiry – the Inquiry into the Progress of the Ombudsman's Inquiry "Operation Prospect" – was established in June 2015 but is not relevant to the current article.

[5] Steven Reynolds, Samuel Griffith and Tina Higgins, "Asserting the Inquiry Power: Parliamentary Privilege Trumps Statutory Secrecy in New South Wales" (Paper presented at the 46th Presiding Officers and Clerks Conference, Hobart, July 2015).

[6] Letter from David Blunt (Clerk of the Parliaments) to Bret Walker SC, 4 December 2014.

[7] Bret Walker, "Mr Bret Walker SC January 2015 Opinion", Appendix 5 in Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect", n 1, 127-133.

[8] See Stephen Frappell, "A Case for a Parliamentary Privileges Act for New South Wales" (2015) 30 *Australasian Parliamentary Review* 8, 11-12.

[9] Select Committee of the Legislative Assembly upon Prostitution, Parliament of New South Wales, *Prostitution* (1986); Joint Select Committee of the Legislative Council and Legislative Assembly upon Parliamentary Privilege, Parliament of New South Wales, *Parliamentary Privilege in New South Wales* (1985). The Attorney General's department subsequently published a discussion paper canvassing the Joint Committee's recommendations: New South Wales Attorney General's Department, *Parliamentary Privilege in New South Wales: Discussion Paper* (1991).

While issues pertaining to the privilege against self-incrimination and the penal jurisdiction conferred by the *Parliamentary Evidence Act* ultimately did not eventuate in the Operation Prospect inquiry, given the lack of precedents in either House (the punitive provisions have been threatened but not invoked), and the ambiguous nature of the Act, they would have posed significant challenges if they had arisen. Thus one of the primary reasons for preparing this article is to generate discussion about the Council's response in the likely event of a "next time".

PART 1: THE PRIVILEGE AGAINST SELF-INCRIMINATION

One area of procedural uncertainty identified in the context of the Operation Prospect inquiry concerns the applicability of the common law privilege against self-incrimination in parliamentary inquiries, a matter Bret Walker SC identified as being of "real systemic significance to the Legislative Council and its procedures".[10] As discussed above, not long after its establishment, the Select Committee sought Mr Walker's advice on a number of procedural issues that were anticipated to arise during the course of the inquiry, including how to deal with a refusal by a witness to answer a question on the grounds of self-incrimination.

The issue arises in the context of s 11(1) of the *Parliamentary Evidence Act*, which provides:

> 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.

In advice provided to the Select Committee in January 2015, Mr Walker expressed the view that "parliamentary proceedings are by their special nature an exception to the general common law rule that renders the privilege against self-incrimination a substantive immunity protecting a person against all kinds of compulsory questioning", and that therefore "there is no privilege against self-incrimination before the Select Committee by force of law".[11] On the other hand, Mr Walker noted the absence of any directly applicable authority on the matter. He also expressed some reservation about the extent of the protection offered by Art 9 of the *Bill of Rights 1689* in this context,[12] an issue that will be returned to below. He emphasised that any claim of the privilege should therefore "be regarded with utmost care", and urged the Committee to exercise "a judicious delicacy".[13]

This part of the article proceeds by briefly outlining the content of, and rationale for, the privilege against self-incrimination. It then examines the applicability of the privilege in parliamentary inquiries, including by reference to some rare instances where committees, both in the New South Wales Legislative Council and United Kingdom House of Commons, have directly grappled with the issue. Next, the article explores whether parliamentary committees *should* be able to compel incriminating evidence.

Origin and rationale for the privilege against self-incrimination

Before exploring arguments about the applicability of the privilege in parliamentary inquiries, it is worth dwelling briefly on the privilege itself. Where does it come from? What is its purpose?

As adverted to by Mr Walker, the privilege against self-incrimination is not merely a rule of evidence but a fundamental and substantive common law right.[14] The privilege is one aspect of the

[10] Walker, n 7, 130.

[11] Walker, n 7, 130-131.

[12] Walker, n 7, 132.

[13] Walker, n 7, 131-132.

[14] Walker, n 7, 130; Australian Law Reform Commission, *Traditional Rights and Freedom – Encroachment by Commonwealth Laws*, Issues Paper No 46 (2014) 73.

more general concept of the right to silence,[15] and is encapsulated in the Latin maxim *nemo tenetur se ipsum accusare*: no person is bound to accuse him or herself.[16] The privilege most commonly encompasses an immunity from being compelled to give self-incriminating evidence in criminal matters, and an immunity from self-exposure to civil or administrative penalties.

As to the origin of the common law privilege, the traditional view is that the privilege developed as a response to the English Star Chamber, which required suspects on trial for treason to answer questions without protection from self-incrimination.[17] Others have argued that the privilege developed "as part of the rise of the adversarial criminal justice system where the prosecution is charged with proving the guilt of a defendant beyond reasonable doubt and subject to protections surrounding the manner of criminal discovery".[18]

While numerous rationales for the privilege can be identified,[19] one key rationale was explained by Mason CJ and Toohey J in *Environment Protection Authority v Caltex Refining Co Pty Ltd*:

> In one important sense, the modern rationale for the privilege against self-incrimination is substantially the same as the historical justification – protection of the individual from being confronted by the "cruel trilemma" of punishment for refusal to testify, punishment for truthful testimony or perjury (and the consequential possibility of punishment). Naturally, methods of punishment are now different: modern-day sanctions involve fines and/or imprisonment, rather than excommunication or physical punishment. Further, the philosophy behind the privilege has become more refined – the privilege is now seen to be one of many internationally recognized human rights.[20]

Indeed, the right to claim the privilege is enshrined in the *International Covenant on Civil and Political Rights*, as well as in bills of rights and human rights statutes in the United States, the United Kingdom, Canada and New Zealand.[21]

As a fundamental common law right, the privilege can only be abrogated by sufficiently clear statutory words, known as the principle of legality. In New South Wales, s 128 of the *Evidence Act 1995*, which applies only to evidence given in court proceedings, displaces and departs from the common law position under which there is an absolute right to claim the privilege. It provides that a witness may raise objection to giving particular evidence on the ground that the evidence may "tend to prove" that the witness has committed an offence against Australian or foreign law or is liable to a civil penalty. However, the witness can nevertheless be required to give the particular evidence (under threat of being charged with contempt of court) where it is in the "interests of justice", and it will not expose him or her to an imposition pursuant to a law of another country. In such cases, the court must give the witness a certificate granting him or her "direct" and "derivative" use immunity in relation to the particular evidence. This means that the (direct) evidence itself, as well as (derivative) evidence of any information, document or thing obtained as a consequence of the person having given the evidence, cannot be used against the witness.

The absolute protection available under the common law has also been extensively modified in recent years in the context of permanent and ad hoc commissions of inquiry and the like.[22] This reflects the approach taken by legislatures "when confronted with the need, based on perceptions of public interest, to elevate that interest over the interests of the individual in order to enable the true

[15] The expression "the right to silence", while sometimes used synonymously with the privilege against self-incrimination, in fact describes a group of specific and general immunities associated with a person's ability to lawfully resist the coercive powers of the state to obtain information from him or her. See *R v Director of Serious Fraud Office; Ex parte Smith* [1993] AC 1, 30-31 (Lord Mustill); Joint Legislation Review Committee, Parliament of New South Wales, *The Right to Silence: Discussion Paper* (2005) 4.

[16] Australian Law Reform Commission, n 14, 74; Joint Legislation Review Committee, n 15, 6.

[17] Australian Law Reform Commission, n 14, 75.

[18] Australian Law Reform Commission, n 14, 75.

[19] Joint Legislation Review Committee, n 15, 8.

[20] *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 498.

[21] Australian Law Reform Commission, n 14, 77.

[22] Neil Laurie, *Parliamentary Investigations* (LLM thesis, Queensland University of Technology, 1998) 59.

facts to be ascertained".[23] Examples of such legislation in New South Wales include the *Special Commissions of Inquiry Act 1983* (s 23(1)), *Criminal Assets Recovery Act 1990* (s 13A(1)), and the *Independent Commission Against Corruption Act 1988* (s 37(2)). The loss of the right to claim the privilege in these contexts is commonly offset by providing for direct use immunity in respect of answers given.[24] It is also subject to the qualifications emerging from the High Court of Australia's decisions in *X7 v Australian Crime Commission*[25] and *Lee v New South Wales Crime Commission*,[26] namely that there is a "companion principle" which survives even when the privilege against self-incrimination is abrogated. The companion principle, which is an aspect of the accusatorial nature of a criminal trial, is that the prosecution cannot compel a person charged with a crime to assist in the discharge of its onus of proof.[27] This principle may have consequences for the conduct of compulsory questioning undertaken under these kinds of statutory regimes, for example by the Independent Commission Against Corruption. In particular, the companion principle may, depending on the circumstances, prevent the questioning of persons presently facing criminal charges and the provision of compelled information to prosecutors.

Does the privilege apply in a parliamentary inquiry?

In accordance with Mr Walker's advice, the position of the New South Wales Legislative Council is that the privilege against self-incrimination – as with other privileges and immunities available at general law – has no application in parliamentary proceedings, including committee inquiries.[28] This view is shared by Enid Campbell, who notes that "[t]here is certainly nothing in Australian judicial case law to suggest that parliamentary powers of inquiry are *prima facie* constrained by the privilege against self-incrimination".[29] This is also the position of the Australian Senate, although the statutory context is obviously quite different.[30]

Mr Walker identifies parliamentary proceedings as being "*by their special nature* an exception" to the privilege against self-incrimination,[31] which, as already noted, would normally require sufficiently clear statutory words to abrogate it. According to his line of reasoning, it is irrelevant whether the *Parliamentary Evidence Act* abrogates the privilege against self-incrimination, because that Act is not the source of Parliament's power to compel provision of information. As to what *is* the source of this power, Mr Walker contends that the nature and function of the Houses of the New South Wales Parliament, as recognised in *Egan v Willis*[32] and *Egan v Chadwick*,[33] "justify cautious resort" to House of Commons precedents.[34]

As to the position in the United Kingdom House of Commons, *Erskine May* states:

> A witness is bound to answer all questions which the committee sees fit to put to him, and cannot excuse himself, for example, on the ground that ... he is advised by counsel that he cannot do so without incurring the risk of incriminating himself or exposing himself to a civil suit ... which would be sufficient grounds of excuse in a court of law ... However, a witness who is unwilling to answer a

[23] *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 503 (Mason CJ and Toohey J).

[24] Joint Legislation Review Committee, n 15, 34-35.

[25] *X7 v Australian Crime Commission* (2013) 248 CLR 92.

[26] *Lee v New South Wales Crime Commission* (2013) 251 CLR 196.

[27] *Construction, Forestry, Mining and Energy Union v Boral Resources (Vic) Pty Ltd* (2015) 89 ALJR 622, [36]-[37].

[28] Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (Federation Press, 2008) 504.

[29] Enid Campbell, *Parliamentary Privilege* (Federation Press, 2003) 166.

[30] Harry Evans and Rosemary Laing (eds), *Odgers' Australian Senate Practice* (Department of the Senate, 13th ed, 2012) 531.

[31] Walker, n 7, 130 (emphasis added).

[32] *Egan v Willis* (1998) 195 CLR 424.

[33] *Egan v Chadwick* (1999) 46 NSWLR 563.

[34] Walker, n 7, 130-131.

> question, after stating his 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 his evidence should not be published.[35]

As Mr Walker notes in his advice to the Select Committee, the House of Commons position was clear by 1828.[36] In that year, a debate was recorded in the House of Commons in which Robert Peel, then Leader of the House, likened the privilege against self-incrimination to legal professional privilege, stating:

> that as the witness before the committee was to be protected from the consequence of his answers his case was taken out of the general rule; for if the witness could refuse to answer any question put to him, no investigation by that House could take place. In that respect, the House differed from the courts of law; and he remembered the case of a witness, an attorney who was examined at that bar, who refused to divulge the secrets of his client; but that was overruled, and the House declared that the rules of the law courts did not apply; that for the ends of public justice it was necessary that he should answer, he being protected from the consequences. On these grounds he was compelled to answer.[37]

This position was affirmed in 1835, when a witness, Mr Prentice, was called to the Bar of the House having refused to answer a question put to him by a Select Committee examining bribery claims in the Great Yarmouth and York elections on the grounds of self-incrimination, despite being informed by the Committee that he was bound to answer such a question. After persisting in his refusal under questioning by the Speaker, the House passed a motion that he ought to answer the question and be admonished to do so. Brought before the Bar of the House a second time, Mr Prentice again persisted in his refusal, at which time the House resolved that he was "guilty of a breach of the Privileges of this House", and ordered that he be committed to the custody of the Sergeant-at-Arms, who was to bring him before the Select Committee so that he could be examined from time to time.[38] A few days later, the House was informed that Mr Prentice had been called before the Committee on two further occasions but continued to refuse to answer the question.[39] The House of Commons subsequently ordered that he be committed to gaol.[40]

A more recent case of a witness claiming the privilege against self-incrimination in response to questioning by a House of Commons committee occurred in 1992. The Social Security Select Committee had begun a general investigation into pension funds when the death of Mr Robert Maxwell led to disclosures about malpractice concerning the management of his Mirror Group companies and their pension funds. The Committee ordered the attendance of his sons, Ian and Kevin Maxwell, to question them in their capacity as trustees of the pension funds. The Maxwells appeared at the hearing accompanied by their legal representatives, who argued that the Committee should not proceed with its questions, including on the basis that their clients had a right not to incriminate themselves.[41] After deliberating, the Committee decided that the questions ought nevertheless to be put in public; however, the Maxwells declined to answer them. The Committee recommended that they be brought before the House,[42] but this recommendation was not acted upon.[43]

The clear and consistent position of the House of Commons has, at least until recently, not been reflected in the New South Wales Legislative Council.

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[35] Malcolm Jack (ed), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (LexisNexis, 24th ed, 2011) 823.

[36] See also Mr Walker's opinion to the Legislative Assembly of Western Australia, "Legal Professional Privilege in Parliamentary Committees", Appendix 2 in Peter J McHugh, "Evidence sought by Parliamentary Committees and Legal Professional Privilege" (Paper presented at the 46th Presiding Officers and Clerks Conference, Hobart, 9 July 2015).

[37] United Kingdom, *Parliamentary Debates*, House of Commons, 4 March 1828, Vol 18, col 970.

[38] United Kingdom, *Parliamentary Debates*, House of Commons, 31 July 1985, Vol 29, cols 1279-1288.

[39] United Kingdom, *Parliamentary Debates*, House of Commons, 4 August 1835, Vol 30, col 47 (Lord Francis Egerton).

[40] United Kingdom, *Parliamentary Debates*, House of Commons, 6 August 1835, Vol 30, cols 111-127.

[41] The Maxwells' legal representatives attended as witnesses so that they could, at the Committee's discretion, respond to questions that it was felt appropriate for them to answer.

[42] Social Security Committee, United Kingdom House of Commons, *The Conduct of Mr Ian Maxwell and Mr Kevin Maxwell*, House of Commons Paper No 353 (1992).

Prior to 1881, there was no statute in New South Wales governing the attendance of witnesses before the Bar of the House or committees, with the Council relying on its common law power to require the attendance of witnesses.[44] While the passage of the *Parliamentary Evidence Act 1881* (NSW) provided statutory power to the House and its committees to send for and examine persons, Council committees continued to encounter difficulties in relation to the calling of witnesses and taking of evidence, including witnesses refusing to answer questions on the basis of the privilege against self-incrimination.[45] For example, in 1887, during an inquiry into the law respecting the practice of medicine and surgery, a witness, Mr Richards, declined to answer a question, questioning whether he was bound to answer if it would incriminate him. The Chair of the Committee replied, "If it criminates you in any way, of course we cannot compel you to answer", and on repetition of the question Mr Richards refused to answer. After deliberating, the Committee resumed its examination, with the Chair stating:

> The committee have decided that if you state as your reason for not answering any question that you believe such answer will tend to criminate you, and render you liable to criminal proceedings they will not compel you to answer the question.[46]

Mr Richards proceeded to refuse to answer the question on that ground. A similar approach was taken in respect of two other witnesses to the same inquiry.[47]

Unfortunately, the introduction of the *Parliamentary Evidence Act* in 1901 did not serve to finally settle the question whether Council committees can compel incriminating evidence. Research undertaken for present purposes has yielded no recent instances of a Council committee compelling an answer where a witness has claimed the privilege against self-incrimination. However, in 1985, the New South Wales Joint Select Committee upon Parliamentary Privilege recommended amending the *Parliamentary Evidence Act* to allow witnesses to claim the privilege against self-incrimination in relation to indictable offences. The Committee's report referred to evidence from the Chair of the New South Wales Legislative Assembly Select Committee upon Prostitution regarding "difficulties that had arisen relating to the scope of the concept of 'lawful question'".[48] A subsequent discussion paper on parliamentary privilege issued by the Attorney General's Department stated that the Joint Select Committee's recommendation arose:

> as a result of a question raised during the hearings of the Select Committee into Prostitution, in which a witness refused to answer questions which could potentially be self-incriminating on the grounds that such questions were not "lawful".[49]

The Joint Select Committee's recommendation to amend the *Parliamentary Evidence Act* was not implemented.

The Council's approach to this issue, since the introduction of the modern committee system in 1988, has been marked primarily by caution and equivocation. During a 2012 Council Select Committee inquiry into the Kooragang Island Orica chemical leak, the Committee decided not to press for answers to questions that may have involved witnesses incriminating themselves.[50] In one

[43] Michael John Allen and Brian Thompson, *Cases and Materials on Constitutional and Administrative Law* (Oxford University Press, 10th ed, 2011) 241.

[44] Lovelock and Evans, n 28, 494.

[45] Lovelock and Evans, n 28, 495.

[46] Appendix B in New South Wales Legislative Council, *Legislative Council Committees: Practice and Procedure* (November 1988).

[47] New South Wales Legislative Council, *Consolidated Index to the Minutes of Proceedings* (1874-1893) Vol 2, 1113.

[48] Joint Select Committee of the Legislative Council and Legislative Assembly upon Parliamentary Privilege, n 9, 118.

[49] New South Wales Attorney General's Department, n 9, 36.

[50] This example was referred to in the Clerk of the Parliament's request for advice to Mr Walker: Letter from David Blunt (Clerk of the Parliaments) to Bret Walker SC, 4 December 2014.

instance, the Chair of the Committee ruled a member's question out of order on the basis that "[y]ou cannot ask him to self-incriminate or potentially self-incriminate".[51]

This ruling was consistent with advice given by the New South Wales Crown Solicitor's Office to the Clerk of the Parliaments in 1990. In that advice, the Assistant Crown Solicitor agreed with the following opinion expressed by his predecessor in 1960:

> Possibly the most striking difference between the powers exercisable by a Committee in accordance with the *Parliamentary Evidence Act* and those exercisable by a Committee of the House of Commons, is the position of the witness. The witness called under the *Parliamentary Evidence Act* may, in general, refuse to answer questions in the like circumstances that a witness called in any civil or criminal proceedings could refuse to answer.[52]

In support of this position, he cited the case of *Crafter v Kelly*, in which it was held that the expression "*lawful question*" "connotes one which calls for an answer according to law, one that the witness is compellable to answering according to the established usage of the law".[53] Applied to s 11(1) of the *Parliamentary Evidence Act*, this reasoning has the effect of bringing the general law as it relates to the compellability of witnesses to bear upon parliamentary committees. On this basis, the Assistant Crown Solicitor advised that the Council's State Development Committee could not compel a witness to give self-incriminating evidence.[54]

This is also the position taken by the Executive Government in New South Wales. Its advice to public servants appearing before parliamentary committees is that:

> The Committees only have power to ask "lawful questions" under the *Parliamentary Evidence Act*. Failure to answer a question which is not a "lawful" question cannot result in the punishment of the witness. A question may not be a "lawful question" if the answer is privileged (eg legal professional privilege, public interest immunity – which includes the confidentiality of Cabinet documents – or the privilege against self-incrimination) or if the question falls outside of the Committee's terms of reference.[55]

The Executive's interpretation of the expression "lawful question" clearly conflicts with a previous advice given by Mr Walker to the Council's General Purpose Standing Committee No 4 in 2000 on the applicability of statutory secrecy provisions. In that advice, Mr Walker observed that a "lawful" question "must have the quality that an answer to it may be compelled by lawful means", concluding that a question may be lawful, "notwithstanding an answer to it requires information to be divulged which would, anywhere else, be prohibited by [statute]".[56]

As noted above, the Council's current position, consistent with Mr Walker's most recent advice, is that the privilege against self-incrimination has no application in parliamentary inquiries. The authors respectfully agree with Mr Walker's conclusion that the source of the power to compel self-incriminating evidence is not the *Parliamentary Evidence Act* but House of Commons precedents, which are clear on the matter. We also agree with Mr Walker that the nature of the Council as a House of Parliament in a system of a responsible government, and its functions to render the Executive

[51] Evidence to Legislative Council Select Committee on the Kooragang Island Orica Chemical Leak, Parliament of New South Wales, Stockton, 15 November 2011, 15 (Robert Borsak, Chair).

[52] IV Knight, "Re: Power of Standing Committee on State Development to Require Production of Documents and Things" (16 March 1990) 4. This passage has been referred to with approval in advice by New South Wales Solicitor General Keith Mason QC, "Powers and Procedures of Joint Select Committees" (20 October 1992), and is consistent with advice by his predecessor, Solicitor General Mary Gaudron QC, "Re: Parliamentary Evidence Act" (8 September 1983).

[53] *Crafter v Kelly* [1941] SASR 237, 242 (Angas Parsons J). Given that the *Evidence Act 1995* (NSW) displaces the common law privilege against self-incrimination in legal proceedings in New South Wales, an interesting question is whether the common law privilege still reflects the "established usage of the law" as referred to by Angas Parsons J.

[54] Knight, n 52, 4-5.

[55] New South Wales Department of Premier and Cabinet, *Guidelines for Appearing Before Parliamentary Committees* (Circular C2011-27, 20 October 2011).

[56] Appendix 3 in Legislative Council General Purpose Standing Committee No 4, Parliament of New South Wales, *Budget Estimates 2012-2013* (2012), 30. This advice was provided following the refusal of officers of the Casino Control Authority to answer certain questions on statutory secrecy grounds.

Government accountable, as recognised in the *Egan* cases, justify resort to those precedents, despite the lack of a House of Commons equivalency provision. The corollary of this approach – that an incriminating question is a "lawful question" a witness can be compelled to answer under s 11(1) of the *Parliamentary Evidence Act* – is that the witness is given the absolute protection of freedom of speech in respect of the answer given under Art 9 of the *Bill of Rights*.

However, it must be acknowledged that this issue is yet to be settled by the courts. Lovelock and Evans state that any objection to a question must therefore be considered by a committee on its merits, having regard to factors including the basis for the objection, the significance of the information to the committee's inquiry, the possible repercussions if the question is pressed, and any alternative means of obtaining the information.[57]

Notwithstanding its position that the privilege against self-incrimination does not apply, and consistent with the cautious approach described above, a Legislative Council committee would be advised to consider seriously any request by a witness that he or she not be obliged to give self-incriminating evidence.[58] It may decide not to press the question, to take the evidence *in camera*, or to allow the witness to take the question on notice and consider keeping the written answer confidential. However, a committee is not currently obliged to take, or even consider taking, any of these steps, pointing to the need for reform to ensure this important aspect of the inquiry power is exercised fairly and appropriately, as discussed further in Part 3.

Should the privilege apply in a modern Parliament?

Having outlined the evolution of the Council's position concerning the applicability of the privilege against self-incrimination, the next issue is whether the privilege *should* apply in a modern Parliament. The opposing points of view on this issue draw on both individual and systemic considerations.

The main *individual* consideration is the extent of the protection offered by Art 9 of the *Bill of Rights* to a witness compelled to give incriminating evidence. Mr Walker's advice to the Select Committee is that "[a]s a matter of law, Art 9 of the *Bill of Rights* will prevent any self-incriminating statement made to the Select Committee being used against the person in question".[59] However, as adverted to above, Mr Walker also noted that there was "sufficient controversy about that proposition ... to justify the Select Committee being rather less confident than the Speaker in the House of Commons at Westminster was in the same debate as Mr Robert Peel dominated, in 1828".[60] The statement of the Speaker to which Mr Walker was referring went as follows:

> I wish to state this principle as broadly as possible; for if I am mistaken, it is high time that my error should be corrected. At present I certainly conceive, that on the privilege of preventing what passes here from being communicated elsewhere, vitally depends on the dignity and the rights of this House. No hon member who hears what passes within these walls (and no other person has a right to hear it) can be required, or allowed, to give evidence in a court of justice touching the matter which he has so heard.[61]

In a sense, the reservation expressed by Mr Walker about the extent of the protection offered by Art 9 is somewhat perplexing, given our understanding that the protection is absolute. It may be that Mr Walker was simply recognising the fact that Art 9 would not prevent investigative agencies from being informed by public evidence in framing their own investigations and gathering admissible evidence to support prosecutions. Such evidence may not consist of matters included in proceedings in Parliament (for example, a submission or a transcript of evidence) but may refer to the same facts and circumstances referred to in those proceedings.

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[57] Lovelock and Evans, n 28, 509.

[58] Lovelock and Evans, n 28, 517. In addition, it is Council practice that a witness appearing voluntarily should not be pressed to answer a question to which they have objected, on the basis of procedural fairness.

[59] Walker, n 7, 132.

[60] Walker, n 7, 132.

[61] United Kingdom, *Parliamentary Debates*, House of Commons, 4 March 1828, Vol 18, col 972.

Indeed, this was the rationale behind the recommendation by the 1985 Joint Select Committee upon Parliamentary Privilege to allow witnesses to claim the privilege against self-incrimination in relation to indictable offences. The Committee rejected the notion that an incriminating answer given by a witness under compulsion:

> should be excluded from any later probative value in any other tribunal requisition. To suggest that this provides an adequate remedy to difficulties of self-incrimination before a parliamentary committee is to ignore reality. Should a witness be compelled to provide incriminating material, the existence of that material or the confirmation it provides to previously held mere suspicion would undoubtedly act as a spur to the police or other investigative authorities to either initiate enquiries or provide greater vigour to existing lines of investigation. Indeed, although the evidence itself might have no probative value, it might well inadvertently reveal misdeeds not yet suspected by law enforcement agencies.[62]

This individual consideration can be contrasted with *systemic* considerations that arise in light of Parliament's role under a system of responsible government; namely, the power of the Parliament and its committees to undertake free and uninhibited inquiries into public affairs. In some circumstances, evidence that would otherwise be protected by the privilege against self-incrimination will be critical to a committee's ability to conduct an effective inquiry. These considerations were powerfully articulated in the House of Commons Social Security Select Committee's report concerning the conduct of the Maxwells in refusing to answer questions about their father's pension funds:

> To opt not to undertake an inquiry into the operation of pension funds in the wake of Robert Maxwell's plundering of the pension funds he controlled would not merely be a betrayal of those citizens who have lost or may still lose their pensions. We believe it would have struck the public as an example of politicians unwilling to grapple with difficult issues which are of major importance to them.
>
> ... From the outset, the Committee therefore was anxious, not only to play the historic role given to the House of Commons of voicing the grievance of constituents (in this instance, the grievance naturally felt by those contributors to the pension schemes run by Robert Maxell who have been defrauded) but also to open up these events to public scrutiny.
>
> It is in carrying out this side of its inquiry that refusal of the Maxwell brothers to give evidence has been most harmful to the Committee's activities.[63]

It must also be remembered that in New South Wales, and most other Australian jurisdictions, a witness's right to claim the privilege is already abrogated in legal proceedings where it is in the "interests of justice" (albeit offset by a grant of direct and derivative use immunity), and is also abrogated in the case of special commissions of inquiry and the like (where it is offset by a grant of direct use immunity only). Given that the protection offered by Art 9 goes at least as far as a grant of direct (though *not* derivative) use immunity, it would be strange indeed if a parliamentary committee's power to compel evidence was weaker than the power of a special commission of inquiry or the Ombudsman.

Given this and – perhaps more fundamentally – the essential nature of the Parliament's inquiry power in a system of responsible government and the body of Westminster precedents that are its source, we conclude that on balance, committees probably *do*, and in any event *should*, have the power to compel self-incriminating evidence – albeit a power which should be exercised carefully.

Furthermore, none of this is to say that s 11(1) of the *Parliamentary Evidence Act* is serving the modern committee system as well as it could be. In the context of the privilege against self-incrimination, the key deficiency is the ambiguity surrounding the expression "lawful question". The resulting conflict between the approaches of the Council and the Executive is clearly less than ideal, particularly in light of the provision's punitive nature. Should a witness (particularly a public servant) object to a question on the basis of self-incrimination, the current terms of s 11(1) would leave a committee in a difficult position if it was decided that the question should be pressed, leaving open the possibility of a legal challenge to determine the correct interpretation of the provision, but perhaps not until a person had been imprisoned for a period within the parliamentary precinct.

[62] Joint Select Committee of the Legislative Council and Legislative Assembly upon Parliamentary Privilege, n 9, 119-120.

[63] Social Security Committee, n 42, v.

Part 2 of this article goes on to explore problems with the penal jurisdiction under the *Parliamentary Evidence Act*, in particular s 11.

PART 2: COMMITTEES' PENAL JURISDICTION

The second procedural issue raised by the Operation Prospect inquiry concerns committees' penal jurisdiction. While the Houses of the New South Wales Parliament do not have the power to punish contempt,[64] the *Parliamentary Evidence Act* provides committees of both Houses with considerable powers to detain and imprison non-members. Under ss 7 to 9, a presiding officer may apply to a judge of the Supreme Court to retain a person in custody if he or she refuses to attend in response to a summons. Under s 11, a witness who refuses to answer a "lawful" question:

> 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.

And finally, s 13 provides that a witness is liable to imprisonment for a maximum of five years for wilfully making a false statement.

During the early stages of the Operation Prospect inquiry, and in light of the Executive's (to that point) clear position in relation to statutory secrecy, there was a reasonable expectation that the punitive provisions of the Act might be triggered. The possibility that an officer of the Legislative Council might be required to detain a recalcitrant witness, and that the House could send a person to gaol for a month, raised two key questions. First, given that the penalties provided by the Act have never been invoked, what procedures would a committee follow if a witness refused to answer a lawful question? A related and perhaps more important question was whether a parliamentary committee or House of Parliament should ever be able to deprive a person of his or her liberty, and if so, under what circumstances?

It is worth noting that Australian Parliaments and the Westminster Parliament have exercised their penal jurisdiction sparingly. While the House of Commons has imprisoned hundreds of offenders over the course of its history, this has not occurred since 1880. With the exception of a case in Western Australia in 1904, the only cases of imprisonment for contempt by an Australian legislature in the 20th century were those of Brian Easton in Western Australia in 1995, and Fitzpatrick and Browne in 1955.[65] Notwithstanding its infrequent use, as discussed in the next part of this article, many commentators argue that this power is out of step with community expectations of the role of Parliament and modern notions of procedural fairness and should either be shared with the courts or relinquished altogether.

Judges in their own cause

It is often suggested that Parliaments' penal jurisdiction is inherently flawed because legislatures cannot offer the suite of safeguards associated with modern notions of procedural fairness. (The precise requirements of procedural fairness are well articulated in legal and parliamentary literature and therefore will not be outlined further here.)

The inherent unfairness of a Parliament acting as both accuser and judge has long been recognised. In 1866, a Judicial Committee of the Privy Council concluded that Parliaments' 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".[66] In 1983, the Chair of the Legislative Assembly Select Committee upon Prostitution, Pat Rogan, told the Joint Select Committee upon Parliamentary Privilege that with regards to s 11 of the *Parliamentary Evidence Act*:

[64] Lovelock and Evans, n 28, 52.

[65] John Waugh, "Contempt of Parliament in Victoria" (2005) 26 Adel L Rev 29, 36, 47.

[66] *Doyle v Falconer* (1866) LR 1 PC 328, 340-341, quoted in Enid Campbell, "The Penal Jurisdiction of Australian House of Parliament" (1963) 4 Syd LR 212, 225.

> My own personal viewpoint as a member of this House is that I would not like to have myself placed in a position of a judge sentencing someone to gaol. We are the lawmakers and it is up to the judiciary then to interpret and carry out the provisions of those Acts.[67]

Some commentators suggest that Parliaments' penal jurisdiction does not accord with community expectations of the role of a legislature, as noted as far back as 1908 by a Commonwealth Joint Select Committee on Privilege:

> The ancient procedure for punishment of contempts of Parliament is generally admitted to be cumbersome, ineffective and not consonant with modern ideas and requirements in the administration of justice. It is hardly consistent with the dignity and functions of a legislative body which has been assailed by newspapers or individuals to engage within the Chamber in conflict with the alleged offenders, and to perform the duties of prosecutor, judge and gaoler.[68]

The 1999 United Kingdom Parliament Joint Committee on Parliamentary Privilege noted the distinct differences between disciplining members and seeking to impose a punishment on non-members:

> It is one thing for the House to discipline its own members. That can be regarded as primarily an internal matter ... It is altogether different for the House to impose punishment, potentially serious, on non-members. By becoming members of Parliament, members agree to abide by the rules of the House, including the rules relating to discipline; outsiders have agreed to nothing.[69]

The fact that in New South Wales only non-members can be punished for contempt would be unlikely to generate support for Parliaments' penal jurisdiction. While public perceptions should not be the primary motivation for parliamentary or law reform, they should not be discounted. The few historic instances of Australian legislatures locking up contemptuous non-members could hardly be described as a public relations coup for the institution of Parliament. Admittedly, many of these cases involved journalists or publishers; their detention was often perceived as "getting even" with a hostile critic, rather than upholding parliamentary privilege.[70] But imprisoning non-journalists, including those for whom there is little public sympathy, has been just as fraught: Brian Easton's seven-day detainment in Casuarina Prison by the Western Australian Legislative Council was portrayed by the media as a farce. Commenting at the time on this incident, a Federal Minister noted that:

> 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.[71]

The then Western Australian Opposition Labor leader echoed these sentiments, stating that he found the imprisonment by the Legislative Council of a citizen "without any right to be heard ... to be quite horrific"; and that his party would overturn this "archaic and repressive power and hand it over to the courts".[72]

Given the past reaction to legislatures seeking to enforce their punitive powers, it is not surprising that the Clerk of the Parliaments advised members at the beginning of the Operation Prospect inquiry that they should consider the "risk of ridicule" before seeking to activate s 11 of the *Parliamentary Evidence Act*, whereby a witness can be committed forthwith into the custody of the Usher of the Black Rod. While he admits that his personal views on the issue have waxed and waned throughout

[67] Evidence to Select Committee of the Legislative Assembly upon Prostitution, Parliament of New South Wales, 8 August 1983, 42 (Pat Rogan, Chair).

[68] Joint Select Committee on Procedure in Cases of Privilege, Parliament of Australia, *Progress Report* (1908) 2.

[69] Joint Committee on Parliamentary Privilege, United Kingdom Parliament, *Parliament Privilege – First Report* (1999) [303].

[70] Heather Goodwin, Aaron Stewart and Melville Thomas, "Imprisonment for Contempt of the Western Australian Parliament" (1995) 25 UWAL Rev 187, 192.

[71] Goodwin, Stewart and Thomas, n 70, 196.

[72] Goodwin, Stewart and Thomas, n 70, 197.

his 20 years' parliamentary experience, Neil Laurie now believes that in general, contempt proceedings for non-members are best dealt with by the courts, such is the odium attached to members being judges in their own cause:

> We need to accept that:
>
> a. contempt proceedings are relatively cumbersome and onerous on committees, members and offenders
> b. there is a real risk that public perceptions will end up (perversely) favouring the offender given that contempt of Parliament proceedings can easily be portrayed as being oppressive
> c. there is a risk of odium to the Parliament, being seen to be a judge in its own matter.[73]

According to John Waugh, it is only the fact that most of the powers are now unused that saves the contempt laws from general condemnation.[74] Noting that the law of contempt of Parliament in Victoria has remained basically unchanged since the middle of the 19th century (as is the case in New South Wales), Waugh argues that:

> History provides example of harsh, even slightly bizarre uses of parliament's power to punish outsiders, but the likely political reaction, and awareness of the requirements of fairness, make a repetition unlikely. Nevertheless, the law used in these cases remains almost unchanged, and while the powers remain, so too does the possibility of their use.[75]

Enid Campbell also acknowledges the "dangerous potential" of Parliaments' rarely used punitive powers. She suggests that the failure of legislators to appreciate this potential has meant that "very little has come of the few isolated attempts to remedy the situation through legislative enactment".[76]

Odgers' acknowledges that the alleged impropriety of Houses acting as judges in their own cause is a common criticism of the Houses' power to deal with contempts, but suggests that the same difficulty arises with contempt of court:[77]

> Again the same difficulty arises with contempt of court: no incongruity is seen in courts judging and punishing contempts ... Just as the courts are the best judge of what interferes with the administration of justice, the Houses may be the best judge of acts which interfere with the performance of their functions and obstruct their members in the performance of their duties.[78]

This is a somewhat perplexing statement, given concerns regarding the exercise of contempt powers by the courts have long been recognised, as encapsulated by Kirby P (as he then was):

> For when a judge deals summarily with an alleged contempt he may at once be a victim of the contempt, a witness to it, the prosecutor who decides that action is required and the judge who determines matters in dispute and imposes punishment.[79]

Indeed, such concerns have led some to argue for the abolition of the common law power to punish for contempt in the face of the court.[80]

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[73] 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.

[74] Waugh, n 65, 52.

[75] Waugh, n 65, 30.

[76] Campbell, n 66, 225.

[77] Courts have a summary jurisdiction to punish for "contempt in the face of the court", conferring on judges and magistrates wide-ranging powers to deal with improper or disruptive behaviour at court hearings. These powers include determining what kinds of conduct taking place in the courtroom constitute contempt, deciding whether or not a person should be charged with contempt, if charged, determining what occurred and whether a person should be found guilty. See Australian Law Reform Commission, *Contempt*, Report No 35 (1987) x.

[78] Evans and Laing, n 30, 87.

[79] *European Asian Bank AG v Wentworth* (1986) 5 NSWLR 445, 452.

[80] Australian Law Reform Commission, n 77, xxxii-xxxiv.

Notwithstanding the inherent problems pertaining to a House of Parliament being both judge and accusor, the transfer of any aspect of the Parliaments' penal jurisdiction would be controversial. According to Harry Evans, the former Clerk of the Senate, any such proposal would require careful consideration, given its potential impact on the separation of powers:

> The balance of power between legislature, executive and judiciary would be affected ... it would greatly expand the scope for judicial inquiry into and judgement upon, parliamentary proceedings, the very thing that parliamentary privilege is intended to prevent.[81]

In addition to the blurring of the separation of powers, Harry Evans identifies several other problems pertaining to any proposal to transfer Parliaments' penal jurisdiction. He argues that such a step would likely lead to restrictions on the category of offences in which a penalty could be imposed, leaving the House powerless to deal with obstructions and interferences not covered by specific statutory provisions. A "catch all" provision in any relevant legislation would address this but would also be met with strong objections.

Another problem identified by Evans relates to restraints on the ability of a House to take preventative or coercive action to guard its processes:[82]

> If prosecution for a past offence were to be the only method of imposing a penalty, then a House would often not be able to prevent such offences, Examples would be continuing adverse action against potential witnesses on account of their evidence which they may give, and continuing concealment or destruction of evidence which may be required by parliamentary inquiry. Under current powers a House could order cessation of such conduct and impose a penalty for violation of that order. A House could also order the committal of a person engaged in such conduct to prevent the continuation and possible future effect of the conduct.[83]

There are no doubt significant and complex issues that would need to be addressed if any steps were contemplated to transfer any aspect of the Parliament's penal jurisdiction to the courts.

The vice of s 11

What procedures would the Select Committee have followed if faced with a witness who refused to answer a lawful question as required under s 11 of the *Parliamentary Evidence Act*? Given its archaic and arcane wording, and the lack of any precedents, it would have been very difficult to know how to proceed. Indeed, it might very well have led the Committee into one of those "slightly bizarre" scenarios referred to by John Waugh and relished by the media. And while detaining a witness within the parliamentary precinct might be an awkward prospect for parliamentary staff, one can only imagine the impact on a witness facing a month in "gaol", not to mention the inevitable legal challenge to the Committee's actions from the witness' lawyer.

The flaws in s 11 have been acknowledged for at least 30 years. During the proceedings of the 1983 Joint Select Committee upon Parliamentary Privilege, committee member, Tim Moore noted that s 11 was:

> a most peculiar section. It says that such a person "shall be deemed guilty of a contempt of Parliament" and makes no provision for any formal adjudication. It is very bad drafting.[84]

Enid Campbell advised the Joint Committee that the *Parliamentary Evidence Act* was ripe for re-examination, a comment which is just as applicable today.[85] However, Campbell's interpretation of s 11 raises more questions than it answers:

> If a witness refuses to answer a question, assuming it to be a lawful question – and examination here means examination by either House or a committee of either House or by a joint committee – he can be

[81] Letter from Harry Evans (Clerk of the Senate) to David Elder (Secretary, House of Representatives Standing Committee of Privileges), 6 August 2007, 1.

[82] Letter from Harry Evans, n 81, 2.

[83] Letter from Harry Evans, n 81, 2.

[84] Evidence to Joint Select Committee of the Legislative Council and the Legislative Assembly upon Parliamentary Privilege, Parliament of New South Wales, 18 April 1983, 33 (Tim Moore).

[85] Evidence to Joint Select Committee, n 84, 4 (Enid Campbell).

> taken immediately into the custody of the Usher of the Black Rod or the Sergeant of Arms. *But technically he would not be guilty of that offence unless the relevant House so orders*. Certainly he cannot be sent to gaol. The critical sanction cannot be applied without a resolution of one of the Houses, and the formal documents of authority required by the gaoler is a warrant under the hand of the Presiding Officer. That section, unsatisfactory as it is in its drafting, in my opinion clearly conferred on the Houses of Parliament a limited penal jurisdiction.[86]

But perhaps the most significant flaw in this section is that it gives the Parliament the power to deprive a person of his or her liberty, as Pat Rogan, the Chair of the Legislative Assembly Select Committee upon Prostitution, noted in 1983: "I agree with the Solicitor General that the vice of section 11 lies in the power of the Parliament to commit to gaol for one month."[87] This raises a wider procedural question generated by the Operation Prospect inquiry: is it ever appropriate for a Parliament or a committee to deprive an allegedly contemptuous non-member of his or her liberty?

Should a modern Parliament retain punitive powers?

Very few parliamentary commentators would suggest that a House of Parliament, including the New South Wales Legislative Council, should reduce its ability to punish contempts. Stephen Frappell argues that the punitive powers provided under the *Parliamentary Evidence Act* are essential to the effectiveness of Council committees:

> Those that doubt whether punitive powers are appropriate in New South Wales need only look at the *Parliamentary Evidence Act 1901* ... Both the 1901 Act and its 1881 predecessor were enacted precisely because committees of the Parliament at the time were encountering considerable difficulty in relation to the calling of witnesses and taking of evidence. 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.[88]

Indeed, the power to summon witnesses provided for under the *Parliamentary Evidence Act* was no doubt instrumental in allowing a Legislative Council committee to take evidence from a very reluctant Chief of Staff in the 2004 Orange Grove inquiry (under summons) and from the Chief Executive Officer of Cabcharge, Reg Kermode, at a 2010 Select Committee inquiry into the taxi industry (under threat of a summons). It helped that in both cases, the existence of the power relied on (to summon a witness) was beyond doubt due to its clear statutory basis.[89]

While 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), on balance we support the retention of strong powers to ensure compliance with committee inquiries. However, in its current form, the *Parliamentary Evidence Act* does not reflect contemporary views regarding the role of Parliament and the administration of justice, especially s 11. The punitive provisions in the statute are arcane and there is no clear procedure, either for witnesses or members to follow. While it is highly unlikely that these provisions will ever be utilised, there is nothing to stop a misguided or politically motivated committee from setting an undesirable precedent, as alluded to by John Waugh and Enid Campbell.

So what should be done to address the vice of s 11, with its archaic language and "dangerous potential" to deprive non-members of their liberty? Possible options to address these issues are discussed in the final part of this article.

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[86] Evidence to Joint Select Committee, n 84, 70 (Enid Campbell) (emphasis added).

[87] Letter from Pat Rogan (Chair, Select Committee of the Legislative Assembly upon Prostitution) to Rodney Cavalier (Chair, Joint Committee upon Parliamentary Privilege), 18 October 1983. Mr Rogan is referring to advice by the Solicitor General, Mary Gaudron QC, dated 8 September 1983.

[88] Frappell, n 8, 47.

[89] Beverly Duffy and David Blunt, "Information is Power: Recent Challenges for Committees in the NSW Legislative Council" (Paper presented at the 45th Presiding Officers' and Clerks' Conference, Apia, Samoa, 30 June-4 July 2014) 13.

PART 3: WHERE TO FROM HERE?

In our view, the ideal mechanisms for addressing the issues raised in this article would be the introduction of a *Privileges Act* for New South Wales, together with Senate-style privilege resolutions to put in place formal procedural protections for witnesses appearing before Council committees.[90] These mechanisms are briefly discussed below. However, in the absence of any legislative change – that is, without comprehensive privileges legislation and in light of the deficiencies we have identified with s 11 of the *Parliamentary Evidence Act* – there is perhaps an even greater imperative for privilege resolutions to be introduced.

A Privileges Act for New South Wales

First, the *Parliamentary Evidence Act* could be modernised as part of a move to codify privileges in New South Wales, as proposed in a recent article by Stephen Frappell.[91] In our view, the introduction of privileges legislation would provide an ideal opportunity to update s 11, and to give thought to the argument that aspects of the Parliament's penal jurisdiction should be transferred to the courts.[92]

As for the privilege against self-incrimination, a *Privileges Act* in New South Wales would also provide an opportunity to make abundantly clear committees' power to compel incriminating answers.[93] Notwithstanding Mr Walker's view that statutory abrogation of the privilege against self-incrimination is strictly unnecessary, such a reform would put the matter beyond doubt.

Such an exercise could take into consideration whether to incorporate a procedure to deal with witnesses resisting incriminating questions, such as that adopted by the Queensland Parliament. The *Parliament of Queensland Act 2001* enables witnesses appearing before parliamentary committees to object to a question on the basis of the privilege against self-incrimination (s 34). If a witness objects on this basis and the committee considers he or she must answer the question despite the objection, the committee may report the matter to the Assembly (s 33). When deciding whether to override the privilege claim and order the question be answered, the Assembly must consider the public interest in having the question answered and the public interest in providing appropriate protection to individuals against self-incrimination (s 35).

Putting aside the question of whether it should be the House or a committee which decides whether to compel a particular answer, one benefit of this procedure is that it identifies the factors that must be taken into account in making such a decision. This at least in part addresses the concern expressed by Richard Gordon QC and Amy Street (writing in the United Kingdom context) that:

> [T]he eliciting of particular answers [may threaten] to damage wider legal relationships, and to harm the public interest in various respects, such as upholding justice and the integrity of the tax system. There is no judge, beyond the select committee itself, as to whether such wider legal relationships may, or will, be damaged, [and] no criteria currently laid down in guidance as to how any balancing exercise might be conducted.[94]

This comment is also apposite in the context of s 11(1) of the *Parliamentary Evidence Act*, which is completely silent on the factors that should be considered, as well as the process that should be followed, in weighing up whether to compel a particular answer. From a process perspective, Enid Campbell pointed out that:

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[90] A third option for reform in the context of the privilege against self-incrimination would be to adopt a process whereby an independent arbiter adjudicates claims of privilege by witnesses. This option was first identified by Enid Campbell: see Campbell, n 29, 166. As Stephen Frappell has noted, this could work similarly to the independent legal arbiter process in place under Legislative Council Standing Order 52 for disputes over claims of privilege by the Executive in relation to documents ordered to be produced by the Council: see n 8. A detailed examination of this option is beyond the scope of this article.

[91] Frappell, n 8.

[92] Campbell, n 66, 226.

[93] The opportunity could also of course be used to clarify committees' power to compel evidence covered by other privileges, such as legal professional privilege and public interest immunity.

[94] Richard Gordon QC and Amy Street, *Select Committees and Coercive Powers – Clarity or Confusion?* (The Constitution Society, 2012) 64-65.

> some of the problems to do with disclosure of highly confidential information to parliamentary committees can be overcome by provisions dealing with restrictions on reporting and the holding of *in camera* hearings. These are the sorts of things that are not in my opinion adequately dealt with under the existing New South Wales legislation.[95]

This comment is of course also relevant in the context of committees' punitive powers.

Senate-style privileges resolutions

An additional option for reform for the Legislative Council would be the introduction of Senate-style privilege resolutions, to ensure that a fair and appropriate process is in place to deal with reluctant witnesses appearing at committee inquiries, including those held by the Council's Privileges Committee. Under the Senate's privilege resolutions, witnesses are:

> 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.[96]

While a Council committee confronted with a claim of privilege by a witness would likely be advised by the Clerk to follow the Senate's procedure, guided by the general statements in Lovelock and Evans, it would be far better for this to be formalised by way of resolution.

However, even if – indeed, especially if – there is no statutory reform of privilege in New South Wales, there is a strong case for the adoption of a well thought-through, fair and transparent procedure by way of resolution. In our view, such resolutions would serve at least three important purposes. First, from a committee's perspective, it would provide a formal framework within which these difficult issues can be resolved, ensuring that the "judicious delicacy" urged by Mr Walker is actually exercised in practice. Secondly, from a member's perspective, it would set boundaries where currently these are ill-defined. And thirdly, from a witness' perspective, it would provide some much-needed procedural protection, giving them confidence that claims of the privilege will be handled fairly.

In summary, we argue that witnesses ought at least to be provided with a measure of procedural fairness via privilege resolutions, given the deficiencies of s 11 of the *Parliamentary Evidence Act*, the fact that the Council's position with respect to the privilege against self-incrimination has, until recently, not been clearly defined, and the potential damage that an inquiry can do to a witness' reputation and career.[97]

In striking an appropriate balance between the inquiry powers of a modern Parliament, and the interests of individual witnesses, we suggest that such a procedural framework is the least that committees, and the witnesses they depend upon, should be able to expect.

[95] Evidence to Joint Select Committee, n 84, 73-74 (Enid Campbell).

[96] Parliamentary privilege resolutions agreed to by the Senate on 25 February 1988: Resolution 1(10).

[97] See, for example, Lindell and Carney, n 2.

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