

The uncooperative witness: the punitive powers of parliamentary committees

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A critical function of Australia's state and national parliamentary committees is to conduct inquiries. To this end, committees are delegated powers from their respective houses, to summon witnesses and compel evidence as well as to pursue and punish any recalcitrant witnesses. While these powers appear *prima facie* to be strong enough to encourage witness cooperation, in practice punitive powers are rarely (if ever) exercised. While non-cooperative witnesses can be frustrating for members, the process of prosecuting a witness for lack of cooperation is time consuming and requires the support of the house. Generally committees will opt to move on to more productive activities rather than choosing to pursue an uncooperative witness. This paper looks at the powers and practices of parliamentary committees regarding uncooperative witnesses to address the question 'why?'

Powers of committees

Clark describes some of the powers enjoyed by Australian parliamentary committees to facilitate the undertaking of inquiries;

...There is a power to order or even compel the attendance of persons, to compel evidence to be given and to compel the production of papers, books and other documents. ... The committee has the power to require evidence to be given upon oath and a person may not refuse to answer on the grounds of self-incrimination, but as a form of protection, nothing they say may be used against them in a court of law. A refusal of a person including a minister to provide papers to a House Committee may be punished. (Clark 2007, p149)

In the absence of jurisdiction-specific parliamentary powers, Australian parliamentary officers will generally fall back on the practices of the British House of Commons as outlined in Erskine May who offers the following for officers confronted with non cooperative witnesses.

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Any disorderly contumacious or disrespectful conduct in the presence of either House or a committee will constitute a contempt, which may be committed by strangers, parties or witnesses. ... any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any Member or officer of such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results, may be treated as a contempt even though there is no precedent of the offence. (Erskine May 2004, p128)

Strong committee punitive powers extend to all Australian jurisdictions except the ACT and include the power to fine or imprison individuals found to be in contempt. South Australia and Victoria have taken on all the powers of the Commons while in Queensland, Tasmania and Western Australia there are restrictions imposed on the power to punish with punitive powers limited to certain offences (Campbell 1999, p197). Campbell also says that any sentence handed down by a house would potentially contravene Article 14 of the International Covenant on Civil and Political Rights to which Australia is signatory. Article 14 stipulates that persons charged with criminal offenses have a right to a 'fair and public hearing by a competent, independent and impartial tribunal established by law' (p199). However Australia and other countries have a history of ignoring international conventions so the point is a mute one. Moreover, Campbell says that even when houses have powers to fine and imprison they are very unlikely to impose such punishments (p203), with houses often content to record judgements and make admonitions or reprimands.

Parliamentary committees and the uncooperative public servant

Parliamentary practices differ little in jurisdictions around Australia regarding the calling of public servants. Determining which public servants must appear before inquiries is generally left to the discretion of departmental heads and ministers, however, all jurisdictions do have the right to call individual public servants should they wish. Private individuals are generally cooperative, however, as public servants are answerable to senior departmental officers and ministers they may feel compromised if required to give evidence inconvenient to colleagues or the government. In recognition of this, commonwealth and state public servants are not required to comment on government policy (see Harris 2005, p655). As such, non-cooperative witnesses are rarely (if ever) pursued by committees to the full extent of the powers available to them and impasses are generally dealt with in the political sphere with committees possibly either reprimanding or naming uncooperative witnesses under the protection of parliamentary privilege and leaving it at that. If evidence is required, it may be preferred to make an approach directly to the relevant minister.

While the power to call for people and papers exists in most jurisdictions, limits to these powers exist. Harris states that;

No committee of the Commonwealth Parliament has been prepared to summons a State public servant or Minister to give documentary or oral evidence which they have been unwilling to provide. If such a summons were issued, a State Government could seek to challenge it in the High Court or simply claim public interest immunity. In the highly unlikely event of either House of the Commonwealth Parliament attempting to deal with a State Minister or Government for contempt, the matter would appear to be one to be decided by the High Court. (Harris 2005, p655)

Technically public servants should appear when asked, however, they may still decline to answer specific questions. Harris says:

Commonwealth public servants appearing before committees as private individuals to give evidence unrelated to their past or present duties as public servants are bound by orders of a committee. They are open to the same penalties as any other citizen if they do not obey. While in principle they are equally bound when summoned to give evidence relating to their official duties, in practice their position is somewhat different. This is particularly so with respect to failure or refusal to answer a committee's questions. They may, under certain circumstances and on behalf of their Minister, claim public interest immunity. It is doubtful, however, whether a public servant, even on instructions from a Minister or the Government, could refuse or fail to obey a summons to attend before a committee. (Harris 2005, p660)

Harris notes that, in the lifetime of the Australian Senate, refusing to furnish a committee with documents or information has not yet resulted in a charge of contempt (see Harris 2005, p663).

- For example in 1951 the Government of the day directed the Chiefs of Staff of the armed forces and other officials not to attend a Senate Inquiry into national service on the grounds that officers should not be expected to comment on government policy. When the committee chair invited witnesses to present on 'factual evidence' rather than policy the Acting Prime Minister responded that the Cabinet considered evidence from such officials to be 'against the public interest'. In the end the invited officials did not appear and they were not summonsed (Harris 2005, p662).
- In addition in 1967 Harris reports that the Joint Committee on the Australian Capital Territory was refused documents by the Attorney General on the grounds that such documents would disclose the nature of advice given to ministers by public servants and that to do so may deter public servants from giving full and frank advice in future.
- In South Australia, committees possess only the authority and powers that are derived from the appointing house. Powers are delegated to committees via the *Parliamentary Committees Act 1991*. This act explicitly specifies that the powers of either house attach to committees and include the power to send for persons, papers and records.

As in other jurisdictions, either house has the power to declare an act to be contempt and to punish as it sees fit in order to protect the ability of parliament to undertake its functions. Possible punishments for a finding of contempt include imprisonment or fines, however, these punishments are yet to be applied. Blackmore (1885 p170) has outlined a procedure to be followed for witnesses refusing to answer questions in defiance of a committee. First, a report would be made by the committee to the house stating then the house could order a witness to respond. Following that, if the witness still refused to respond, the house could order the witness to appear in the house to explain. The house then has the option to take any measures it deems appropriate to vindicate its privileges.

In 2008, South Australia's Natural Resources Committee reported that officers of the Department of Water Land and Biodiversity had failed to answer questions to the satisfaction of its Members. Committee dissatisfaction with the performance of this department resulted in the tabling of a highly critical Committee report and the naming of officers in Parliament. In tabling the report, Committee Presiding Member, John Rau MP said:

The important facts in this debate are contained, of course, in the report. The list of misdemeanours goes on beyond lengthy delays from public servants after the committee had requested information, beyond the refusal to supply documents (which, it was said, were prepared for cabinet), beyond key information being omitted to the committee and it goes, in fact, beyond disingenuous responses and incorrect advice given to the committee.

It goes right to the point of public servants having lied to the committee. One can only conclude from reading the transcript of the committee proceedings that there was a deliberate misleading of the committee. I am not afraid to name some of the personnel concerned. The person deserving of most censure, in my opinion, is Mr Darryl Harvey of the department. He is referred to in the proceedings as a principal policy officer of the department. There were a number of occasions when he deliberately withheld the truth to the point where it must be concluded that he was deliberately deceiving the members of the committee. This is a gross offence in terms of the administration of public affairs in this state. I note also that Mr Michael Deering, an officer of the department, was present during investigations of the committee, and, when it was open to him to provide positive and truthful contributions in response to committee questioning, he said nothing. In his case it may be a matter of errors by omission, but that is nonetheless an extremely serious matter. I also note that the then chief executive of the department, Mr Rob Freeman, gave assurances that documents and information would be provided and, in fact, those assurances were not met. ... I certainly support the amendment moved to the neutral motion moved by the chair of the committee. I support the amending motion moved by the Hon. Bob Such, which brings a note of censure into this debate. But I see it this way: the officers concerned — or at least in respect of Mr Darryl Harvey — there needs to be some disciplinary action. The house — and, as far as I am aware, the committee — has not been advised that any such disciplinary action has occurred as a result of the transgressions which have been outlined by me and other speakers. Either Mr Harvey needs to be disciplined, or, if the minister is not prepared to ensure that that happens, the minister needs to face the consequences. (Hansard House of Assembly [26/11/08] p1064)

One month after the Committee's report was tabled, a new Minister was sworn in and a new Departmental chief executive appointed. The Natural Resources Committee sought an immediate meeting with the new appointees in order to facilitate an improved relationship between it and the department regarding future matters (K Cudarans 2009, pers. comm., 30 October).

As with other jurisdictions, the senate has the power to require attendance of witnesses and it can compel evidence including production of documents (Evans [undated] p139). This power stems from Section 49 of the constitution which confers on houses the powers existing under the House of Commons at federation (1901), of which this power was one (ibid., p139). A possible limitation of this power is that the house cannot summon the monarch and this might extend to include the Governor General in Australia. This exclusion is untested and likely to remain that way (ibid., p140). There is a well established convention that each house should not compel members of the other house or members of the judiciary to appear or answer questions (ibid., p141). In addition, the power to compel people may be limited to subjects within the legislative competence of the commonwealth and may not extend to state office holders, the practice being for the responsible state Minister to nominate relevant state public servants to give evidence and produce documents on their behalf (ibid., p142).

Evans explains that while senate committees do not generally summon commonwealth public servants directly, preferring to ask ministers to provide the appropriate people, they reserve the right to exercise this power to select specific public servants and on occasions have issued subpoenas for named officers to appear before specific inquiries. This is a necessary power in all jurisdictions to discourage the disingenuous practice of supplying witnesses with little relevant knowledge to inquiries in order to avoid scrutiny.

It has been argued that ministerial staffers are immune from having to give evidence to parliamentary inquiries by virtue of their relationship to their minister. Evans considers that governments are the main candidates for non-cooperation and specifically disputes claims of immunity for staffers:

It is executive governments which are most likely to refuse information to the Senate and its committees. It is executive governments which usually seek to conceal information from the legislature and the public. It is executive governments, with their vast resources, which can most readily resist the requirements of the legislature. (ibid., p146)...[F]rom time to time the claim has been made that it is not appropriate for the personal staff and advisers of ministers to appear before parliamentary committees, or it is not appropriate for them to be summoned, depending on which of two versions of the claim is made. This notion has particular appeal to ministers. The suggestion is frequently elevated into a supposed 'convention', but that would mean that it must be a frequently-breached convention. Presumably the rationale of the alleged convention is that personal staff and advisers are not action-takers or decision-makers in the system of government, but merely extensions of their

ministers, who are entirely responsible for what occurs in their offices. This rationale has been punctured by numerous examples of ministerial staff taking actions and making decisions, and by ministers declining to accept responsibility for the actions and decisions of their personal staff.

And

In the context of the Select Committee on a Certain Maritime Incident, however, it was suggested that they have some kind of immunity arising from the supposed immunity of their ministers. There is no basis for any such immunity, either in parliamentary practice or in law. Ministerial staff have appeared before Senate committees to explain their roles and actions, voluntarily several times and once under summons (the latter occasion accompanied by the usual protestations that it would not set a precedent, etc., which only serve to demonstrate that the power is there). (ibid., p145)

One possible method to settle arguments over production of disputed information on the basis of 'public interest' is to have them assessed by a neutral third party. The senate has applied this practice with the auditor general acting as independent arbiter and a similar practice has been used in NSW. However, such practice has no status in law or convention and is at present reliant on executive cooperation (ibid., p146).

'Executive privilege' is sometimes asserted as a right of governments (including its officers) to withhold information on the grounds of national or public interest and as such is quoted to try and prevent certain witnesses including public servants from appearing or certain evidence being made public. Evans (undated p143) states that this claimed 'right' has never been confirmed by any court or legislature in Australia. In NSW, as in other jurisdictions, former members and ministers can be compelled to attend as can current ministerial staff. There are no restrictions on summoning public servants although they may only be asked 'lawful questions' with the definition of 'lawful' remaining open to interpretation. Lovelock states that:

Prima facie claims of privilege (for example, legal professional privilege, public interest immunity — which includes the confidentiality of Cabinet documents — or the privilege against self-incrimination) have no application to parliamentary inquiries. However this does not mean such claims are ignored. Any claim or rights normally afforded in our legal system are usually given serious consideration by parliamentary committees. (Lovelock 2008, p504)

If faced with claims of commercial in confidence, committees may attempt to obtain evidence by offering to hear it 'in-camera' or 'off the record' to minimise witness concerns regarding disclosure of potentially sensitive information (Lovelock 2008, p512). However unlike 'off the record' evidence which is not recorded, 'in-camera' evidence is generally still recorded by Hansard leaving open the possibility that a committee may decide later on to publicly release the evidence if it considers that appropriate. A common reason for not providing papers is that they are private and irrelevant (see Clark 2007, p149)

Possible remedies

Odgers 'Australian Senate Practice' outlines a range of possible remedies (and also some potential problems) regarding senate dealings with non-cooperative witnesses.

Remedies against executive refusal of information... the principal remedy which the Senate may seek against an executive refusal to provide information or documents in response to a requirement of the Senate or a committee is to use its power to impose a penalty of imprisonment or a fine for contempt, in accordance with the Parliamentary Privileges Act 1987. ...there are practical difficulties involved in the use of this power, particularly the probable inability of the Senate to punish a minister who is a member of the House of Representatives, and the unfairness of imposing a penalty on a public servant who acts on the directions of a minister. A penalty imposed for contempt may be contested in the courts under the Parliamentary Privileges Act ... It is possible, but unlikely, that the courts in such a challenge could determine a claim of public interest immunity... The Senate may impose a range of procedural penalties on a government for a refusal to provide information or documents, ranging from a motion to censure a minister... to a refusal to pass government legislation. The Senate has, however, usually been reluctant to resort to the more drastic of these kinds of measures. (Odgers 2008, p488)

Harris argues that committee punitive powers are likely to remain untested for the foreseeable future with, committees preferring to rely on voluntary assistance and co-operation of witnesses rather than compulsion and Courts being reluctant to intervene in the affairs of the Parliament (Harris 2005, p647).

As discussed above, the senate has resolved that it would be unfair to prosecute any public servant who on the instructions of a minister, declined to cooperate with a senate inquiry. Evans relates in 2002 that the senate bypassed a bill that would have seen future government claims of immunity determined by courts. Evans said:

...the Senate Privileges Committee recommended against, and the Senate did not consider, a bill which would have turned government claims of public interest immunity into legal questions to be resolved by courts This left non-cooperation by governments squarely in the political field. (Evans 2002, p 138)

A political rather than legalistic approach is also applied in other jurisdictions. In South Australia, for example, an uncooperative public servant is more likely to be given an opportunity to go 'in-camera' or 'off the record' to explain why they feel unable to answer questions, than to be reprimanded by a committee. In extenuating circumstances an uncooperative witness may be reprimanded and possibly named in parliament; however that is likely to be the extent of the punishment. In many instances when faced with non-cooperation, a committee may simply choose to take no further action and move on to more productive pursuits. (K Cudarans 2009, pers. comm., 30 October) However, according to Evans (2002 p139), the problem of non-cooperating government officers has not yet been resolved in any jurisdiction.

In South Australia (as in other jurisdictions) it is a matter of convention; (and it has been suggested law), that cabinet documents cannot be supplied to committees. This is not generally contested by committees, who respect cabinet privilege. However,

an expansive definition of ‘cabinet document’ in South Australia has provided departments with an opportunity to withhold documents that may not have been covered by a more narrow definition. As such, in 2009 the Natural Resources Committee was refused documents on the basis that they were ‘*used in the preparation of a Cabinet document*’ (Parliament of South Australia 2008, p19). Crown law advice received by the committee (Crown Solicitor 2008) found that cabinet documents were documents that ‘*disclose the internal deliberations of Cabinet*’. This advice also stated that whether any particular document fitted this definition could only be determined by individual and careful consideration of the document and the circumstances surrounding the document in question, and that great care needed to be taken to ensure the deliberations of cabinet were not disclosed. The issue in this instance was that the ‘careful consideration’ was undertaken by the same department that had previously been seeking to withhold documents rather than an disinterested third party. Thus, an independent determination of whether the documents should be considered privileged was prevented.

This claimed exemption and blanket justification is similar to that used to respond under Freedom of Information (FOI) legislation. While document requests from parliamentary committees are not covered by FOI, members frequently use FOI to request documents subsequently used in committee hearings and departments treat committee requests in much the same way as FOI requests. Indeed, in his annual report for 2008/2009, the SA Ombudsman concluded that cabinet document immunity was being misused in order to prevent the release of documents sought under FOI and suggested amendments to the legislation to improve transparency and accountability, in particular in regard to exemptions.

I note that interstate and Commonwealth FOI legislation apart from NSW, does not have such a broad exemption as clause 1(1)(e). I consider that an exemption worded to exempt access to documents revealing rather than concerning a decision or deliberation of Cabinet would be more appropriate, and would protect Cabinet confidentiality and also conform to the objectives of the FOI Act. (Ombudsman 2009, p2)

In addition the Ombudsman considered that decisions to prevent access on the basis of Cabinet privilege need to be properly justified ‘by reference to specific exemptions, and specific information within documents. (p2)

When faced with less than cooperative public servants committees may prefer to approach the relevant minister directly. Harris relates one example of this occurring in 1977. Most instances would not be documented.

In 1977 a subcommittee of the Standing Committee on Expenditure was able to obtain important information, initially refused, after the Minister’s approval was obtained. No objection was raised to the committee’s subsequent publication of the evidence. The same committee was unsuccessful in certain other attempts to obtain information from the Government and brought this to the attention of the House in a report describing its first year of operation. The committee indicated that the Prime Minister had refused to provide it with two sets of documents, even on a confidential basis, on the ground that they were internal working documents.

Attention was drawn to the fact that the documents would have helped the committee to determine which matters under investigation it should concentrate upon and in turn would have enabled it to use its limited resources to greater advantage. The committee urged Governments, if necessary, to find ways of minimising restrictions on information to be made available to committees, for example, by providing documents with offending material removed. This latter course has in fact been followed on occasions. (Harris 2005, p664)

Harris argues that committees cannot operate on their own volition if documents are refused by a witness and must seek the support of the house:

... the most appropriate course of action for a committee faced with a refusal by a witness to produce specified documents would be to acquaint the House of the refusal so that it may make a determination (as with oral evidence). It would be inappropriate for a committee to take direct action to search for a copy or take possession of documents without first informing the House and seeking a determination from it. May cites disobedience to or frustration of committee orders for the production of documents as an instance of contempt. (p666)

NSW and Tasmania are unusual in that they have not adopted by statute the powers of the British system. NSW parliamentary powers rely on the principle of 'reasonable necessity' — that is, the Parliament assumes the relevant powers that it needs to discharge its functions (Lovelock 2008, p488). The state's *Parliamentary Evidence Act 1901* provides committees with powers to compel attendance of witnesses and requires them to answer questions. If a witness refuses to appear after being summoned they can be apprehended and forced to appear, (Lovelock p496) provided that they are a resident and are not an MP. Members can be 'invited' to appear as is the common practice in other jurisdictions. Unlike other jurisdictions, all witnesses are sworn in and give evidence under oath, serving to remind the witness of the importance of telling the truth. Such practice could be applied to other jurisdictions. Suspension of a government member has also been used to great effect:

In 1998 and 1999 the New South Wales Legislative Council succeeded in extracting information from the government by suspending the Treasurer, a member of the Council, from service in the Council, its power to do so having been upheld by the Court of Appeal: *Egan v Willis and Cahill* 1998 158 ALR 527; *Egan v Chadwick and others* 1999 46 NSWLR 563. Following this case the Council adopted the procedure of appointing an independent arbiter to assess any claims of public interest immunity arising from orders for documents. This procedure has worked successfully in several cases. (Odgers 2008, p489)

This remedy may not, however, attract the interest of other jurisdictions.

Conclusion

While various powers are available to parliamentary committees to enable them to conduct enquiries and strong punitive powers exist in all jurisdictions, these powers are rarely, if ever, used. Committees will generally try a range of alternative actions

to obtain the information or cooperation that is required. The process of pursuing and prosecuting a witness over their lack of cooperation has the potential to absorb a lot of time and resources and still not produce a result that members seek. The South Australian case discussed outlines a rare occasion of naming those deemed to have frustrated committee requests. Exercise of the full extent of powers possible under the law is low. Consequently uncooperative witnesses tend to go largely unpunished. Add to this the potential for political embarrassment if public servants are seen to be obstructing committee enquiries and disrespecting the parliament.

Given the ‘*hubris to which Australian governments and ministers are prone*’ (Evans 2002, p139) Australia is waiting for a ‘Watergate’ type scandal to arise to properly test (as yet untested) committee and house powers and procedures as they relate to uncooperative witnesses. ▲

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