ARTICLES

Limits to Select Committee Investigations — A New Zealand Perspective

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Abstract

In recent years there has been a widening of select committees' powers to conduct investigations, which they have utilised increasingly. This has given rise to numerous attempts to dispute the right of committees to carry out investigations, in the form of legal challenges, accusations that investigations are 'unconstitutional', or that they run counter to Standing Orders. These developments have effectively exposed the practical limitations to the investigatory powers of committees. This article focuses on the procedural issues committees have encountered, and it also touches on the limits of process and application, and seeks to establish what, if any, constraints the New Zealand Parliament's select committees operate under.

Introduction

The New Zealand Parliament's power to investigate is derived from that of the English House of Commons, a body which has been referred to as having potentially unlimited investigatory powers. References to the English Parliament as 'the grand inquest of the nation' date back to around 1600. In Howard v. Gossett[1] Lord Coleridge declared 'That the Commons are, in the words of Lord Coke, the general inquisitors of the realm, I fully admit: it would be difficult to define any limits by which the subject matter of their inquiry can be bounded'.

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1 Gossett v. Howard (1845) Note 3 at 379–380. See Neil Laurie, 'The Grand Inquest of the Nation — A Notion of the Past?', *Australian Parliamentary Review*, 16(2): 173 (2001).

New Zealand's adoption of the English Parliament's investigatory powers dates back to the 1850s, when Imperial legislation established the New Zealand constitution and confirmed the application of English law in New Zealand.[2] New Zealand, as a colonial legislature, took steps to define its common-law privileges by passing the Parliamentary Privileges Act 1856, and later the Parliamentary Privileges Act 1865, wherein it adopted all the powers and privileges of the House of Commons as at 1 January 1865.

A Trend for Widening Committee Powers

The New Zealand Parliament has progressively delegated its power of inquiry to its select committees. Currently there are 13 standing committees, established under Standing Order 188, each dedicated to a specific subject area: Commerce; Education and Science: Finance and Expenditure; Foreign Affairs, Defence and Trade; Government Administration; Health; Justice and Electoral; Law and Order; Local Government and Environment; Māori Affairs; Primary Production; Social Services; and Transport and Industrial Relations.

The other permanent committees are the Regulations Review Committee, Business Committee, Privileges Committee, Officers of Parliament Committee, and Standing Orders Committee. Committees are re-established at the beginning of each Parliament.

Until relatively recently committees could conduct only inquiries referred to them by the House;[3] then a change to Standing Orders in 1985 gave committees the power to initiate their own inquiries to 'examine the policy, administration and expenditure of departments and associated non-departmental government bodies'[4] related to their particular subject areas. The trend of a widening of investigative powers continued in 1996 when, on the recommendation of the Standing Orders Committee, the terms of reference for committee inquiries were broadened to allow committees to examine any matters related to their subject areas.[5]

New Zealand's select committees have considerable autonomy compared with their Australasian counterparts. Three main factors limit a committee's power of inquiry; its lifespan, constraints on terms of reference, and its ability to initiate

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2 The New Zealand Constitution Act 1852, and English Laws Acts 1854 and 1858, which confirmed the application of English law as at 1 January 1840.

3 Excepting the then Public Expenditure Committee which before 1985 had the power to form a subcommittee to 'examine the public accounts and the accounts of such corporations, undertakings and organisations as are in receipt of any money appropriated by Parliament, in such a manner and to such an extent as the committee thinks fit'. A speaker's ruling determined that this power could be used to inquire into a specific organisation or to inquire into a subject matter (including a policy matter). See Public Expenditure Committee, *Report on Inquiry into Devaluation*, 1984, I.12C

4 SO322, *Standing Orders of the House of Representatives*, 1986.

5 SO192(2), *Standing Orders of the House of Representatives*, amended 22 August 1996. See also Standing Orders Committee, *Review of Standing Orders*, 1995, 1.18A, p .40.

investigations. Australian state legislatures have various committee systems, and not all have permanent committees covering all subject areas. Ad hoc committees may be created by the House for a specific purpose, or investigations established by statute, in which case terms of reference clearly define the scope of investigations;[6] while other committees may be created with broader terms of reference but with a finite lifespan. There are also constitutional limitations to investigations in Australia. For example the federal structure in Australia and the existence of bicameral legislatures in some states place restrictions on the evidence that may be sought by various Houses.[7] By contrast New Zealand's legislative system is unicameral; Parliament's 13 subject committees may initiate investigations on any item within their broad subject areas; and each subject committee is permanent for the duration of each parliament.

Investigatory Options and the New Briefing Function

It should be remembered that committee investigations encompass other items of business besides inquiries. Issues warranting deeper investigation may arise out of a committee's consideration of any item of business. Such an item may be a bill, petition, financial review, Estimate, Supplementary Estimate, international treaty examination or 'any other matters' (Standing Order 189(1)).

Committees may also conduct investigations using a new 'briefing' function. The power to conduct briefings on matters in a committee's subject area arose from a review of Standing Orders in 2003. Between 1986 and 1996 committees had wide but tightly defined powers to initiate their own investigations into the policy, administration and expenditure of departments and associated non-departmental government bodies in their subject area. From 1996 to 2003 Standing Orders specified that committees could inquire into any matters at all related to their subject area. However, there was no specific authorisation for a committee to receive ad hoc briefings on matters related to its subject area. In practice this meant that each briefing was defined as an inquiry. To clarify matters Standing Orders were revised to specify that committees may 'receive briefings on, or initiate inquiries into, matters related to their respective subject area'.[8]

The intention of the new briefing function is to allow committees greater freedom to conduct preliminary or ad hoc investigations into issues of concern or interest that may arise during the committee's consideration of an item of business. It provides for more flexible arrangements because it constitutes another option for investigation, avoiding the need for a full-scale inquiry where the committee is satisfied that its initial investigations do not raise issues of serious concern. During

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6 See Laurie, 'The Grand Inquest of the Nation'.

7 See Harry Evans, The Parliamentary Power of Inquiry: any limitations? *Australasian Parliamentary Review*, 17(2): 131–9 (2002).

8 SO189(2), *Standing Orders of the House of Representatives*, amended 16 December 2003.

a briefing a committee may receive information, ask questions, and request further material. Committees can also hold a series of briefings on an item of interest and, where continuing concerns require monitoring the committee might continue to gather information behind closed doors, without the outside pressures and expectations that a formal inquiry would elicit.

Legal Challenges; Inquiries Contravening Statutes

In September 2000 the Education and Science Committee of the 46th Parliament resolved to exercise its powers under Standing Orders 189(2) and 190[9] to conduct financial review inquiries of public tertiary education institutions, on a cyclical basis. A potential barrier to these inquiries emerged in that sections 160 and 161 of the Education Act 1989 provide for the preservation of the independence and academic autonomy of tertiary institutions. In recognition of these provisions, the committee wrote to all tertiary institutions informing them that in conducting these inquiries it would bear in mind the academic freedom provisions of the Education Act 1989.

There was considerable opposition to the inquiries from parts of the education sector. First and foremost, the legality of the inquiries was challenged. It was claimed that 'the inquiries proposed by the select committee are precluded by the statutory scheme provided for by Section 161 of the Education Act', [10] which guarantees the academic freedom and institutional autonomy of tertiary institutions.

Further objections were raised. Interestingly, there was an attempt to argue that Standing Orders prohibited the inquiries. The delegated authority of the committee to conduct the inquiries was challenged on the basis that Standing Orders 329 and 330 confined committees' powers of financial review to government departments, crown entities, state enterprises and other public-sector agencies. These arguments were dismissed by the Education and Science Committee, which noted that that Standing Orders 329 and 330 (now numbered 328 and 329) do not preclude other inquiries. Furthermore, their report noted that Standing Orders 189 and 190 (now 188 and 189) actively provide for such inquiries. The institutions were pointedly informed that Standing Orders are rules created and interpreted by Parliament, and that it was highly unusual for a challenge to a committee's interpretation of its terms of reference to be made from outside the House.

Another argument offered was that the inquiries were unnecessary given that accountability mechanisms already exist in the Education Act 1989 and the Public Finance Act 1989. The committee was undeterred, observing that neither statute

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[9] Under these Standing Orders (1999) the committee could inquire into matters related to education, education review, industry training, research, science, and technology.

[10] Memorandum for the Education and Science Committee on behalf of Universities' Chancellors and Vice Chancellors, Appendix A of Education and Science Committee, *Review Inquiries of public tertiary education institutions*, July 2001, 1.2A [unpaginated].

imposed any restriction to a potential select committee inquiry. The committee suggested there could also be benefits to a parallel system of parliamentary accountability. In noting that in the 2000/01 financial year more than $1.3 billion of public money was appropriated to tertiary education and training providers, the committee said, 'Parliament authorises the expenditure of public money and as a condition of that authorisation Parliament is entitled to exact accountability from any recipient, including the tertiary sector.'[11]

The committee has since proceeded with several reviews of particular tertiary institutions[12] on the basis that it would not recommend changes to 'the academic, operational, and management decisions of the institutions.'[13] In doing so the committee took on board the advice of the Clerk of the House, David McGee, in respect of the Education Act 1989:

> Whether ss160 and 161 are directly binding or not, they express values in respect of tertiary institutions which Parliament has seen fit to express…while they stand it is incumbent on a select committee to respect the law that members have passed. Consequently I believe that the committee should take s.161(2) in particular into account in framing procedures for the inquiries that it proposes.[14]

Nevertheless, the committee's decision to observe the principles of academic freedom, as codified in section 161(2) of the Act, was a self-imposed restriction. The committee did not concede that it could not conduct an investigation, or that such an investigation was in contravention of the Act.

Implications of Legal Challenge

As a direct legal challenge to the committee's decision to conduct the inquiries did not eventuate it is impossible to know what the outcome would have been had the courts been forced to consider the matter. Philip Joseph, counsel for the universities chancellors and vice chancellors who opposed the inquiries, later stated his view that legal action might have been brought successfully by the tertiary institutions, and an injunction placed on the inquiry.[15] Another possibility might be legal action in response to any adverse findings of an inquiry.

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[11] Education and Science Committee, *Review Inquiries of public tertiary institutions*, July 2001, I.2A [unpaginated].

[12] Southland Institute of Technical Polytechnic, Victoria University, Northland Polytechnic and the Wananga o Aotearoa.

[13] *Review Inquiries of public tertiary institutions*, July 2001.

[14] David McGee, Report and Advice to the Education and Science Committee on its proposed reviews of tertiary institutions, 15 March 2001, p.7.

[15] Philip Joseph, Report on Submission of Counsel for the Commerce Commission in response to Draft 'Findings' on Petition of Mr John Dickson: 1996/930: The Inquiry Powers of the Commerce Committee to Review Decisions of the Commerce Commission under the Commerce Act 1986, May 2002, p.11.

It is well understood that while Parliament makes and can change the law, it must also abide by the law as it is at the time. The fact that it is a sovereign law making body and could conceivably change the law, does not mean it does not need to follow it. However, courts have not seen it as their role to enforce or supervise Parliamentary compliance with legislation. This arises from the principle that Parliament and the courts avoid interference in each others processes. This was recently reasserted in a case involving an attempt by an individual to force a select committee to receive a submission on a bill was considered by first the High Court, and then the Court of Appeal in 2004. The Court of Appeal affirmed the position of the High Court: 'Neither the High Court nor this court can intrude inappropriately into the business of Parliament. This is because of the critical importance of the separation of powers between Parliament and the Courts'.[16]

In the case of the tertiary inquiries, Mai Chen noted that to prove that the committee was acting *ultra vires* would have been 'exceedingly difficult to do due to parliamentary privilege and Article 9 of the Bill of Rights 1688'.[17] However, Joseph has argued that in this instance Article 9 might be exempted on the basis that Parliament intentionally limited its power to conduct inquiries in this area by legislation. 'It is untested whether Article 9 would prevent challenge in the courts. Article 9 is a general provision that arguably would yield to context-specific legislation, where the legislation exhibits an intention to oust Parliament's inquiry function'[18].

The key area of debate here is whether the Education Act 1989 exhibits an intention to oust Parliament's inquiry function. Parliamentary privilege may be abrogated, explicitly or, by implication, by way of legislation. However if it were not explicitly abrogated it would usually require necessary implication; that is, the legislation would have to be unworkable or of no effect unless this meaning were taken.

It would be extremely difficult to argue that the Education Act 1989 exhibits an intention to constrain Parliament's inquiry powers. The Clerk of the House has given his opinion that 'it would be unusual in the extreme if statute law was directed to apply in respect of the proceedings of the House so as to *prohibit* the House from doing something'.[19] In this instance the object of the Act, as defined in section 160, is to give institutions 'as much independence and freedom to make academic, operational, and management decisions as is consistent with the nature of the services they provide, the efficient use of national resources, the national interest

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[16] Judgment of the Court delivered by Hammond J, In the Court of Appeal of New Zealand, CA191/04, dated 26 October 2004. Refer also to Judgment of Fogarty J, In the High Court of New Zealand. Christchurch Registry, CIV 2004-409-001014, dated 29 June 2004, and Queen v Attorney-General, High Court, Christchurch Registry, CIV 2004-409-000543, 19 April 2004.

[17] Mai Chen, Government Inquiries: a public law tool, paper delivered at the 4th New Zealand Public Law Forum 'Public Law 2002', Wellington, 16–17 April 2002.

[18] Philip Joseph, Report on Submission of Counsel for the Commerce Commission, p.11.

[19] David McGee, Report and Advice to the Education and Science Committee on its proposed reviews of tertiary institutions, 15 March 2001, p. 2. Original emphasis.

and the demands of accountability'. It would be difficult to argue that the object of the Act is predominantly the preservation of academic autonomy over all other matters. Section 161(4) specifies 'Councils and chief executives of institutions, Ministers and authorities and agencies of the Crown' as being obliged to act so as to give effect to academic freedom. However, it is not clear that this requirement encompasses the House of Representatives. Joseph on behalf of the tertiary institutions argued it did, the Clerk of the House took the contrary view.

If a court were to accept the argument that it should issue an injunction preventing a parliamentary committee from taking some course of action on the grounds that it was acting in breach of the law, it is almost certain that the Speaker would refer the matter to the Privileges Committee for consideration. In effect, it would constitute a process issue for Parliament. Parliament may decide that the law should be changed to make it explicit that an inquiry by a committee is legitimate or it may clarify that the prohibition applies equally to Parliament.

'Unconstitutional' Inquiries

There have been various challenges to committee investigations based on claims that such investigations are breach constitutional conventions, the explicit or implicit requirements of statute or the Standing Orders. Most of these have been ill-founded or raised in inappropriate forums. Examples outlined below raise two issues: whether a parliamentary committee is authorised to look into the affairs of a quasi-judicial body, given the doctrine of the separation of powers, and whether a committee can or should investigate an identifiable individual.

Case Study 1 — the Dickson Petition

In 1996 the Commerce Committee began considering the Petition of John A Dickson, which requested an investigation into, and compensation for, certain activities of the Commerce Commission.[21] This prompted an in-depth investigation by the Commerce Committee into the Commission. Counsel for the Commerce Commission claimed that 'For Parliament to comment on the correctness of Decision 172 would be unconstitutional'.[22] Bearing in mind the parliamentary

[20] Judgment of the Court delivered by Hammond J, In the Court of Appeal of New Zealand, CA191/04, dated 26 October 2004. Refer also to Judgment of Fogarty J, In the High Court of New Zealand. Christchurch Registry, CIV 2004-409-001014, dated 29 June 2004, and Queen v Attorney-General, High Court, Christchurch Registry, CIV 2004-409-000543, 19 April 2004.

[21] The initial petition was presented in the 46th Parliament in 1996, but was not carried over to the 47th Parliament. It was re-submitted in the 47th Parliament in 2002, as Petition 2002/6 of John Andrew Dickson, requesting that an inquiry be launched into activities of the Commerce Commission regarding the investigation of complaints lodged by Dickson Lambeth & Associates and Dickson Livestock, and that the petitioner be compensated.

[22] Submission from Counsel for the Commerce Commission in response to Draft 'Findings' on petition of Mr John Dickson: 1996/930, paragraph 15.2

convention against commenting on a judicial finding the committee sought further advice[23] and reported:

> The advice from Joseph stated the Commission is not a Court of Record it is an independent statutory body constituted under section 8 of the Commerce Act 1986. It is designated a Commission and is deemed to be a body corporate with perpetual succession. The Law Commission has identified the Commission as a specialist administrative body. Professor Joseph states that by petitioning Parliament and asking for an inquiry Mr Dickson does not challenge the binding force of Decision 172. A legally impeachable decision is presumptively valid and binding, unless and until it is successfully challenged in the courts.

The committee refrained from commenting on whether the decision made by the Commission was right or wrong. Significantly though, it reserved the right to look into the issues raised by the case: 'The courts have never questioned the validity of the decision itself. If the majority were convinced that the Commission had made such an error that we considered it negligent or incompetent we would not hesitate to comment.' The committee's report also included minority views, which did not refrain from criticising the competency of the Commerce Commission: 'a reasonable person would have to conclude that the Commission performed incompetently with respect to Decision 172'. The committee claimed the right to comment on the validity of a legal decision by differentiating between its right to question the performance of an independent statutory body on the one hand and criticising the activities of a Court of Record, an action that would be inconsistent with the doctrine of the separation of powers, on the other.

Case Study 2 – Inquiry into Dr Parry

The Health Committee's inquiry into Dr Parry, initiated in 2001, was fraught with difficulties. Several high-profile investigations into Dr Parry had already been conducted by various bodies in response to complaints by former women patients of mistreatment and negligence.[24] Dr Parry's lawyer claimed that there had never been a select committee inquiry 'personalised into an individual' and that the inquiry was 'unconstitutional.[25]

Having decided to conduct the inquiry the committee had to navigate several potential pitfalls. Standing Order 199 states that committees cannot inquire into allegations of criminal activity by a recognisable individual without the express authority of the House. As the individual was clearly recognisable, the committee

[23] Philip Joseph, Report on Submission of Counsel for the Commerce Commission in response to Draft 'Findings' on Petition of Mr John Dickson: 1996/930; The Inquiry Powers of the Commerce Committee to Review Decisions of the Commerce Commission Under the Commerce Act 1986.

[24] Including an audit by the Ministry of Health, and investigations by the Health and Disability Commissioner and by the Complaints Assessment Committee of the New Zealand Medical Council, which brought four disciplinary charges, two resulting in 'unbecoming' findings.

[25] Harry Waalkens, reported in 'The many trials of Dr Parry', *New Zealand Herald*, 30 October 2004.

avoided the issue of an inquiry into criminal conduct by framing its investigation around 'the adverse affects on women as a result of treatment by Dr Graham Parry', and by constructing its terms of reference very carefully. While it is quite clear that the theoretical distinction between criminal activity and professional misconduct is stark, this case showed that in practice the distinction is readily blurred.

Dr Parry sought assurance from the committee that what his lawyer described as his 'constitutional' rights would be guaranteed.[26] The select committee chairperson wrote back noting that 'select committees have in place two constitutional protections for these instances. First there is the natural justice requirement…Secondly is the *sub judice* requirement'.[27] The use of the term 'constitutional' on both sides is, perhaps, overstating the case.

The first requirement, natural justice, requires that if allegations are made that may seriously damage the reputation of an individual that person must be given the opportunity to respond. The NZ Bill of Rights Act 1990 sets out that everyone has the right to the observance of principles of natural justice.[28] Section 3 applies the Act to the legislature.[29] Parliament has also included specific processes for following natural justice principles in Standing Orders 232 to 238. While natural justice principles were observed and Dr Parry was given opportunity to respond to allegations, the inquiry demonstrated certain weaknesses inherent in the provision of natural justice by committees.

The nature of the inquiry meant it was clear from the outset that allegations would be made which would be harmful to the reputation of Dr Parry. The inquiry was instigated in full knowledge of the likelihood of sustained allegations damaging to Dr Parry's reputation. The sustained succession of allegations meant any response had little hope of deleting the negative perception formed in the public consciousness. In this context the protections afforded by the Standing Orders, while ensuring Dr Parry could respond to allegations, fell short of the protection he felt he needed — a protection from being exposed to the allegations in that forum in the first place.

The *sub judice* requirement, now specified in Standing Orders 111 and 112, prohibits parliamentary consideration of matters awaiting or under adjudication in any court of record 'if it appears to the Speaker that there is a real and substantial danger of prejudice to the trial of the case'. In determining the boundaries of the committee's investigation there was some debate over what constituted a court of

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[26] Letter from Christopher J Hodson QC to Judy Keall MP, (Chairperson Health Committee) 17 July 2001.

[27] Letter from Judy Keall MP, to Christopher J Hodson QC, dated 20 July 2001.

[28] Bill of Rights Act 1990, section 27(1)

[29] Bill of Rights Act 1990, section s3 'This Bill of Rights applies only to acts done
(a) By the legislative, executive, or judicial branches of the government of New Zealand; or (b) By any person or body in the performance of any public function, power, or duty conferred or imposed on that person or body by or pursuant to law.

record. Counsel for Dr Parry asserted that the committee should be constrained by the decisions of the Medical Practitioners Disciplinary Tribunal as if it were a court of law. Clearly it is not, and the committee advised Dr Parry's counsel accordingly.[30] However, even though the sub judice rule did not apply, the principle behind had some application and the committee was aware of the need to tread carefully.

While the Health Committee walked a very fine line in conducting its inquiry, it did attempt to adhere to Standing Orders. The committee's actions represented an innovative way of circumventing a potential restriction of its powers.

Unconstitutional Conclusions

The term 'unconstitutional' is often used loosely to voice disapproval at a perceived intrusion of parliamentary power. This may happen where the parliamentary power in question is being exercised in a way that runs contrary to popular understandings of rights such as those derived from common law or human rights legislation. It is important to see these assertions for what they are, a rhetorical device. It is not viable to argue that an action by a committee is 'unconstitutional' when that committee's powers are derived from the House of Representatives, whose role in the constitution is well established.[32] Where a committee's actions are in accordance with the rules of parliament a challenge to its authority pitched against New Zealand's 'constitution' would not have any sound basis for success.

Statutory Secrecy —— A Stumbling Block for Committees

In recent years several challenges have arisen for committees conducting inquiries when they have sought information that is protected by statutory secrecy provisions. There is some ambiguity over whether statutory secrecy provisions in legislation may, by implication, limit parliament's power to seek persons, papers, and records. Because there is no clear guidance on whether statutory secrecy provisions in statutes apply to committees, committees are required to approach each situation case by case and to seek a workable solution. A suggestion for clarifying the position was put forward by Philip Joseph in 1995. In a submission to the Standing Orders Committee he recommended that legislation provide for Parliamentary select committees to be exempt from secrecy provisions. His proposal has not been adopted.

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[30] Letter from Judy Keall, Chairperson Health Committee to Christopher Hodson QC, dated 16 October 2001 and letter from Christopher Hodson QC to Judy Keall dated 28 August 2001.

[31] Letter from Judy Keall, Chairperson Health Committee to Christopher Hodson QC, dated 16 October 2001 and letter from Christopher Hodson QC to Judy Keall dated 28 August 2001.

[32] See for example the Cabinet Manual, 2001, Cabinet Office, Department of Prime Minister and Cabinet, Wellington, New Zealand, http://www.dpmc.govt.nz/cabinet/manual/index.html

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To date committees have avoided attempting to override statutory secrecy provisions. During the Inquiry into Financial Procedures at RNZAF Ohakea in 1994 the Foreign Affairs and Defence Committee sought information protected by statutory secrecy provisions in the Serious Fraud Office Act 1990. The Director of the office handed the material over to the committee in the exercise of his discretionary power in the Act to release information to any person he was satisfied had a proper interest. In its report to the House the committee noted the importance of respecting information otherwise protected by statute, but also asserted its right of access: 'the committee would not wish any public sector organisations to operate under the impression that their activities cannot be scrutinised by the House of Representatives'.[34]

Other conflicts between information requests and statutory secrecy provisions have been harder to reconcile, such as one that arose in the Inquiry into the New Zealand Fire Service Commission by the Internal Affairs and Local Government Committee in 1998. When seeking a copy of a report relevant to the inquiry the Committee was advised by the Commission that this information was secret and could not be released without breaching section 51B of the Fire Service Act 1975. The committee received advice on the issue and spent considerable time considering its options. While one option was to receive the report from a previous Chief Executive of the Fire Service, the committee set this against the advice it had received, and made a judgment that on balance the public interest was not as great as the importance of ensuring that confidentiality was not compromised by release of the material. Therefore a motion to receive the report was tied, and lost, as was a motion to receive the report in secret.

Similarly, during the Finance and Expenditure Committee's inquiry into the Inland Revenue Department in 1999, the committee's ability to invoke papers was claimed to be restricted by the secrecy provisions of the Tax Administration Act.[35] In this instance the Solicitor-General advised the committee that, while the wording of the secrecy provision provided that the departmental officers' obligation to maintain confidentiality could be set aside in certain circumstances,[36] those circumstances did not include the select committee's inquiry. The committee acquiesced: 'In effect the committee has an obligation to obey the law. It is up to the committee to determine a way to reconcile its desire for information with any secrecy provisions that might apply'.[37] However, as in the report of the inquiry by the Foreign Affairs and Defence Committee, an ambiguous reservation was added: 'while we were not

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[34] Foreign Affairs and Defence Committee, Inquiry into Financial Procedures at RNZAF Ohakea, 1994, I.4A, p.4

[35] Finance and Expenditure Committee, Inquiry into the powers and operations of the Inland Revenue Department, 45th Parliament, Oct 1999, I.3I.

[36] The only exceptions being communications 'for the purpose of carrying into effect' the Inland Revenue Acts.

[37] Finance and Expenditure Committee, *Inquiry into the powers and operations of the Inland Revenue Department*, 45th Parliament, Oct 1999, I. 3I, p. 10

strictly bound by the law to observe the secrecy provisions, we still had an obligation to take account of them'.

The prevailing line of thought, as illustrated by the advice given by the Solicitor General and the Clerk of the House, is that committees should take into account the spirit of legislation and give effect to the values of secrecy provisions. Further to this, the Standing Orders Committee recently addressed the issue of whether a committee is obliged to respect statutory secrecy provisions, and established some general useful guiding principles.[38] Its report highlights the obligation for committees to consider seriously the reasons for, and potential impact of, requesting information subject to statutory secrecy provisions. Interestingly, it implies that there is some possibility that the Speaker may decline to issue a summons for information that an agency maintains is subject to statutory secrecy provisions.

Legal Professional Privilege and Commercial Sensitivity

Information is sometimes denied to a committee on the grounds of legal professional privilege: that is, that the release of the information would be counter to the confidentiality of the lawyer-client relationship, and might compromise the outcome of legal action by allowing legal opinions to be turned over to the other parties. The prevailing opinion is that committees should respect legal professional privilege. The Standing Orders Committee noted in its 2003 review of Standing Orders, 'Legal professional privilege is a legitimate basis under common law for withholding documents in legal proceedings. It may be possible to find a workable solution such as the willing provision of a summary or extract of an opinion'.

Commercial sensitivity or 'commercial in confidence' is also increasingly being claimed as grounds for denying committees access to information. In practice committees have been loath to demand information where there are genuine grounds for keeping the information confidential, and have sought to strike a balance by either withdrawing the request where the information is not explicitly necessary to its investigation, or receiving the information in private or in secret. Striking this balance is a continuing source of tension for committees. In a recent financial review report the Education and Science committee noted:

> we consider that where information has been withheld for reasons of commercial sensitivity, we should undertake to respect this wherever possible. In doing so in this case we note that we were limited in our ability to hold to account Venture Investment Fund's investment performance due to the unique contractual arrangements of the investments. We will be monitoring and continuing to seek information regarding investment performance over the next 12 months.[39]

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[38] Standing Orders Committee, *Review of Standing Orders (2003)*, December 2003, I.18B, pp. 30–32.

[39] Education and Science Committee, *2003/04 financial review of New Zealand Venture Investment Fund Limited*, p. 4., http://www.clerk.parliament.govt.nz/Publications/CommitteeReport/ .

Access to information has also been an issue in Australia, where the incidence of 'commercial in confidence' claims has grown. For example, in the Australian Capital Territory increased outsourcing of government functions and involvement of private-sector funding in government projects has led to the passing of legislation (the Public Access to Government Contracts Act 2000) to provide a regime to make public, as far as possible, the terms of government contracts.[40]

In exceptional circumstances the committee can apply to the Speaker to require the supply of the information to the committee using Standing Order 197. However, the comments in the recent Report of the Standing Orders Committee on this matter,[41] highlight problems with this approach. There are also practical problems of trying to implement this power, as outlined below.

Practical limitations and the Application of Committee Powers

There are significant practical limitations to a committee's powers of investigation. Internal political pressures such as a lack of agreement among committee members and, commonly, the pressure to put investigations on hold and prioritise other items of business with pressing deadlines will affect the effectiveness of the committee's investigation. In this respect much depends on how cohesive the committee is and how effectively the Chairperson manages it.

The course of the inquiry may also be hampered by resourcing issues, such as the availability of independent advisers on a specialist subject; or a lack of public interest may affect the number and quality of submissions received.

It is a practical reality that committees are to a large extent reliant on the subject of their investigation cooperating and providing information if the inquiry is to be effective and credible. Most organisations that are to any extent accountable to Parliament elect to cooperate with committees inquiring into such organisations; but problems arise where organisations or individuals do not cooperate. In the cases discussed above, despite the opposition of tertiary institutions to examination by committee, and the challenges citing statutory secrecy provisions, it was not necessary for the committee's to attempt to utilise their power under Standing Orders 196 and 197 to demand the provision of persons, papers and records..

[40] See Tom Duncan, 'Has the Balance Been Struck? Access to Commercial in Confidence Information', *32nd Conference of Australian and Pacific Presiding Officers and Clerks, Wellington, New Zealand*, 1–6 July 2001.

[41] Standing Orders Committee, *Review of Standing Orders* (2003), December 2003, I.18B, pp. 30–32.

Persons Papers and Records — a Study

In June 1996 the Justice and Law Reform Committee exercised its right, under Standing Orders, to send for persons, papers, and records.[42] The committee resolved to direct that three witnesses be summoned to attend and give evidence on a petition before it,[43] and the summonses were served by the New Zealand Police. As the Standing Orders Committee subsequently noted, until this point the power to seek persons 'had not been formally exercised within living memory in New Zealand, and perhaps never at all'.[44] In this case the witnesses, who were gang members, did not appear. The committee considered options for compelling the witnesses to appear, including seeking an Order of the House, or seeking that the House punish the witnesses for contempt of Parliament.[45] On reflection the committee decided not to pursue the matter further.

This example starkly exposed the weakness of the power to seek persons, papers, and records, when applied to those who had no interest in complying. It led to the adoption of more rigorous guidelines in Standing Orders seeking to discourage committees from employing the power without serious consideration.[46] In 1999 the Standing Orders Committee observed:

> the power to order someone to attend and be examined before a committee, and to produce documents to the committee, is an extremely serious infringements of that person's civil liberties. It is possible that, if the power were misused or used in a clearly inappropriate manner, any attempt to enforce such an order could be challenged as an unreasonable search or seizure contrary to section 21 of the New Zealand Bill of Rights Act 1990.[47]

Standing Order 197 now prescribes that a committee wishing to issue a summons for the attendance of persons or provision of papers and records must apply to the Speaker, who may issue a summons if he or she is satisfied that the evidence sought is necessary to the committee's proceedings and that all other reasonable steps have been taken by the committee to obtain the evidence.

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[42] Standing Orders 203 and 204, *Standing Orders of the House of Representatives*, amended 22 August 1996.

[43] Justice and Law Reform Committee, *1993/606 Petition of D F E Harrington as Mayor and the Councillors of Invercargill City Council and Others*, 1996, I.7C.

[44] Standing Orders Committee, *Review of the Operation of the Standing Orders*, 1999, I.18B, p.16.

[45] Penalties the House could impose included imprisonment, fine, censure, exclusion from the precincts of Parliament, and requiring an apology.

[46] Amendments were made to the *Standing Orders of the House of Representatives* on 8 September 1999.

[47] Standing Orders Committee, *Review of the Operations of Standing Orders*, 1999, I 18B, p.16.

Conclusions

In recent years select committees have been increasingly exercising their investigatory powers in an adventurous and confrontational way. Naturally this has resulted in challenges from those who feel their interests have been affected by the committee's actions. This is especially the case where the institutions investigated are either non-governmental or, although they are in the government sector, have normally enjoyed a high degree of independence.

It remains unclear where the boundaries lie with regard to committee investigations. This is partly because there has been no definitive decision in the courts on this matter, but also because committees have not as yet attempted to test the full potential of their parliamentary inquiry powers. Where outside bodies have challenged the actions of a committee on the basis of a possible conflict between statutory or common-law rights and the powers of select committees, committees have tended to respect these rights and have not fully tested their powers.

It is likely that the next few years will see select committees continue to test the boundaries, and it is reasonable to assume that this will prompt further opposition. Ultimately these developments can be viewed as a part of a wider evolutionary process in which the boundaries of Parliament's investigatory powers have been, and continue to be, explored. ▲