

The power to compel the attendance of witnesses and the giving of evidence before committees – lessons from the NSW Legislative Council

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Abstract: It is well-established that the central purpose of parliamentary committees is to perform functions which the houses themselves are not well equipped to perform. This includes conducting inquiries, hearing from witnesses, examining evidence and formulating conclusions based on the information presented to them. In order to ensure this occurs, Australasia’s parliaments have legislated or delegated the requisite powers. These powers include provisions to compel witnesses to appear, to produce papers and to impose penalties for non-compliance. This paper explores the New South Wales committee system and operation of the Parliamentary Evidence Act 1901 as experienced by a Legislative Council committee inquiry in 2022-2023.

INTRODUCTION

It is well-established that an essential function of Australia’s parliamentary committees is to conduct inquiries. As a result, Committees are delegated powers to carry out specific tasks including but not limited to, the ability to take submissions, hear evidence and report their findings. Further, among these powers is the ability to summon witnesses, order the production of documents and compel witnesses to appear or answer questions. Most Australian jurisdictions have adopted the privileges of the House of Commons or have legislated in this area. However, the privileges of the Houses of New South Wales derive from the common law test of necessity, as well as certain statutes including Article 9 of the Bill of Rights. Additionally, the *Parliamentary*

Evidence Act 1901 (NSW) governs the powers of committees to compel witnesses to attend hearings and give evidence.

In late 2022, early 2023 the Legislative Council's Portfolio Committee No 7 - Planning & Environment's inquiry into allegations of impropriety against agents of the Hills Shire Council and property developers in the region tangibly demonstrated the limitations of the *Parliamentary Evidence Act* and highlighted potential negative consequences for committee scrutiny of issues relevant to the community. The interaction between the *Parliamentary Evidence Act*, historical criticisms, the behaviour of witnesses during the conduct of the inquiry and examples of the arrangements utilised by other Parliamentary jurisdictions to address compulsion and contempts are examined below.

THE PARLIAMENTARY EVIDENCE ACT 1901

While most witnesses called to appear before New South Wales' Legislative Council committees appear voluntarily, a committee may summon a witness to give evidence under Section 4 of the *Parliamentary Evidence Act*, which states:

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

(2) Any such person may be summoned to attend and give evidence before a committee by an order of such committee signed by the Chair thereof and served as aforesaid.¹

Prior to 2000, Legislative Council committees routinely summoned all witnesses other than members.² However, on advice from Bret Walker SC 'that summoning witnesses

¹ *Parliamentary Evidence Act 1901* (NSW), s 4.

² Stephen Frappell and David Blunt, *New South Wales Legislative Council Practice: Second Edition*, Sydney: The Federation Press, 2021, p. 797.

as a general practice was supererogatory, and should be avoided,³ since 2000 there are very few examples of committees summoning witnesses to attend and give evidence.⁴

While the threat of being summoned is often enough to convince reluctant witnesses to appear before a committee, there are a number of situations where a committee may summon a witness, including:

- where a witness declines an invitation to give evidence voluntarily;
- where a witness has refused to provide certain information to committees voluntarily;
- where a witness specifically requests that they be summoned in order to ensure the protection of parliamentary privilege, although a summons is not in fact required to ensure that parliamentary privilege applies.⁵

In accordance with section 4(2) of the *Parliamentary Evidence Act*, if a summons is issued, it must:

- specify the name of the committee and inquiry to which the summons relates, including the time, date and place of the hearing;
- be signed by the committee chair on behalf of the committee;
- state a particular purpose, such as to answer specific questions or to produce particular documents; and,
- be served on the recipient personally.⁶

³ Frappell and Blunt, *New South Wales Legislative Council Practice*, 2021, p 797.

⁴ Frappell and Blunt, *New South Wales Legislative Council Practice*, 2021, p 797.

⁵ Frappell and Blunt, *New South Wales Legislative Council Practice*, 2021, pp. 797-798.

⁶ Frappell and Blunt, *New South Wales Legislative Council Practice*, 2021, pp. 799-800.

Service of a summons is usually undertaken by the Usher of the Black Rod or an officer of the Legislative Council and on service being effected it is usual practice for an affidavit of service to be prepared and presented to the committee.⁷

Additionally, s6 of the *Parliamentary Evidence Act* requires a summoned witness to be paid reasonable expenses of attendance. Failure to do so would likely constitute ‘just cause or reasonable excuse’ for a witness not to attend and give evidence before a committee as per s7 of the *Parliamentary Evidence Act*.⁸ If a witness is summoned and fails to appear without ‘just cause or reasonable excuse’, the committee can call on s7 to escalate the matter. This involves the committee reporting the matter to the President and requesting

*‘that the President certify the facts to a judge of the Supreme Court ... with a view to having the witness apprehended for the purposes of being brought before the committee to give evidence’.*⁹

Sections 8 and 9 then detail the issue of a warrant by a judge to apprehend the witness for the purpose of bringing the person before the committee to give evidence and allows for the person in question to be retained in custody ‘for the purposes of giving evidence, until discharged by order of the President’.¹⁰

In regards to the practical functioning of the *Parliamentary Evidence Act*, it is important to note a number of issues. Firstly, in order for the service of a summons to be effected, the summons must be personally served. To do so the nature of the summons must be explained to the person named on the summons and the summons must either be given to them or left in their presence if they refuse to accept it.¹¹ The primary reason for the requirement for personal service is very much a function of the time that the *Parliamentary Evidence Act* was enacted in 1901 and whilst most legal processes in

⁷ Frappell and Blunt, *New South Wales Legislative Council Practice*, 2021, p. 800.

⁸ Frappell and Blunt, *New South Wales Legislative Council Practice*, 2021, p. 800.

⁹ Frappell and Blunt, *New South Wales Legislative Council Practice*, 2021, p. 800.

¹⁰ Frappell and Blunt, *New South Wales Legislative Council Practice*, 2021, p. 801.

¹¹ Frappell and Blunt, *New South Wales Legislative Council Practice*, 2021, p. 800.

New South Wales can be served electronically, this does not apply to summonses required to be personally served.¹²

Secondly, while the Parliament of New South Wales has the constitutional power to legislate extra-territorially as established by High Court decisions and s2(1) of the *Australia Acts 1986*, it is unlikely that this would apply to the *Parliamentary Evidence Act* as it does not use explicit language to that effect.¹³ Additionally, given that the *Parliamentary Evidence Act* was enacted in 1901 it would be difficult to suggest or infer that the Parliament intended for a committee to be able to issue a summons to a witness that resided outside of New South Wales. Whilst an argument could be made that an extra-territorial extension of the operation of section 4 is required for the Act to fulfil its objective of providing the Legislative Council and its committees with the power to perform their legislative and scrutiny functions, it seems unlikely that the courts would find this way.

However, if a witness chooses to give evidence to a Legislative Council committee from another Australian jurisdiction, they are protected by national defamations laws enacted in all Australian states which extend to the publication of a matter in the course of the proceedings of a 'parliamentary body', including the giving of evidence. As a result, while interstate witnesses cannot be summoned, they can choose to give evidence from another jurisdiction with the protection of absolute privilege.

¹² Division 2 of Part 2 of the *Electronic Transactions Act 2000* (NSW) establishes a general presumption in New South Wales that requirements to provide information in writing can be met by means of electronic communications. Of note, Section 9 of Division 2 concerns instances under the law where a signature is required, and circumstances where that requirement is taken to have been met in relation to an electronic communication. However, section 5 of the *Electronic Transactions Regulation 2017* (NSW) specifically excludes a number of circumstances from the flexible signature requirements in the Act. They include under section 5(e) 'any requirement under a law of this jurisdiction for a document to be served personally or by post'. Due to the requirement in section 4 of the *Parliamentary Evidence Act 1901* (NSW) for summonses to be personally served, the effect of section 5(e) would appear to be that summonses cannot be validly issued if signed electronically. Other processes under section 5 of the Regulation that cannot be met with electronic signature including lodging, filing and signing documents in connection with legal proceedings and producing documents and evidence for judicial bodies.

¹³ Correspondence from Professor Gabrielle Appleby, University of New South Wales Law and Justice to the Clerk of the Parliaments providing legal advice on the power of committees to summon witnesses outside of the state of New South Wales, received 9 April 2021, p 7.

CRITICISM OF THE PARLIAMENTARY EVIDENCE ACT

While the *Parliamentary Evidence Act* provides committees with considerable powers relating to the summoning, attendance, and examination of witnesses there are a number of significant criticisms that call into question the practical application of the *Parliamentary Evidence Act*. Firstly, where a witness who is not a member of the Legislative Assembly or Legislative Council has been successfully served with a summons and then fails to appear before a committee without just cause, the *Parliamentary Evidence Act* allows for the non-member to be punished for contempt. Specifically, as previously mentioned, ss7 to 9 allow for the President of the Legislative Council or the Speaker of the Legislative Assembly to apply to the Supreme Court for a warrant to be issued that would allow for the person named in the warrant to be detained:

*... in custody, to the intent that the person may from time to time be produced for the purpose of giving evidence, or be remanded and finally be discharged from custody, pursuant to any order under the hand and seal of the President or Speaker.*¹⁴

Further, s11 allows for the detention of a witness if they refuse to answer a lawful question when before a committee. In this situation:

*... 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.*¹⁵

Additionally, if a 'witness wilfully makes any false statement, knowing the same to be false, the witness shall, whether such statement amounts to perjury or not, be liable to imprisonment for a term not exceeding five years.'¹⁶

¹⁴ *Parliamentary Evidence Act 1901* (NSW), s 9.

¹⁵ *Parliamentary Evidence Act 1901* (NSW), s 11.

¹⁶ *Parliamentary Evidence Act 1901* (NSW), s 13.

These are extraordinary provisions. Despite penal punishments being available to Australian, New Zealand and other Westminster Parliaments, they have, in the modern era, been used sparingly. As noted by Ohnesorge and Duffy, 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 Fitzpatrick and Browne in 1955 and Mr Brian Easton in Western Australia in 1995.¹⁷ In the case of Mr Easton the media portrayed the actions of the Western Australian Legislative Council as nonsensical. A Federal Minister at the time commented 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.¹⁸

It is not surprising that to date the Houses of the New South Wales Parliament have not attempted to enforce the penal punishments contained within the *Parliamentary Evidence Act*. In their paper examining the appropriateness of the powers of the *Parliamentary Evidence Act*, Ohnesorge and Duffy reflect that ‘political pressure and media scrutiny may be more persuasive than never-used punitive powers to persuade reluctant witnesses to co-operate with a committee.’¹⁹

The debate about the appropriateness of parliaments having a penal jurisdiction and its acceptance by the community has been ongoing for over a century²⁰ and it is likely that this will not be resolved in the near future. In the context of New South Wales, Ohnesorge and Duffy argued for the retention of strong powers to ensure compliance

¹⁷ Sharon Ohnesorge and Beverly Duffy, ‘Out of step? The New South Wales Parliamentary Evidence Act 1901’ *Public Law Review*, 27 (1) 2016, p 47.

¹⁸ H. Goodwin, A. Stewart and M. Thomas, ‘Imprisonment for Contempt of the Western Australian Parliament’, *The University of Western Australia Law Review*, 25 (1) 1995, p 196.

¹⁹ Ohnesorge and Duffy, ‘Out of step? The New South Wales Parliamentary Evidence Act 1901’, p 51.

²⁰ Joint Select Committee on Procedure in Cases of Privilege, Parliament of Australia, Progress Report, 1902, p 2.

with committee inquiries,²¹ however they proposed that the introduction of a *Privileges Act* alongside Senate-style privilege resolutions would:

*... provide an ideal opportunity to update s 11 [of the Parliamentary Evidence Act], and ... give thought to the argument that aspects of the Parliament's penal jurisdiction should be transferred to the courts.*²²

Additionally, they speculated that the introduction of Senate-style privilege resolutions would act 'to ensure that a fair and appropriate process is in place to deal with reluctant witnesses appearing at committee inquiries' and prevent misguided or politically motivated committees from setting an undesirable precedent by attempting to enforce the penal powers in the *Parliamentary Evidence Act*.²³

In 2018, the New South Wales Legislative Council, on the recommendation of its Privileges Committee adopted the 'Procedural Fairness for Inquiry Participants' resolution which outlines the procedures that Legislative Council committees must follow to ensure proper process and fair treatment for inquiry participants. Among other procedures, the resolution specifically provides that:

- witnesses are normally invited to appear at a hearing and a summons is only issued where a committee decides that it is warranted;
- witnesses are normally given reasonable notice of a hearing to which they are invited or summoned to appear, and are supplied with a copy of the committee's terms of reference, membership and other information prior to appearing;
- a committee chair will ensure that all questions put to witnesses are relevant to the inquiry, that is to say, within the terms of reference of the inquiry;
- with the prior agreement of a committee, witnesses may be accompanied by, and may consult, a legal adviser or support person;

²¹ Ohnesorge and Duffy, 'Out of step? The New South Wales Parliamentary Evidence Act 1901', p 51.

²² Ohnesorge and Duffy, 'Out of step? The New South Wales Parliamentary Evidence Act 1901', p 52.

²³ Ohnesorge and Duffy, 'Out of step? The New South Wales Parliamentary Evidence Act 1901', pp. 51, 53.

- witnesses may object to answering a question, and a committee should consider any such objection.²⁴

Additionally, witnesses must be treated with courtesy at all times which places a responsibility on committee members, and in particular the chair, to ensure that the questioning of witnesses is respectful and civil.²⁵

While undoubtedly a step in the right direction the introduction of the resolution was not accompanied by a review of the *Parliamentary Evidence Act* or the adoption of new legislation to ensure that witnesses are appropriately protected.

NEW SOUTH WALES LEGISLATIVE COUNCIL COMMITTEES AND THE PARLIAMENTARY EVIDENCE ACT

The 57th New South Wales Parliament from 2019 to 2023 saw a significant increase in the number of summons issued to ensure witness attendance and participation in inquiry hearings particularly towards the end of the parliamentary term. In some cases, witnesses were issued summons after expressing concerns about giving evidence due to confidentiality obligations and were apprehensive that parliamentary privilege alone would not protect them from legal proceedings as a result of evidence given to the committee.²⁶ However, there was also a small subset of witnesses that actively evaded the service of a summons after attempts to persuade them to appear voluntarily were unsuccessful. The following details the challenges encountered by Portfolio Committee No. 7 - Planning & Environment during its inquiry into allegations of impropriety against agents of the Hills Shire Council and property developers in the region.

²⁴ Frappell and Blunt, *New South Wales Legislative Council Practice*, 2021, pp. 818-819.

²⁵ Frappell and Blunt, *New South Wales Legislative Council Practice*, 2021, p 819.

²⁶ Public Accountability Committee, NSW Legislative Council, *Transport Asset Holding Entity*, Legislative Council (2022), p xii.

PORTFOLIO COMMITTEE NO 7 - PLANNING & ENVIRONMENT'S INQUIRY INTO ALLEGATIONS OF IMPROPRIETY AGAINST AGENTS OF THE HILLS SHIRE COUNCIL AND PROPERTY DEVELOPERS IN THE REGION

Background

On June 23 2022, Ray Williams, Liberal member for Castle Hill, made a number of allegations in the New South Wales Legislative Assembly about the preselection of Liberal candidates for the Hills Shire Council election in December 2021 and raised concerns about the interactions between the council and property developers in the region.²⁷ As a result, on 8 December 2022, Portfolio Committee No 7 - Planning & Environment resolved to inquire into allegations of impropriety against agents of the Hills Shire Council and property developers in the region.²⁸

By way of context, New South Wales' Legislative Council's Portfolio Committees consist of seven members including three government members, two opposition and two cross bench members.²⁹ The Coalition Government was therefore in a minority on the committee. In regard to the Hills Shire Council, at the time of the inquiry, nine of the thirteen council positions were held by Liberal party members. This included the position of Mayor and Deputy Mayor.

From the establishment of the inquiry, the committee had approximately three months to conduct its investigation due to New South Wales' general election which occurred on Saturday 25 March 2023. The government was prorogued on Monday 27 February however committees were able to transact business until the expiry of the Parliament on Friday 3 March 2023.

²⁷ R. Williams, New South Wales, *The Hills Shire Council Liberal Party Councillors*, Legislative Assembly, 23 June 2022, pp. 9118 – 9119.

²⁸ The establishment of this inquiry followed the initiation of an inquiry into Canterbury-Bankstown Council by a Government majority committee with the target being the Labor Mayor who had been preselected for the Legislative Council.

²⁹ New South Wales Legislative Council, *Committees—Rules, Resolutions and Membership: First Session of the Fifty-Eighth Parliament*, p 11. Accessed at: <[https://www.parliament.nsw.gov.au/lc/rules/Documents/Committees%20-%20Rules,%20Resolutions%20and%20Membership%20-%20as%20at%2019%20May%202022%20\(new%20doc\).pdf](https://www.parliament.nsw.gov.au/lc/rules/Documents/Committees%20-%20Rules,%20Resolutions%20and%20Membership%20-%20as%20at%2019%20May%202022%20(new%20doc).pdf)>.

The inquiry, the witnesses, and the Act

On 30 January 2023 the committee resolved to invite 14 witnesses to appear at a hearing on 15 or 16 February 2023.³⁰ Approximately one week later the committee secretariat had had very limited communication or no communication with four key witnesses and the Chair instructed the secretariat to re-issue invitations to attend the hearing.³¹ With still little to no contact from the four witnesses the committee resolved to issue summons to those individuals³² under s4 of the *Parliamentary Evidence Act*.

Over the course of 10 and 13 February 2023, multiple senior officers of the Department of the Legislative Council attempted to serve the summons on the four witnesses.³³ During this time it was established that one of the witnesses was out of jurisdiction in Victoria. Despite the committee's position that their evidence was key to corroborating the evidence of other witnesses, without their voluntary participation they could not be pursued further.³⁴

The other three witnesses could not be found at their homes, places of work and were not responding to the efforts of the secretariat to contact or locate them to effect service of the summons. This was highly unusual and suggested to committee members that attempts were being made to evade service, and that the 'witnesses were deliberately not co-operating with the inquiry'.³⁵

With the efforts of departmental staff being unsuccessful in serving the summons, on 14 February 2023, the committee resolved to engage private process servers to effect service of summons on the remaining three key witnesses that were thought to be in

³⁰ Portfolio Committee No. 7 – Planning and Environment, NSW Legislative Council, *Allegations of impropriety against agents of the Hills Shire Council and property developers in the region* (2023), pp. 31-32, 34.

³¹ Portfolio Committee No. 7 – Planning and Environment, NSW Legislative Council, *Allegations of impropriety against agents of the Hills Shire Council and property developers in the region* (2023), p 36.

³² Portfolio Committee No. 7 – Planning and Environment, NSW Legislative Council, *Allegations of impropriety against agents of the Hills Shire Council and property developers in the region* (2023), p 36.

³³ Portfolio Committee No. 7, pp. 15-18.

³⁴ Portfolio Committee No. 7, p 17.

³⁵ Portfolio Committee No. 7, p 23.

New South Wales.³⁶ This decision was made in an ongoing attempt to ensure compliance with s4(1) of the *Parliamentary Evidence Act* which requires personal service of a summons. Procedurally, the engagement of process servers was a significant step, one that had never previously been undertaken by a Legislative Council committee. In justifying the use of process servers, the committee report noted that:

... the use of professional process servers was entirely appropriate in this context ... Private process servers routinely deal with the service of legal documents. They can provide cheques for conduct money as needed, and offer an efficient, professional and cost effective service. Process servers – being commercial agents – are also licensed and regulated by the Office of Fair Trading. They can provide comprehensive reports on attempts made to serve documents, and an affidavit of service as required.³⁷

From 16 to 26 February 2023, between six and eight attempts were made by the process servers to serve the summonses on the three ‘missing’ witnesses with reports provided to the committee each day.³⁸ During this period, the witnesses successfully evaded the attempts of the process servers. The evasive actions were on the face of it quite entertaining, and included:

- an unauthorised absence from a scheduled meeting of the Hills Shire Council where that individual holds the position of Councillor;³⁹
- a process server attending a property, hearing voices inside and after knocking for a number of minutes finding that the voices ceased and no person would answer the door;⁴⁰

³⁶ Portfolio Committee No. 7, p 39.

³⁷ Portfolio Committee No. 7, pp. 22-23.

³⁸ Portfolio Committee No. 7, pp. 15-18.

³⁹ Correspondence from Mr David Reynolds, Acting General Manager, The Hills Shire Council, to the secretariat, received 22 February 2023.

⁴⁰ Correspondence from Tim Tiernery & Associates Pty Limited, Private process servers report, received 20 February 2023.

- accusations that a witness was hiding in a red gum forest to evade process servers;⁴¹ and,
- a witness informed the committee that one of the three ‘missing’ witnesses had been seen driving around their local area wearing a black full face ski mask.⁴²

Concurrent to the attempted serving of summons by parliamentary staff and private process servers, the Committee Chair, Sue Higginson MLC, authorised several media releases informing the public about the inquiry and the challenges that the committee had encountered in attempting to locate and serve summons on the identified witnesses. This included naming the witnesses and statements encouraging them to come forward to speak to the committee voluntarily.⁴³ The media releases led to significant media interest and the generation of numerous print and televised news stories by the *ABC*, *9 News*, *7 News*, the *Sydney Morning Herald*, news.com.au and the *Daily Telegraph*. The intensity of the coverage increased as the expiry of the Parliament approached and as the evasion techniques utilised by the key witnesses became public knowledge.

⁴¹ Evidence, Shirlee Burge, *Allegations of impropriety against agents of the Hills Shire Council and property developers in the region hearing*, 2 March 2023, p 11.

⁴² Evidence, Shirlee Burge, *Allegations of impropriety against agents of the Hills Shire Council and property developers in the region hearing*, 2 March 2023, p 12.

⁴³ Media Release, Portfolio Committee No. 7 – Planning and Environment, ‘Upcoming hearings in inquiry into the Hills Shire Council and property developers in the region’, 11 February 2023, Accessed at: <<https://www.parliament.nsw.gov.au/lcdocs/other/18183/Media%20release%20-%20Upcoming%20hearings.pdf>>; Media Release, Portfolio Committee No. 7 – Planning and Environment, ‘Key witnesses failing to co-operate with parliamentary inquiry into the Hills Shire Council and property developers in the region’ 14 February 2023. Accessed at: <<https://www.parliament.nsw.gov.au/lcdocs/other/18191/Media%20release%20-%20PC7%20-%20Continued%20efforts%20to%20summon%20witnesses.pdf>>; Media Release, Portfolio Committee No. 7 – Planning and Environment, ‘Hearing tomorrow in inquiry into the Hills Shire Council and property developers in the region’, 22 February 2023. Accessed at: <<https://www.parliament.nsw.gov.au/lcdocs/other/18226/Media%20release%20-%20PC7%20-%20Hearing%20tomorrow.pdf>>; Media Release, Portfolio Committee No. 7 – Planning and Environment, ‘Final hearing for inquiry into the Hills Shire Council and property developers in the region’, 1 March 2023, Accessed at: <<https://www.parliament.nsw.gov.au/lcdocs/other/18250/Media%20release%20-%20PC7%20-%20Final%20hearing.pdf>>.

Correspondence received by the committee reveals that despite the Legislative Council having adopted the Procedural Fairness Resolution, a number of witnesses were concerned that the actions of the committee suggested that the inquiry was ‘being conducted to further political ends’⁴⁴ and that the committee did not have the authority to conduct an inquiry once the Parliament had been prorogued.⁴⁵ Further, a number of witnesses questioned whether the committee would afford them procedural fairness if they appeared at a hearing.⁴⁶ Had these witnesses appeared, the provisions of the Procedural Fairness Resolution would have been available to them to ensure their treatment by the committee was fair. Specifically, they could have:

- requested that their evidence be heard in camera;
- requested that they attend and consult with a legal adviser during a hearing;
- objected to questions;
- taken questions on notice; and,
- requested the opportunity to respond to adverse comments made about them.⁴⁷

Nonetheless, the committee’s investigations were clearly hampered by the actions of the witnesses as well as the time constraints imposed by the forthcoming election. The seriousness of the witnesses’ actions led to the committee finding that:

- witnesses for whom summons were issued to assist the inquiry engaged in serious and deliberate attempts to evade service; ... and;

⁴⁴ Correspondence from Mr Jean-Claude Perrottet to the committee, received 28 February 2023.

⁴⁵ Correspondence between the committee and Mr Dylan Whitelaw, received 23 - 28 February 2023.

⁴⁶ See, for example: Correspondence between the committee and Mr Jeremy Greenwood, received 23 - 28 February 2023, Correspondence between the committee and Mr Dylan Whitelaw, received 23 - 28 February 2023, Correspondence between the committee and Mr Robert Assaf, received 23 - 28 February 2023; Correspondence from Mr Jean-Claude Perrottet to the committee, received 28 February 2023.

⁴⁷ New South Wales Legislative Council, *House – Rules, Resolutions, Officeholders and Ministerial representation: First Session of the Fifty-Eighth Parliament*, pp. 15 – 17. Accessed at: <<https://www.parliament.nsw.gov.au/lc/rules/Documents/House-Rules,%20Resolutions%20and%20Officeholders%20and%20ministerial%20representation.pdf>>.

- witnesses for whom summons were issued to assist the inquiry engaged in deliberate attempts to avoid giving evidence to the inquiry.⁴⁸

Further, the committee noted that:

... three of the witnesses ... all took steps to deliberately avoid attempts by both parliamentary staff and professional process servers to serve a summons. These witnesses showed a blatant disregard for parliamentary processes ... [A] New South Wales parliamentary committee has never been faced with such serious, deliberate and co-ordinated attempts by witnesses to evade service of a summons.⁴⁹

To address this unprecedented issue, the committee recommended that, at the beginning of the 58th Parliament, the New South Wales Legislative Council:

- refer an inquiry into the Parliamentary Evidence Act 1901 to the Privileges Committee, with a view to identifying amendments to ensure it is fit for purpose and modernised, including in relation to the summoning of witnesses; and
- send a message to the New South Wales Legislative Assembly requesting that that House refer the same inquiry to its Standing Committee on Parliamentary Privilege and Ethics.⁵⁰

The Committee also recommended that:

Legislative Council committees consider the use of professional process servers to serve a summons on a witness in extraordinary circumstances where the witness has demonstrated that they are not co-operating with the committee, and that this matter be considered by any future inquiry by

⁴⁸ Portfolio Committee No. 7, p 22.

⁴⁹ Portfolio Committee No. 7, pp. 21, 23.

⁵⁰ Portfolio Committee No. 7, p x.

*the Privileges Committee into the operation of the Parliamentary Evidence Act 1901.*⁵¹

Portfolio Committee No 7's report was tabled out of session on 3 March 2023, the final day of allowable committee activity in the 57th Parliament. However, on 20 September 2023 the House referred an 'Inquiry into the provisions of the Parliamentary Evidence Act 1901' to the Legislative Council Privileges Committee.⁵² The terms of reference specifically refer to Portfolio Committee No 7's inquiry into the Hills Shire Council and the recommendation to inquire into

*the Parliamentary Evidence Act 1901 ... with a view to identifying amendments to ensure it is fit for purpose and modernised, including in relation to the summoning of witnesses.*⁵³

As at October 2023 a reporting date has not been set.

EXAMPLES OF OTHER JURISDICTIONAL APPROACHES TO COMPULSION AND CONTEMPTS

The complexities of dealing with reluctant or recalcitrant witnesses is not unique to New South Wales however various jurisdictions have taken different approaches to addressing these behaviours, otherwise known as contempts. For example, Claressa Surtees, Clerk of the Australian House of Representatives notes 'allow the Houses provides a coherent framework for identifying, considering, and responding to contempts, and potential contempts.'⁵⁴ While the Parliamentary *Privileges Act 1987* (Cth) bestows the power to detain, imprison or impose a fine for a contempt, almost without exception, these powers are not exercised. As further noted by Surtees:

⁵¹ Portfolio Committee No. 7 – Planning and Environment, NSW Legislative Council, *Allegations of impropriety against agents of the Hills Shire Council and property developers in the region* (2023), p x.

⁵² Minutes, NSW Legislative Council, 20 September 2023, pp 508-509.

⁵³ Privileges Committee, NSW Legislative Council, *Inquiry into the provisions of the Parliamentary Evidence Act 1901 – Terms of Reference* (2023). Accessed at: <<https://www.parliament.nsw.gov.au/lcdocs/inquiries/3006/Terms%20of%20Reference%20-%20Inquiry%20into%20Parliamentary%20Evidence%20Act%201901.pdf>>.

⁵⁴ Claressa Surtees, 'Submission (SCC0032) to the House of Commons, Committees of Privileges: Select committees and contempts: clarifying and strengthening powers to call for persons, papers and records inquiry,' Accessed at: <<https://committees.parliament.uk/writtenevidence/13575/default/>>.

One reason for this is that most witnesses do not need to be compelled to provide evidence, and usually welcome the opportunity to engage with parliamentary committee inquiries. Another reason may be that, throughout various evidence gathering processes, witnesses are regularly reminded of their rights and responsibilities, with accompanying explanations of the powers of the House to deal with possible contempts of Parliament. Furthermore, while committees are aware of their considerable powers, they generally exercise caution and discretion in exercising these powers. It is considered that the ability of the House to exercise its rights should be carefully weighed against the need to engage constructively with individuals and organisations.⁵⁵

In the United Kingdom Parliament, the enforceability of committee powers and the appropriate solution to deal with this issue has been the subject of debate for the better part of the last 23 years. In 1999 and then again in 2013 the Joint Committee on Parliamentary Privilege conducted inquiries into this specific issue. While the 1999 committee recommended legislation, the 2013 committee preferred to reassert powers through standing orders and resolutions.⁵⁶ These inquiries were followed by the 2016 House of Commons Committee of Privileges inquiry that was asked to specifically consider the issue of ‘the exercise and enforcement of the powers of the House in relation to select committees and contempts’.⁵⁷ While the inquiry was interrupted by two general elections, the prioritisation of other matters and the COVID-19 pandemic, a report was eventually published in May 2021 which noted that:

Parliament has historic powers to punish Members and non-Members for contempt. A ‘contempt of Parliament is a relatively rare occurrence, but in recent years it has become a more prominent issue, especially in the context

⁵⁵ Claressa Surtees, ‘Submission (SCC0032) to the House of Commons’.

⁵⁶ Committee of Privileges, House of Commons: United Kingdom Parliament, *Select committees and contempts: clarifying and strengthening powers to call for persons, papers and records* (2021), p 6.

⁵⁷ Committee of Privileges, House of Commons, p 3.

of select committees, which have, for instance, sometimes been unable to compel the attendance of witnesses or secure provision of papers.⁵⁸

The Committee ultimately concluded:

... we consider the best option is for new legislation to provide a statutory basis for existing select committee powers to summon witnesses and compel attendance and provision of information. New legislation would provide much needed clarity, effective deterrents for noncompliance and would bring our Parliament into line with many comparable legislatures.⁵⁹

Following the publication of the report the Committee conducted public consultation, the results of which were published in 2022. While some modifications were made to the original proposals, the Committee stated that by pursuing the aforementioned course of action they were:

... balancing the risks of action ... over the risk of inaction which could leave Parliament toothless and unable fully to discharge its responsibilities.⁶⁰

While different in nature, the examples of the Australian and United Kingdom Parliaments acknowledge that strong committee powers are required to ensure witness compliance and importantly provide clarity to witnesses regarding their rights, responsibilities, and protections.

CONCLUSION

There have been many discussions about the numerous deficiencies of New South Wales *Parliamentary Evidence Act*. However, the experience of Portfolio Committee No. 7 has brought into stark relief the limitations of an Act that is now 123 years old, particularly in relation to the requirement for personal service of a summons and its jurisdictional constraints. If the committee's investigations had not been limited by the

⁵⁸ Committee of Privileges, House of Commons, p 3.

⁵⁹ Committee of Privileges, House of Commons, p 3.

⁶⁰ Committee of Privileges, House of Commons, p 31.

impending New South Wales state election, the committee would have had to decide if it wanted to continue to pursue the recalcitrant witnesses or not. If they chose the former and the witnesses were able to remain successfully 'hidden' they would have no recourse under the *Parliamentary Evidence Act* and would have had to rely on other means to try to persuade the witnesses to appear. If the committee chose the latter and did not continue to pursue the witnesses, this would perhaps have led to questions about the effectiveness of the committee system in New South Wales.

The committee was very clear in its recommendations – the *Parliamentary Evidence Act* needs to be reviewed to identify appropriate amendments to ensure that it is modernised and fit for purpose. The inquiries and practices of other jurisdictions also demonstrate that whether legislation, Standing Orders or resolutions are utilised to address the issue of compulsion, they must be coherent, relevant and ensure that the rights of committees are upheld and the ability to constructively engage with individuals and organisations is retained. While the evasive witness behaviour detailed above could perhaps be considered an anomaly of the 57th Parliament it would be remiss of the 58th Parliament to not heed the recommendations of Portfolio Committee No 7. A modernised *Parliamentary Evidence Act* is required to ensure that the work of committees is supported now and into the future and that the power to compel is balanced appropriately with both procedural and legal safeguards for witnesses. It will, therefore, be very interesting to see what amendments the newly established Privileges Committee inquiry into the provisions of the *Parliamentary Evidence Act* ultimately recommends.