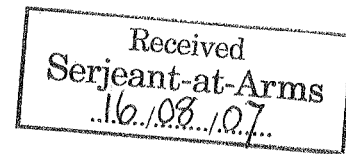


LEGISLATIVE COUNCIL

OFFICE OF THE CLERK



14 August 2007

Mr David Elder
Secretary
House of Representatives Standing Committee of Privileges
PO Box 6021
Parliament House
CANBERRA ACT 2600

Dear Mr Elder

RE: PAPER BY PROFESSORS LINDELL AND CARNEY

I refer to your letter dated 3 July 2007 seeking comments on a paper by Professors Geoffrey Lindell and Gerard Carney concerning the procedures of the House of Representatives and the House of Representatives Privileges Committee in relation to parliamentary privilege.

Thank you for the opportunity to comment on the paper.

Please find attached a response on behalf of the New South Wales Legislative Council.

Yours sincerely

A handwritten signature in cursive script that reads "Lynn Lovelock".

Lynn Lovelock
Clerk of the Parliaments

REVIEW OF THE PROCEDURES OF THE HOUSE OF REPRESENTATIVES RELATING TO THE CONSIDERATION OF PRIVILEGE MATTERS AND PROCEDURAL FAIRNESS

RESPONSE FROM THE NEW SOUTH WALES LEGISLATIVE COUNCIL

Transfer of penal jurisdiction to the courts

In their paper, Professors Lindell and Carney argue that there is an overwhelming case for transferring at least the penal jurisdiction of the House (and the Senate) to the courts.

This suggestion is of only limited relevance to the New South Wales Legislative Council.

The Houses of the New South Wales Parliament have a common law power¹ to discipline members and any other person found guilty of contempt of Parliament. However, this is not an unrestricted punitive power. Rather, the common law power of the Houses of the New South Wales Parliament is 'protective' and 'self-defensive' only and cannot be used punitively as a disciplinary or coercive measure.

For example, the power of expulsion of members is available to the Houses of the New South Wales Parliament for the purpose of self-protection only, as defined by the common law.² This line of authority was adopted by the High Court in *Willis and Christie v Perry* in 1912³, in which it was decided that the Speaker of the Legislative Assembly had no power to cause a member who has been disorderly in the chamber, and had left it in a disorderly manner, to be arrested outside the chamber and brought back into it. The 'only purpose' of such action, according to the High Court, was to punish the member concerned.⁴

Accordingly, there is less likelihood of cases arising in New South Wales than in the Commonwealth Parliament where the exercise of judicial power by the Parliament significantly trespasses on the rights of an accused member or person.

Procedural fairness: Privileges Committee

In their paper, Professors Lindell and Carney argue that the House of Representatives should prescribe by resolution, similar to the Senate, a range of protections designed to confer a higher level of procedural fairness in contempt matters before the House Privileges Committee (and the House itself).

Similar to the House of Representatives, and unlike the Senate, the New South Wales Legislative Council has not adopted a privileges resolution setting out the procedures to be observed by committees for the protection of witnesses.

However, in May 1996, the Legislative Council Standing Committee on Parliamentary Privilege and Ethics published a report entitled 'Inquiry into the attendance of witnesses before parliamentary

¹ The Parliament of New South Wales has not adopted a specific statute dealing with the powers and immunities of Parliament as the Commonwealth Parliament has done with the *Parliamentary Privileges Act 1897* (Cth).

² See the authority in *Armstrong v Budd* (1969) 71 SR (NSW) 386 and *Egan v Willis* (1998) 195 CLR 424 at 455.

³ *Willis and Christie v Perry* (1912) 13 CLR 592

⁴ *Ibid* at 598

committees', in which it set out various procedures to be followed when calling public servants and statutory office holders before committees.

As a result of this report and subsequent developments, all Legislative Council committees, including the Privileges Committee, generally observe the following procedural practices for the protection of witnesses:

- Parties are normally invited to make a written submission to an inquiry before being invited to give oral evidence.
- Arrangements for determining witnesses are generally left in the hands of the Chair of the committee after consultation with the other members of the committee, however any decision to summons a witness should be determined by a vote of the committee.
- Witnesses are normally invited to appear at a public hearing and summons are only issued where a witness has declined such an invitation.
- 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 before the committee.
- Witnesses have the opportunity to give their evidence *in camera*, and any application to do so should be considered by the committee.
- The committee is generally expected to ask questions within the terms of reference of its inquiry.
- Witnesses may be accompanied by, and may consult, an adviser.
- Witnesses may object to answering a question, and the committees should consider and determine any objection by a witness.
- Witnesses and other persons may be given an opportunity to respond to any adverse reflections upon them.
- The transcript of evidence is published as soon as possible and also presented to the House with the committee's report.

These procedural practices for the protection of witnesses currently rest on various sources of authority, including the standing orders and the resolution establishing committee.

In a number of areas noted above, the Legislative Council Privileges Committee provides procedural protection to witnesses similar to those envisaged by Professors Lindell and Carney. These include taking all evidence in public unless an *in camera* hearing is appropriate, publishing transcripts as soon as possible and tabling them with the report of the Committee, informing witnesses of the general nature of issues being investigated and providing witnesses with an opportunity to respond to committee inquiries and terms of reference.

However, the recommendations of Professors Lindell and Carney clearly extend beyond these procedural protections normally offered by the Council Privileges Committee to encompass additional protections which are not normally provided by the Privileges Committee.

In general terms, the number and nature of inquiries conducted by the Council Privileges Committee to date has not warranted adoption of such uniform procedures as advocated by Professors Lindell and Carney. Due to the nature of the common law powers of the Council, the Council Privileges Committee is less likely to be drawn into scenarios where a formal 'charge' of contempt is made and the accused is subject to significant penal sanction.

That is not to say, however, that such inquiries do not occur. It is notable that during the inquiry into the conduct of the Hon Franca Arena undertaken by the Standing Committee on Parliamentary Privilege and Ethics in 1998⁵, the Privileges Committee adopted additional procedural protections for witnesses and third parties to the inquiry, given the nature of the inquiry. This is discussed below.

It is also possible that in the future, the New South Wales Legislative Council will seek to prescribe by resolution specific procedural protections for witnesses.

Committee members should be disqualified for apparent bias

In their paper, Professors Lindell and Carney argue that members of the Privileges Committee of the House of Representatives should be automatically disqualified for apparent bias, for example where a member refers a matter to the Privileges Committee for inquiry.

This practice is not followed in the Legislative Council. Similar to the Senate, the practice in the Council is that members should assess whether they should disqualify themselves from membership of the Privileges Committee for a particular inquiry.

This issue arose in 1989 during the Privileges Committee inquiry into the Special Report from the Select Committee on the Police Regulation (Allegations of Misconduct) Amendment Bill. In this instance certain members of the Committee indicated that in view of their membership of the select committee, they ought not to vote on recommendations which might emerge from the Privileges Committee. The Clerk advised that it was a matter for the individual member as to whether they remained on both committees, and that there was no provision for noting abstentions in either the committee or the House. Notwithstanding this, the Privileges Committee presented an interim report, and sought direction from the House. On 6 April 1989 a motion was moved in the House to discharge the three members concerned and appoint other members in their place. After debate the motion was subsequently withdrawn by leave, and the three members continued to serve on the Privileges Committee.⁶

In 1993, there was a second instance where a member of the Privileges Committee, the Hon John Jobling, remained a member of the Committee when it was referred terms of reference to look into the unauthorised publication of details of *in camera* evidence from the Joint Select Committee upon Police Administration,⁷ of which he was also a member.⁸

⁵ This inquiry arose following a speech given by the Hon Franca Arena in the Council on 17 September 1997 in relation to an alleged 'cover-up' of high-profile paedophiles.

⁶ *LC Minutes* (6/4/1989) 518-519 See also *Report of the Standing Committee upon Parliamentary Privilege together with the proceedings of the Committee*, 7 December 1989, p 50

⁷ The select committee was established to investigate the relationships between the Minister for Police, the Police Board of NSW, the Inspector General of Police and the Commissioner of Police following the resignation of the Hon Ted Pickering as Minister for Police on 23 September 1992.

⁸ Privileges Committee, *Report concerning the publication of an article appearing in the Sun Herald Newspaper containing details of in camera evidence*, October 1993

This issue also arose during two inquiries in 1999 and 2001, but with a different result. During the 1999 inquiry by the Privileges and Ethics Committee into statements made by the Hon Michael Gallagher and the Hon John Hannaford concerning the Lord Mayor of Sydney, the Hon Helen Sham-Ho informed the House that due to her personal involvement in the City of Sydney Council elections she wished to step aside as Chair and requested the Leader of the House to replace her on the Committee for the inquiry.⁹ On 15 September 1999, on the motion of the Hon Michael Egan, the House resolved that the Hon Peter Breen be appointed as a member of the Committee in place of Mrs Sham-Ho for the purpose of the inquiry.¹⁰

Similarly, in 2001, Mrs Sham-Ho was replaced by Mr Breen as a member of the Privileges Committee inquiry into the possible intimidation of witnesses before General Purpose Standing Committee No 3 (GPSC 3) and unauthorised disclosure of committee evidence. This step was taken because Mrs Sham-ho had chaired the GPSC 3 inquiry, and was therefore personally involved with the events which had led to the inquiry.¹¹

This issue has not arisen subsequently in the New South Wales Legislative Council, and no further action has been taken in relation to disqualification for apparent bias.

Full legal representation of witnesses or the accused

In their paper, Professors Lindell and Carney argue that the Privileges Committee of the House of Representatives should give an accused the right to be represented by a lawyer, and that the Committee should be authorised to recommend to the Presiding Officer the reimbursement to an accused of his or her legal expenses from parliamentary funds when the interests of justice warrant this.

The Legislative Council Standing Orders do not allow persons or organisations to be represented by a solicitor or counsel at a committee hearing unless the committee decides otherwise.

However, counsel may attend in an advisory capacity. In such circumstances, prior permission of the committee is not required, although the adviser cannot give evidence on behalf of the witness, object to procedure or lines of questioning, cross-examine another witness, or intervene during the committee's examination of another witness.

Where a witness gives evidence *in camera*, the committee may, at its discretion, permit an adviser to be present if the witness so requests.¹²

Counsel may also appear as a witness separately. For example, during the 2001 GPSC 3 Inquiry into Cabramatta Policing, a counsel for police witnesses was refused the right to appear as counsel but was granted an appearance as a witness in his own right.¹³

It is notable, however, that during the inquiry into the conduct of the Hon Franca Arena in 1998, the Privileges Committee adopted a number of additional procedural protections for witnesses along the lines advocated by Professors Lindell and Carney. These additional protections were adopted due to the highly controversial nature of the inquiry.

⁹ Mrs Sham-Ho's husband was standing as a candidate in the forthcoming City of Sydney Council elections.

¹⁰ *LC Minutes* (15/9/1999) 56

¹¹ *LC Minutes* (28/6/2001) 1070

¹² See for example the Privileges Committee inquiry into the publication of an article appearing in the Sun Herald Newspaper containing details of *in camera* evidence, at which the solicitors of one of the witnesses (Mr Synnott) were permitted to be present in the capacity of adviser during the taking of *in camera* evidence; Privileges Committee, *Report concerning the publication of an article appearing in the Sun Herald Newspaper containing details of in camera evidence*, October 1993, p 46

¹³ GPSC 3, *Cabramatta Policing*, Report No 8, July 2001, pp 2-3

During the inquiry, the Privileges Committee maintained the Council's position that witnesses cannot be represented by counsel without the leave of the House, but that they may be *assisted* by legal representatives, 'in the sense that they may consult their legal advisers during hearings and seek their lawyers' assistance in answering questions from the Committee.' However, during the inquiry, Mrs Arena's lawyers were permitted to:

- submit written questions to be put to other witnesses by members of the Committee on Mrs Arena's behalf
- make submissions in relation to the Committee's proposed editing of Mrs Arena's evidence prior to the public release of that evidence
- make submissions in relation to Mrs Arena's conduct before the Committee commenced its final deliberations.¹⁴

While these additional procedural protections worked effectively during the Arena inquiry, it is notable that they still do not go as far as those advocated by Professors Lindell and Carney. For example, Professors Lindell and Carney advocate the right of legal representatives to cross-examine witnesses. The Legislative Council would not support this approach. As indicated, during the Arena inquiry, the Privileges Committee adopted the approach of permitting legal representatives to submit written questions to be put to other witnesses by members of the Committee on Mrs Arena's behalf.

Professors Lindell and Carney also advocate that the accused should have the right to address the Committee upon conclusion of all evidence and in relation to any penalty. Once again the New South Wales Legislative Council does not confer this as a right on witnesses before the Privileges Committee, although there is no limitation on witnesses or other participants in an inquiry contacting the committee throughout the course of the inquiry. However, as noted, during the Arena inquiry, the Privileges Committee did permit counsel to make written submissions in relation to Mrs Arena's conduct before the Committee commenced its final deliberations. There are also a number of other inquiries where the Privileges Committee has accepted written submission from legal counsel acting for persons whose conduct the Committee was investigating.¹⁵

Professors Lindell and Carney also propose financial assistance for witnesses to engage legal counsel. The Council would not normally fund financial assistance for witnesses engaging a solicitor or counsel. Once again, however, during the Arena inquiry, the Legislative Council sought from the New South Wales Treasury funding for the legal representation provided to Mrs Arena, in the interests of ensuring procedural fairness.

The Legislative Council is not in a position to fund legal representation out of its own revenue.

Protection of third parties

In their paper, Professors Lindell and Carney also advocate a number of procedural protections for third parties to inquiries by the House of Representatives Privileges Committee.

¹⁴ Standing Committee on Parliamentary Privilege and Ethics, *Report on the Inquiry into the Conduct of the Honourable Franca Arena MLC*, Report No 6, June 1998, pp 9-10

¹⁵ See Standing Committee on Parliamentary Privilege and Ethics, *Possible intimidation of witnesses before General Purpose Standing Committee No. 3 and unauthorised disclosure of committee evidence*, 13 November 2001, paras 1.14-1.15

The Legislative Council has not adopted uniform procedures in this regard. In general, however, Council practice requires committees to consider all relevant issues including the protection of third parties. Where a witness makes an adverse reflection in the course of their evidence, and a committee is not hearing the evidence *in camera*, there are various options available to the committee. They include providing a reasonable opportunity for the person who has been adversely named to respond or expunging the evidence from the published (as a last resort). When considering which of these procedures should be adopted, a committee needs to balance the potential harm caused by the adverse reflection, the importance of the evidence to the inquiry and the public interest in the committee conducting its proceedings and taking evidence in public.

Once again, however, during the inquiry into Mrs Arena, additional procedural protections for third parties were adopted along the lines advocated by Professors Lindell and Carney. The Committee permitted the legal advisers for the interested parties to be present during the *in camera* hearings of the Committee (but not during any deliberative meetings). As was the case with the lawyers for Mrs Arena, the legal representatives of the interested parties were permitted to:

- submit written questions to be asked of witnesses by members of the Committee during hearings (although the Committee members themselves ultimately determined which questions were to be asked)
- view Mrs Arena's evidence and make written submissions in relation to its publication
- make written submissions in relation to Mrs Arena's conduct, when invited to do so by the Committee.

Proceedings of the House upon receipt of a report of the Privileges Committee

The New South Wales Legislative Council has not adopted any of the processes recommended by Professors Liddell and Carney in relation to proceedings in the House upon receipt of a report from the Privileges Committee, save in respect of the tabling of the full transcript of the evidence of proceedings.

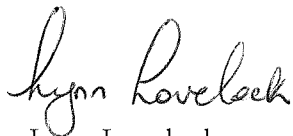
In part, this is again because the Legislative Council does not have a punitive power to punish for contempt, and accordingly is unlikely to be in a position where it is required to impose a sanction as a disciplinary or coercive measure. For example, the opportunity for an accused to address the House in relation to any proposed punitive penalty, as advocated by Professors Liddell and Carney, does not apply. Where the House may be considered to have exceeded its 'protective' and 'self-defensive' powers, such matters may be appealed to the courts.

However, Professors Liddell and Carney also make two recommendations for proceedings of the House upon receipt of a report of the Privileges Committee that the Legislative Council does not support, namely:

- that the House should not overturn a finding of no contempt by the Privileges Committee, and that
- the House should not impose a penalty which exceeds that recommended by the Privileges Committee

In relation to these two recommendations, the Council takes the view that it is ultimately for the House to determine whether a contempt has been committed and whether a (non-punitive)

sanction should be imposed. The House should not be limited by the findings of its committees. Although a committee may conduct an inquiry according to the principles of procedural fairness, that should not prevent the House from disagreeing with its findings or recommended sanctions based upon that procedure.



Lynn Lovelock
Clerk of the Parliaments
New South Wales Legislative Council