



13 August 2007

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

Dear Mr Elder

Thank you for the opportunity to comment on the paper prepared by Professor Lindell and Professor Carney for the House of Representatives Standing Committee of Privileges regarding procedures in relation to parliamentary privilege.

The paper provides a comprehensive review of the current procedures of the House of Representatives and its Standing Committee of Privileges in relation to parliamentary privilege. It covers aspects that are rarely considered in New South Wales due to the fact that the New South Wales Parliament has limited penal powers. These limited powers relate to contempts committed by witnesses, which are punishable under the *Parliamentary Evidence Act 1901* (NSW) and have never been exercised by the Legislative Assembly.

The New South Wales Parliament has however considered a proposal to transfer penal jurisdiction in relation to offences committed against the privileges of the House to the courts. In 1878 the Legislative Assembly passed the *Parliamentary Powers and Privileges Bill*, which vested the powers and privileges of the House of Commons in the Houses of the New South Wales Parliament, with the exception that the penal jurisdiction would be transferred to the Supreme Court when an offence was committed outside the precincts by a person who was not a Member of the Parliament. Contempts committed by Members or within the precincts would be dealt with by the House concerned. Provision was made in the Bill for either House to direct the Attorney General to prosecute.

The Legislative Council amended the Legislation to remove the transferral of the penal power to the Supreme Court and the provision for the Houses to direct the Attorney General to prosecute. It was considered the proposal would give rise to collisions between the Supreme Court and the Parliament in that the House may declare a breach of privilege or contempt and the Supreme Court may disagree. Concerns were also voiced that the requirement of the Attorney General to prosecute if directed by either House removed the independence and discretion of the Attorney General to determine whether prosecution was warranted. The Houses did not agree on the amendment and a free conference was held. However, the Council did not consider the report of its own managers from the free conference and

accordingly the bill was not passed. A similar bill was introduced in 1901 but lapsed due to prorogation.

These concerns may still be relevant today in that even if the power to punish for contempts was transferred to the courts some preliminary inquiry would need to be considered by the House or a committee to determine whether an alleged contempt is serious and should be dealt with by the courts. This may give rise to disagreements between the Parliament and the courts as to whether a contempt has been committed. While such conflict would undoubtedly be rare it may leave open the possibility that such a procedure could conflict with Article 9 of the *Bill of Rights* as the courts would be questioning and possibly impeaching the proceedings of the House or the committee.

I appreciate that the penal power vested in a number of legislatures is an extraordinary power and should be exercised with due care. Given that there have been few occasions where the penal power has been exercised in Australian jurisdictions there is an argument that this extraordinary power has not been abused. Furthermore, due consideration and bi-partisan support is required for any penal sanction to be applied to a contempt by any House of Parliament.

In relation to procedural fairness, many of the suggestions set out in Part IV of the paper reflect current practices and standing orders in place in New South Wales and presumably in other jurisdictions. For example, it is the practice of committees administered by the LA to hold all hearings in public except in exceptional circumstances such as where it is necessary to protect the witness or third parties. The Legislative Assembly's *Guide to Committees* lists occasions when evidence may be appropriately taken *in camera*:

- Where a committee has reason to believe that evidence about to be given may reflect adversely on a person or body;
- Sub judice issues;
- Evidence which might incriminate the witness;
- Commercial in confidence issues;
- Classified material;
- Medical records;
- Evidence which may bring advantage to a witness's prospective adversary in litigation;
- Evidence likely to involve serious allegations against third parties; and
- When there are legal requirements for certain things to remain confidential.

It is also the practice of committees administered by the Assembly to publish all submissions received and transcripts of evidence, that are not confidential as soon as possible and Standing Order 303 provides for the evidence to be tabled with the report. It states:

"The report together with the minutes, evidence and other documents shall be tabled by the Chair or another Member signing the report or other Member of the committee on that Member's behalf."

In relation to excluding Members with an interest in the inquiry due to apparent bias, the Standing Orders prohibit Members with a personal interest from sitting on the inquiry. Standing Order 276 provides:

"A Member shall not sit on a committee if personally interested in the inquiry before the committee."

A number of other suggestions made by Professor Lindell and Professor Carney such as allowing the accused and other witnesses to cross-examine witnesses raise questions. For example, is it appropriate for non-Members to be asking questions in a parliamentary inquiry?

The proposals suggested by Professor Lindell and Carney aim to ensure that people who are accused of contempts or breaches of privilege are dealt with fairly and I have not formed any firm views on the matters raised. However, I am of the view that the Parliament should be wary of any procedure that has the potential to conflict with Article 9 or which removes the exclusive cognisance of the House to control its own proceedings.

I look forward to seeing the committee's considered views on the matters raised in paper.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Russell D Grove', with a large, stylized initial 'R'.

Russell D Grove
Clerk of the Legislative Assembly