THE LAW SOCIETY
OF NEW SOUTH WALES

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8 November 2017

The Hon Matthew Mason-Cox MLC
Chair
Legislative Council Privileges Committee
Parliament House
6 Macquarie Street
Sydney NSW 2000

By email: privilege@parliament.nsw.gov.au

Dear Mr Mason-Cox,

**Inquiry into procedural fairness for inquiry participants**

Thank you for the opportunity to provide a submission to the Legislative Council Privileges Committee's inquiry into procedural fairness for inquiry participants. The Law Society's Public Law Committee has contributed to this submission.

The *Parliamentary Evidence Act 1901* (NSW) ("Act") is the key piece of legislation regulating the powers of NSW parliamentary committees. The Act provides the Houses of Parliament and parliamentary committees with a number of powers, including the power to:

- summon a person to attend and give evidence;[1]
- seek the issue of a warrant to force a person who has been summoned to attend the Committee;[2]
- penalise witnesses for the failure to answer lawful questions – although we note that this is through the mechanism of contempt and the penalty involves a gaol term imposed by a House of Parliament;[3]
- penalise witnesses for wilfully making a false statement when the witness knows the statement to be false.[4]

The Act provides that witnesses shall not be subject to any legal action for evidence given under the Act.[5] However the Act does not offer any other protections for witnesses who are compelled to appear before a committee or set out any procedures for receiving witness evidence at committee hearings. The Select Committee on the Legislation Council Committee System noted that there are no formal, publicly available procedures in place to ensure the protection of witnesses.[6]

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[1] *Parliamentary Evidence Act 1901* (NSW) s 4(2).
[2] *Parliamentary Evidence Act 1901* (NSW) ss 7, 8.
[3] *Parliamentary Evidence Act 1901* (NSW) s 11.
[4] *Parliamentary Evidence Act 1901* (NSW) s 13.
[5] *Parliamentary Evidence Act 1901* (NSW) s 12.
[6] Select Committee on the Legislation Council Committee System, Parliament of NSW, *The Legislative Council committee system*, Discussion Paper (2015) 18; Select Committee on the Legislation Council Committee System, Parliament of NSW, *The Legislative Council committee system*, Final Report (2016) 1.23.

The Discussion Paper prepared by the Privileges Committee to assist contributions to this inquiry states:

> There is no legal requirement for Parliament or a parliamentary committee to observe procedural fairness in its proceedings.[7] However, the public is entitled to expect that committees will have regard to principles of fairness when conducting their inquiries.[8]

The Law Society agrees that the current standards of public administration and fairness require the procedures of parliamentary committees to be guided, to the extent possible, by principles of procedural fairness. Australian courts have considered that reputation is an interest attracting the protection of procedural fairness, even in instances where the nature of the proceeding is non-adversarial.[9] While there is no legal requirement to provide procedural fairness in the operation of parliamentary committees, other jurisdictions have recognised a need to formalise the provision of procedural fairness to those witnesses and affected parties. For these reasons, the Law Society welcomes this inquiry in relation to the NSW Parliament.

We offer the following comments in response to the questions raised in the Privileges Committee's Discussion Paper.

**How effective are the procedures currently followed by the Council committees for the protection of witnesses?**

The Act provides that no action shall be maintainable against any witness who has given evidence under the authority of the Act.[10] There are limited formal guidelines, resolutions or standing orders that give clear instruction on the procedures in place to protect witnesses and advise members of the public on what to expect when engaging with a committee.

The Law Society understands that parliamentary committees seek to ensure that submission authors and witnesses who appear before the committees are treated fairly. In this respect, we note that on 18 October 2007 the Legislative Council adopted a resolution of continuing effect regarding the broadcasting of proceedings.[11] Part of that resolution dealt with the broadcasting of committee proceedings and provided that a committee may authorise the broadcasting of proceedings. The resolution also provides that a committee must give consideration of any objection by a witness to the broadcasting of their appearance with particular regard to the protection of the witness and the public interest in the proceedings.

We consider that it would assist the community, and enhance public support of the committee system, for Parliament to further develop public guidelines on protections in place for witnesses in parliamentary inquiries, including considerations relating to procedural fairness, as set out below.

**What procedural protections are observed in other Parliaments that would be appropriate for the NSW context? What are the sources of these procedures?**

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[7] Senate Standing Committee on Privileges, Australian Parliament, *Report on question on appropriate penalties arising from the Report of Committee of Privileges of 17 October 1984* (1985) 29.
[8] Privileges Committee, NSW Parliament, *Discussion Paper: Procedural fairness for inquiry participants* (2017), 2.
[9] *Annetts v McCann* [1990] HCA 57; *Ainsworth v Criminal Justice Commission* [1992] HCA 10, [27].
[10] *Parliamentary Evidence Act 1901* (NSW) s 12.
[11] New South Wales, *Parliamentary Debates,* Legislative Council, 18 October 2007, 279-281; discussed in Lynn Lovelock and John Evans, *NSW Legislative Council Practice* (Federation Press, 2008), 565 available at https://www.parliament.nsw.gov.au/lc/proceduralpublications/Pages/New-South-Wales-Legislative-Council-Practice.aspx.

The Law Society notes that NSW is one of the few Australian jurisdictions that does not have a statutory definition of the powers and privileges of parliament.

While organisations in other jurisdictions are best placed to comment on the protections in place in those jurisdictions, and their effectiveness, we note that the Select Committee on the Legislative Council Committee System outlined in their final report that the Australian Senate adopted privilege resolutions in 1988 following the enactment of the *Parliamentary Privileges Act 1987* (Cth).[12] Those resolutions include resolutions on procedures for the protection of committee witnesses, addressing matters such as the publication of evidence, the giving of *in camera* evidence and adverse mention.[13] We also note that the South Australian *Parliamentary Committees Act 1991* (SA) expressly gives parliamentary committees the power to determine to hear a matter in private.[14]

**What practices or procedures to protect procedural fairness are observed by courts, tribunals and investigating agencies? Are any of these appropriate for Council committees?**

Australian courts and tribunals are under a duty to afford procedural fairness.[15] This requires that each party is given a reasonable opportunity to present his or her case. Courts have an overriding duty to ensure that a trial is fair and this includes that a litigant does not suffer a disadvantage from exercising his or her right to be self-represented.[16] By way of example we note s 38 of the *Civil and Administrative Tribunal Act 2013* (NSW) makes provision for the general procedure of the Tribunal. This requires the Tribunal to take such measures as are reasonably practicable to ensure that the parties to the proceedings understand the nature of the proceedings and to ensure that the parties have a reasonable opportunity to be heard or otherwise have their submissions considered in the proceedings.[17]

We also note that the requirement to provide procedural fairness arises in respect of other investigating agencies. In relation to Royal Commissions, the Privy Council has held that:

> The first rule [of natural justice] is that the person making a finding in the exercise of such a jurisdiction must base his decision upon evidence that has some probative value. The second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made.[18]

While the *Royal Commission Act 1902* (Cth) does not impose any requirements in relation to procedural fairness, the High Court has held that if an inquiry may operate to "destroy, defeat or prejudice a person's rights, interests or legitimate expectations" it is required to observe the principles of procedural fairness.[19] The High Court has also held that reputation is an interest that attracts the protection of the principles of procedural fairness.[20]

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[12] Select Committee on the Legislation Council Committee System, Parliament of NSW, *The Legislative Council committee system* (2016), 6.
[13] By way of example, the Australian Senate privilege resolutions are available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Privileges/Completed_inquiries/2004-07/report_125/e02.
[14] *Parliamentary Committees Act 1991* (SA) s 26.
[15] *International Finance Trust Company Ltd v New South Wales Crimes Commission* [2009] HCA 49, [54].
[16] *Hamod v New South Wales* [2011] NSWCA 375.
[17] *Civil and Administrative Tribunal Act 2013* (NSW) s 38(5).
[18] *Mahon v Air New Zealand* [1984] 1 AC 808, 820F-H.
[19] *Annetts v McCann* [1990] HCA 57, [2].
[20] *Ainsworth v Criminal Justice Commission* [1992] HCA 10.

We understand that it is usual practice for commissions of inquiry to circulate, in advance of the final findings a list of potential findings critical of a person or body that may be made and to give such person or body an opportunity to consider those potential findings and address them.

In some other jurisdictions the requirement for inquiries to take steps that would achieve procedural fairness, such as providing an affected party with notice of the intention to make a finding and a reasonable opportunity to respond to the finding, are set out in the relevant legislation.[21]

Similarly, the NSW Independent Commission Against Corruption ("ICAC") must afford procedural fairness to those who may be adversely affected by its findings.[22] Under the amended *Independent Commission Against Corruption Act 1988* (NSW) the ICAC is now required to issue guidelines relating to the conduct of public inquiries. Those guidelines are to address a number of areas, including any matter the ICAC considers necessary to ensure procedural fairness in public inquiries.

**What are the advantages and disadvantages of codifying procedural protections and what would be the best mechanism for codifying such procedures?**

As noted above, the Act provides that witnesses who appear before parliamentary committees are protected from legal action for anything they say in evidence. However, that provision may not operate to minimise the adverse impact of evidence provided to a committee or allow affected parties an opportunity to reply. While parliamentary committees do not generally recommend action against individuals or organisations, the publicity associated with parliamentary inquiries and their resulting recommendations can have a significant effect on the reputation of individuals and organisations.[23]

This is an important consideration given that parliamentary privilege means that the recommendations of parliamentary committees are not subject to review. Given this, it is important that the committees be guided by principles of procedural fairness. The Law Society considers that it would be appropriate for the Parliament to publish formal guidance on procedural fairness for inquiry participants, including a framework for when evidence will be heard in private and under what circumstances that evidence will be made publicly available.

We suggest that the procedural protections offered to committee witnesses should draw on the existing procedures that have been put into place by other bodies of inquiry in NSW and the extensive resolutions of the Australian Senate that set out the procedures to be observed by Senate committees for the protection of witnesses. Based on that, we suggest that the codified procedural protections should include the following:

- how a witness will be required to give evidence to a committee;
- how a witness may apply for their evidence to be heard *in camera* and the criteria against which such an application will be assessed;

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[21] *Commissions of Inquiry Act 1995* (Tas) s 18; *Royal Commissions Act 1991* (ACT) s 35A; *Inquiries Act 2013* (NZ) s 14(3).

[22] *Edward Moses Obeid Sr v David Andrew Ipp* [2016] NSWSC 1376, [85]-[86].

[23] See consideration in Procedure and Privileges Committee, Legislative Assembly of Western Australia, *Procedural Fairness and Powers of the House* (2010), 2. Available at http://www.parliament.wa.gov.au/Parliament%5Ccommit.nsf/(Report+Lookup+by+Com+ID)/A759CA0CC7BCB284482578310040D204/$file/Procedural+Fairness+and+Powers+of+the+House+Report+8+2010+FINAL.pdf.

- the criteria that the committee should use in determining whether evidence heard *in camera* will be made public and what notice should be provided to the witness who gave the evidence;
- when and on what basis a witness may object to answering a question put by a committee;
- when a committee may consider hearing evidence *in camera*, even if the witness does not request that the evidence be heard that way;
- whether witnesses can disclose to others what they said to the committee in such a private session;
- what opportunities will be offered to witnesses to correct a transcript of their evidence; and
- in what circumstances witnesses and third parties will be afforded an opportunity to respond to allegations that may adversely affect them before those allegations are made public or form the basis of recommendations.

We note that the Discussion Paper suggests that the committees already consider these issues.[24] Accordingly, codifying these procedures will be unlikely to adversely affect the work of the committees and may operate to improve public understanding of, and confidence in, the committee system.

For the reasons previously addressed by the Department of the Senate, given the current technology and the live steaming of public committee hearings we do not consider that providing for evidence to be expunged after it is made public is a practical solution.[25]

Given the nature of parliamentary proceedings and parliamentary privilege, the Law Society suggests that it would be appropriate for these procedural protections to be set out in resolutions or standing orders which are enforceable within parliament.

**What if any special protections may be needed in inquiries by the Privileges Committee concerning possible contempts?**

It has been noted that "no other institution of government has the power to investigate an allegation as well as effectively charge those alleged to be responsible, try the charge and impose a penal sanction".[26] The unique nature of the proceedings of the Privileges Committee in respect of contempt of Parliament has been recognised to combine the traditional inquisitorial functions of the parliamentary committees with duties that are of a judicial or quasi-judicial nature.[27]

Within this context procedural fairness is particularly important. The Discussion Paper notes that in view of the gravity of a finding of contempt, the Privileges Committee has adopted additional measures to strengthen procedural fairness in some of its inquiries.[28] The Law Society agrees that these additional procedures are appropriate and notes again that there is value in codifying these procedures to ensure that they are well understood. We suggest

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[24] Privileges Committee, NSW Parliament, *Discussion Paper: Procedural fairness for inquiry participants* (2017), 2-5.
[25] Department of the Senate, Submission No 4 to the Select Committee on the Legislation Council Committee System, *Legislative Council committee system*, 24 February 2016, 10.
[26] Geoffrey Lindell and Gerard Carney, Report to the House of Representatives Standing Committee of Privileges, "Review of procedures of the House of Representatives relating to the consideration of privilege matters and procedural fairness", 3.
[27] Joint Select Committee on Parliamentary Privilege, NSW Parliament, *Parliamentary Privilege: Final Report*, 1984, 7.65.
[28] Privileges Committee, NSW Parliament, *Discussion Paper: Procedural fairness for inquiry participants* (2017), 4-5.

that any formalised procedures in relation to Privileges Committees should consider the following:

- allowing a witness whose conduct is being investigated an opportunity to respond to allegations or documents before the material is made publicly available;
- allowing legal advisers for witnesses;
- the circumstances in which the Privileges Committee will hear evidence *in camera*;
- the circumstances in which the Privileges Committee may recommend the reimbursement of costs of representation of witnesses before the Committee; and
- the criteria to be taken into account when determining matters relating to contempt.

Should you have any questions regarding this submission please contact Ella Howard, Policy Lawyer, on (02) 9926 0252 or at Ella.Howard@lawsociety.com.au.

Yours sincerely,

Pauline Wright
**President**