

Power of Parliamentary Committees
in Obtaining Information from the Executive

Research and Library Services Division
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Background

In May 1995, a Sub-committee was set up by the LegCo Panel on Security to study reports of the Police Management Review. All but one of the 42 reports have been provided to Members by the Administration. The remaining report, which is related to the review of the Security Wing of the Police Force has been withheld on the ground that it contains sensitive information concerning the security of Hong Kong. Despite Members' repeated requests for the report, the Administration maintains that it would be against the public interest to release it.

2. At the request of the Panel made on 24 June 1995, a study on the power of overseas parliamentary committees in obtaining information from the Executive has been undertaken.

3. Due to the tight time schedule and complexity of the subject, this paper aims to provide preliminary findings based on limited materials on hand relating to parliamentary practice in the United Kingdom, Australia (covering developments up to 1980) and New Zealand. An update of this paper will be made when more detailed and current information is available.

United Kingdom (UK)

Power to send for persons, papers and records

4. To effectively perform their functions such as scrutiny of government policies and expenditures, it is important for parliamentary committees to have the co-operation of witnesses and to secure all relevant information. In the UK Parliament, select committees have the powers to send for persons, papers and records that are conferred on them either under specific standing orders, or in the orders relating to their appointments.

5. These powers are usually unqualified (to the extent described below), but some select committees may be given narrower and defined powers. For example, the Committees on the Civil List set up in 1947, 1952 and 1971 were empowered to examine only witnesses who voluntarily appeared before it.

6. When a committee exercises its formal power to send for persons and papers, witnesses will be summoned to attend the committee and to produce the documents required by the committee. If a witness refuses to supply information or fails to appear when summoned, the committee will report his conduct to the House. The House will then order the individual to attend at the bar. If the witness still ignores the order, he will be regarded as in contempt of the House and is punishable by the House.

Conflicts between Crown privilege and parliamentary privilege

7. Select committees have virtually unlimited power to send for persons, papers and records, except to the extent that they conflict with privileges of the Crown and of Members of the House of Lords, or with the rights of Members of the House of Commons¹. For certain types of documents, the Crown, through its Minister, may claim an immunity for their production, giving rise to conflicts between Crown privilege and parliamentary privilege.

8. Several incidents where Ministers and other persons declined to provide select committees with specified papers are cited in Griffith & Ryle's "Parliament: Functions, Practice and Procedures"². These cases and their outcome are briefly described below:-

In 1982, the Ministry of Defence agreed to provide the Public Accounts Committee with details of major projects costing more than a specified amount. For information which is highly sensitive on security grounds, it was agreed that it would be given to the chairman, but not to all members of the Committee.

In 1985 the UK government refused to provide information concerning the tin trading crisis caused by the International Tin Council. The government cited international treaty obligations, *sub judice* and constraints set out in the Memorandum of Guidance on advice given to Ministers as reasons for refusal. The matter was brought to the House and, in a division, the House supported the government.

In 1986, the Defence Committee succeeded in getting summaries of minutes of Ministerial meetings which discussed policy towards the Westland company after exerting considerable pressure on the government. The committee originally asked for the minutes of the meetings.

¹ May, p 629

² Griffith & Ryle, pp 449 - 451

Official Guidelines

9. The UK Government has issued guidelines to the civil servants on the types of documents that they would claim privilege.

10. The Cabinet Office Memorandum of Guidance³ for officials appearing before select committees stipulates that any withholding of information should be limited to reservations necessary in the interests of good government or to safeguard national security. Committees' requests may be declined on grounds of excessive costs involved in obtaining information. Officials are also told not to give evidence on the following:-

- advice given to Ministers or Law Officers
- private affairs of individuals or institutions on which information has been supplied in confidence
- questions in the field of political controversy
- sensitive information of a commercial or economic nature
- matters which are or may become the subject of sensitive negotiations with governments or other bodies
- specific cases where the Minister acts in a quasi-judicial or appellate role

In general, these guidelines also apply to the production of documents.

Australia

11. In Australia, a parliamentary committee's powers to send for person, papers and records are delegated from the House by the resolution of appointment pursuant to standing orders.

12. Like their UK counterpart, some committees are given restricted power. For example, the House imposed a qualification on the power of the Joint Committee on Foreign Affairs that the Committee would need the agreement of the Minister for External Affairs to send for persons, papers or records. In later Parliaments, however, restrictions on committees' power to call for evidence were gradually eased⁴.

³ Griffith & Ryle, p 449

An updated Memorandum is being sought from the Cabinet Office

⁴ Pettifer, p 607

Conflicts between Crown privilege and parliamentary privilege

13. The Parliament may come into conflict with the government when the administration claims Crown privilege on certain classes of documents and refuse to produce them. Incidents where Ministers or officials resisted to provide committees with papers as cited in Pettifer's "House of Representatives Practice"⁵ are given below:

In 1969, the Treasurer instructed his officers appearing before the Senate Select Committee on the Canberra Abattoir not to provide confidential information on the abattoir that had not been released to the public. In response, the committee advised the Treasurer that it reserved the right to discuss the matter with him should circumstances arise. In the end no such circumstances arose.

Again, in relation to requests of the Senate Select Committee on the Canberra Abattoir, the Minister for Health refused to provide an inter-departmental committee report to the committee claiming that it was confidential advice for the Cabinet. The committee reported to the Senate the Minister's refusal to supply the report but the Parliament ended before it had time to pursue the matter arising from by the claim of Crown privilege.

Studies on Crown Privileges by Committees

14. In 1975, public servants summoned to the Bar of the Senate were instructed not the answer questions or to produce documents on Government's overseas loans negotiations. The Prime Minister and three other Ministers wrote to the President of the Senate making a claim of privilege on the grounds that for departmental officers to answer questions and to produce documents on the issue would be "detrimental to the proper functioning of Public Service and its relationship to Government, and would be injurious to the public interest"⁶.

15. The Committee of Privileges examined the issue and presented a report to the Senate on 7 October 1975. The four government Senators, who formed the majority of the committee, supported the usual practice for Ministers to certify whether a claim of privilege is justified and accepted that the conclusions of the Ministers should be valid and lawful. Three opposition Senators, on the other hand, produced a dissenting report holding the view that the conclusiveness of the Minister's certificate of a claim of privilege should be for the Senate to decide. The report of the committee was not considered by the Senate before the Parliament was dissolved on 11 November 1975.

⁵ Pettifer, pp 535 - 537

⁶ Pettifer, p 536

16. The Joint Committee on Parliamentary Committee System studied the issue later on but was unable to clarify the rules governing Crown privilege. It was of the opinion that governments had to rely on Crown privilege to protect themselves. In view of the events in the Senate in 1975, the committee concluded that neither House was likely to overcome the use of Crown privilege unless the government was prepared to release the relevant information⁷.

Official Guidelines

17. In 1978, a paper entitled *Parliamentary Committees - Proposed Guidelines for Official Witnesses* was issued by the Australian Government and tabled in the House⁸. According to the paper, only a Minister may make a claim of Crown privilege. Furthermore, Crown privilege is to rest on a class of information. The guidelines then list the categories of documents and oral evidence which a claim of privilege may be considered. Documents relating to defence and internal security are those that fall into this category. The full guidelines in respect of claims of privileges by Ministers is given at Appendix I.

18. In drawing up the guidelines, the government had considered, among other things, the importance of promoting the freest flow of information through the parliamentary committees to the public and the protection, in the national interest, of the necessary confidences of government and the privacy of individual citizens⁹.

19. The government indicated that these guidelines serve as a reference for officials and would not solve the complex question of "deadlocks" between the Parliament and the Executive on claims of Crown privilege. These guidelines are also not binding on the House or the committees.

New Zealand

20. In New Zealand, the House of Commons has delegated the power to send for persons, papers and records to all select committees by standing orders.

21. A committee, in exercising its formal power to send for paper, directs that a summons or letter signed by the chairman be served on the custodian of the documents. If a Minister of the Crown so summoned refuses to furnish the committee with the paper on the grounds of confidentiality, the committee may report to the House which may order its production. If necessary, the House may require that the paper be produced in secret.

⁷ Pettifer, p 536

⁸ Pettifer, pp 610 - 613

⁹ Pettifer, p 609

Concluding Remarks

22. Committees in the UK, Australian and New Zealand parliaments have the powers to send for persons, papers and records. These powers are almost unqualified, except to the extent that they are in conflict with the privilege of the Crown.

23. From time to time, Ministers and officials resisted parliamentary committees' requests for papers on the grounds that to do so would not be in the public interest. Different ways, such as providing sensitive information to the chairman only, or providing summaries instead of the documents themselves, have been used to resolve the 'deadlocks' between the parliament and the Executive.

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Reference:

UK

1. Parliament: Functions, Practice and Procedures, by J.A.G. Griffith and Michael Ryle
2. Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament, edited by C.J. Boulton (21st edition)

Australia

3. House of Representatives Practice, edited by J.A. Pettifer (1981 edition)

New Zealand

4. Parliamentary Practice in New Zealand, by David McGee (2nd edition)

Extracted from "House of Representatives Practices" PP 611-612

Claims of Privilege by Ministers

15. Claims of privilege should only be made by a Minister (normally the responsible Minister), consulting the Prime Minister where necessary.

16. As far as practicable, the question whether a claim of privilege should be made should be decided before a hearing, so that a certificate by the Minister can be produced.

17. If an official witness, when giving evidence to a Committee, believes that circumstances have arisen to justify a claim of privilege he should request a postponement of his evidence, or of the relevant part of his evidence, until the Minister can be consulted. (See also paragraph 8 above.)

18. It should be noted that privilege can be claimed in respect of oral evidence as well as documents.

19. Documents - or oral evidence - in respect of which Ministers may wish to consider claiming privilege may include matters which fall within the following categories:

- (a) Cabinet (and Cabinet Committee). Executive Council and Loan Council documents and proceedings.
- (b) communications between officers and Ministers and between Ministers
- (c) material the publication of which would be injurious to the national interest, e.g. matters relating to defence, internal security, confidential communications with other countries and with the States
- (d) opinions of the Law Officers of the Crown and legal advice to Ministers, departments and Commonwealth Government authorities
- (e) communications between officers and between officers and third parties relating to the formulation of policy
- (f) material which, by statute, is required to be kept secret, e.g. section 16 of the Income Tax Assessment Act.

20. There are documents within the foregoing categories which within themselves may not appear to warrant a claim of privilege but the production of which may affect subsequent claims of privilege. There should in such cases be consultation with the Minister, and where necessary the Prime Minister, as provided in paragraphs 15-17.

21. In addition to the documents mentioned in a paragraph 19 there are other documents and there is other oral evidence in respect of which privilege might be claimed, depending on the circumstances. It is not possible to give an exhaustive list, the question in each case being whether the balance of public interest is against disclosure of the material.

22. The following list will give some indication of the possible nature of the material referred to in paragraph 21, but it is important that each matter be considered in the light of the particular circumstances:

- (a) communications between Ministers and third parties
- (b) medical, financial and other personal information relating to private citizens and officers, e.g. medical reports, financial returns
- (c) material obtained from individuals or corporations in confidence or in circumstances where there is a duty not to disclose it
- (d) material which, if disclosed, might injure or substantially embarrass private citizens
- (e) information obtained by officers relevant to possible breaches of the law.

23. Documents that are given one of the usual security ratings as 'Confidential', 'Secret', or 'Top Secret' would normally be included under one of the categories in paragraph 19 above. Before producing a document bearing such a classification, an official witness should seek instructions from the Minister. (Note: it does not follow that documents without a formal security classification may not be the subject of claim of privilege. Nor does it follow that classified documents may not in any circumstances be produced. Each document should be considered on its own merits and, where classified, in consultation with the originator.)

24. In relation to oral evidence, the same considerations apply as to the contents of a classified document and as to information which, while not contained in a document, is of a Confidential, Secret or Top Secret nature.