Finding a Balance between Accountability and Exclusive Cognisance: Some Recent Developments in NSW

Leslie Gönye*

Introduction

The report of the Joint Select Committee [JSC] upon Parliamentary Privilege in New South Wales, tabled in September 1985, made a number of significant recommendations that go to the core of parliamentary privilege.[1] The conclusion of that report described parliamentary privilege as 'a tool to permit members to serve fearlessly those whom they represent and not to rule from a rarified and remote position alien to those community interests'. It saw 'the parliament as a living institution interacting with and responsible to the community it serves' and 'endeavoured to propose recommendations which do not seek to further insulate your parliament from this community'.[2] These words were quite visionary for the time as the Legislative Assembly of New South Wales had a tradition of being very guarded about the information that was shared or made publicly available. This contrasts with current Legislative Assembly policy, which is to make as much information as possible readily accessible and available to interested persons and the public.

This paper will collate a selection of disparate events that have shaped aspects of the doctrine of exclusive cognisance in New South Wales since 1985. When aggregated, these less prominent but pragmatic legislative, procedural and administrative developments demonstrate how the parliament of New South Wales has opened up along the lines envisaged by the thrust of the report of the JSC upon Parliamentary Privilege.

* Clerk-Assistant (Committees), Legislative Assembly of New South Wales.

1 Index of Recommendations, Report of the Joint Select Committee upon Parliamentary Privilege in NSW. Parliament of NSW (September 1985), p. i.

2 Report of the Joint Select Committee upon Parliamentary Privilege in NSW. Parliament of NSW (September 1985), p. 130.

Australasian Parliamentary Review, Autumn 2008, Vol. 23(1), 212–26.

Accountability

In response to a recommendation of the Public Service Committee of the House of Commons, both Houses of the United Kingdom parliament, in 1996-97 passed motions espousing what they see as the principles of ministerial accountability to parliament. I have taken one of those principles to shape this paper. By substituting 'Ministers' with '*parliament*' and 'Parliament' with '*the public*' I would suggest that one means of 'Parliament's Accountability to the People', with my substituted words in italics, might be:

> *Parliament* should be as open as possible with *the public*, refusing to provide information only when disclosure would not be in the public interest, which should be decided in accordance with relevant statute and codes.[3]

As a parliamentary officer one would also add in accordance with accepted parliamentary practice.

Exclusive Cognisance

A collection of supporting principles complements the necessary freedom of speech and debate or proceedings of parliament as set out in article 9 of the *Bill of Rights*. Broadly, 'what happens within Parliament is a matter for control by parliament alone'.[4] Collectively, this principle of control by parliament of its own affairs free of outside interference is known as exclusive cognisance.

The 1999 report of the UK parliamentary Joint Committee on Parliamentary Privilege examined a number of rights under the umbrella of exclusive cognisance. These were:

> the right of each House to provide for its proper constitution. This includes the power to expel a member by resolution; the right to judge the lawfulness of its own proceedings. This includes the power of the House to determine, judge or depart from its own procedures; the right to institute inquiries and call for witnesses and papers; and the right to administer its internal affairs within its precincts.
>
> Under these rights David McGee of the House of Representatives in New Zealand specifically identified a number of additional immunities, which are strongly linked to proceedings of both the House and its committees. They include the use of parliamentary proceedings outside of parliament; admission of strangers; control of reports and its own proceedings; committee proceedings; protection for reports of proceedings. [5]

---

[3] D Limon and WR McKay (eds), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 22nd edn. Butterworths (1997), p. 63.

[4] Report of the Joint Committee on Parliamentary Privilege. UK Parliament (1999), para 229.

[5] David McGee, *Parliamentary Practice in New Zealand*, New Zealand Government Printer (1985), pp. 426–36.

The Scope of Exclusive Cognisance

A number of significant claims of parliamentary privilege have been subject to judicial review to help define the scope of exclusive cognisance, for instance: *Stockdale v Hansard* (1836–37) 173 ER 322; and *Bradlaugh v Gossett* (1883–84) 12 QBD 271.

Other claims under the scope of exclusive cognisance that go beyond the 'proceedings' of parliament have also been made in various other jurisdictions over the years. One particular case is used to illustrate the potential for exclusive cognisance to limit accountability.

In *The King v Sir R.F. Graham-Campbell, ex parte Herbert*,[6] AP Herbert, a novelist who later became a member of the House of Commons, made an application for process against the House of Commons' Kitchen Committee and the Manager of the Refreshment Department of the House for the unlawful sale of liquor. The Chief Magistrate, Sir Rollo Graham-Campbell, of the Bow Street Police Court, felt he had no jurisdiction to issue the process sought. The matter then went to the King's Bench Division seeking an order for the consideration of the matter.

There the Attorney General argued that the 'privilege of the House cannot be confined to what takes place in the debating chamber itself'.[7] He evoked the Lord Denman metaphor of the 'energetic discharge' by members of their duties by adding:

> The House sits for long periods and arrangements have to be made for heating the House when the weather is cold and the provision of refreshment for the mind in the library and refreshment for the body in suitable places. The regulation of these matters is clearly within the area of the internal affairs of the House and connected with the affairs of the House.[8]

Strauss, for the applicant, argued against the claim. He said if it was upheld it would create a new privilege to commit a crime. Lord Hewart, CJ, in just over a page judgement upheld the view of the magistrate relying almost solely on the words of Lord Denman in *Stockdale v Hansard.*

Charles Robert, Principal Clerk, Procedure, of the Senate in Canada, in an article [9] on internal affairs, along with Geoffrey Lock, the former Head of the Research Division in the House of Commons Library, in a memorandum of advice to the Joint Committee on Parliamentary Privilege (UK) have both argued that in quoting Lord Denman, Lord Hewart assigned 'the opposite of the originally intended

---

[6] R v Graham-Campbell et al, ex p. Herbert [1934] 1 KBD pp 595–605.

[7] Ibid, p 598.

[8] Ibid, pp 598–9.

[9] Charles Robert 'An Opportunity Missed' *The Table* vol. 74 (2006) pp 7–21.

meaning.' Hence faulty reasoning on the part of Hewart and 'the flavour of his ruling would likely have been much different.'[10]

Herbert did not have the money to appeal the decision. The consequence, as Herbert, Lock and Robert have concluded, is that the scope of privilege was widened. Herbert wrote,[11] as quoted in Robert's article, the implications of the judgement was that the House could sell milk, bad meat or bread, morphine and opium without regard to the Sale of Food and Drugs Act as they might fall within the scope of the internal affairs of the House.

Robert argues the decision in *Graham-Campbell* has influenced the House of Commons approaches to privilege by creating a kind of statutory immunity that did not exist before the case.[12] Lock similarly points out one of the consequences of Hewart's judgement. The parliament had come to 'regard itself as exempt from laws quite unrelated to its core activities and remote from the protection of free speech'.[13] He gives instances of breaches of the Trade Descriptions Act; Health and Safety at Work Act; Food Safety Act; Offices, Shops and Railway Premises Act; Prices and Income Act; Data Protection Act; and, various pieces of industrial relations legislation.

Robert also points to shifts in exclusive cognisance. It has come to mean the right of a House to administer its internal affairs within the Parliamentary precincts as opposed to the traditional sense, the right to determine and control core functions. As contemporary parliaments have changed rapidly in recent decades, unlike the centuries it took to establish privileges, there has been an expansion in support services provided to Members. For example, in just technological development alone parliaments have had exponential growth in the new areas of management and operation. Hence the Joint Committee on Parliamentary Privilege (UK) addressed the challenge of modernising privilege and the gap in theory and practice between the narrow scope of proceedings in parliament and the wider ambit of internal affairs.

The UK Joint Committee canvassed the extremes of claims for exclusive cognisance. These range from the arrangements for parliamentary business to:

> the provision of basic supplies and services such as stationery and cleaning. This latter extreme would be going too far if it were to mean, for example, that a dispute over the supply of photocopy paper or dismissal of a cleaner could not be decided by a court or industrial tribunal in the ordinary way.[14]

---

[10] Ibid, p 10 and Geoffrey Lock, *Memorandum of Advice to the Joint Committee on Parliamentary Privilege* (UK).

[11] AP Herbert *Uncommon Law: Being 66 Misleading Cases* London (1955).

[12] Charles Robert op cit, p 15.

[13] para 20 Lock op cit.

[14] Ibid, para 241.

The Joint Committee went on to recommend the enactment of provisions 'to effect that the privileges of each House to administer its own internal affairs in its precincts applies only to activities directly and closely related to proceedings in Parliament.[15]

New South Wales Developments

The privileges of the parliament of New South Wales 'are to be found in the whole body of common law and a few relevant statutes'[16] as, unlike many other parliaments, it has not legislated to establish its privileges. In New South Wales the status of the exclusive cognisance doctrine is not settled. There have been no decided cases elucidating the doctrine. So on the surface the doctrine of exclusive cognisance would be a traditional antithesis of parliament's modern accountability to the people. However, from the mid 1980s there have been a number of incursions into exclusive cognisance. These developments have both confirmed and relaxed any absolutist interpretation of the doctrine.

The words of the JSC report provide a reference point in both time and a change of attitude from which this paper now turns to highlight a selection of recent lower profile legislative, procedural and administrative developments in New South Wales that have in a small way have shaped the fringe aspects of exclusive cognisance. This collation is conducted from a Legislative Assembly perspective.

As many have highlighted, there is plenty of both ongoing debate and uncertainty in relation to the scope of exclusive cognisance within the realm of parliamentary privilege. It is also recognised that as both constitutional frameworks and the powers of parliaments differ direct comparisons across jurisdictions may be indicative only. However, as the UK Joint Committee on Parliamentary Privilege noted at paragraph 251, it is for the parliament to make out a reasoned case for exemptions of the law. Since 1985 a number of measures have been taken by the Legislative Assembly and by the parliament as a whole to remove some of that uncertainty. The first were two pieces of legislation that confirmed exclusivity. They are dealt with in chronological order.

Freedom of Information

The *Freedom of Information Act* 1989 (NSW) provides for the right of the public to obtain access to information held by the Government, which includes a host of public authorities and public offices. The legislation respects both the doctrine of separation of powers and parliamentary privilege. Section 7 (1) (a) (iii) defines the public authorities the legislation is applicable to other than the Legislative Council

[15] Ibid, para 251.

[16] Report of the Joint Select Committee upon Parliamentary Privilege in NSW op cit p 15.

or Legislative Assembly or a committee of either or both Houses. Moreover s 8 (3) (a) (ii), provides that a holder of a public office does not include a member of the Legislative Council or Legislative Assembly or a committee of either or both of those bodies. Thus, even in opening up the work of the government to public scrutiny, the executive clearly puts a boundary around some parliamentary and other material that the public cannot access.

Parliamentary Precincts

On 10 July 1997 the *Parliamentary Precincts Act* (NSW) received assent. For the first time, this set out a definition of the parliamentary precincts and removed any doubts by providing a basis for the control, management and security of the precincts. Under s 5 and Part 4 of the Act the Presiding Officers — or a parliamentary officer or police officer authorised by the Presiding Officers — may direct a person to leave or not to enter the parliamentary precincts. Under s 15 the Presiding Officers may enter into arrangements with the Commissioner of Police to provide for the security of the parliamentary precincts. Significantly, s 13 of the legislation establishes the Corporation of the Presiding Officers of the Parliament of New South Wales as owner of the parliamentary precincts. The legislation (in section 25) does not authorise directions to members to be removed or prevented from entering the precincts other than by the existing powers of the Houses. Also, s 26 provides that 'Nothing in this Act derogates from the powers, privileges and immunities… 'of the parliament, Houses, committees, Presiding Officers or members. The legislation implements one of the recommendations of the JSC upon Parliamentary Privilege, namely to provide a clearer basis for a core privilege in the control of the parliamentary precincts. It is the only significant recommendation of the committee to be adopted.

Reporting when Parliament Not In Session

However, there have been quite a number of incremental steps that have relaxed exclusivity. First, an overhaul of the annual reporting requirements of Government departments took place in the *Annual Reports (Departments) Act* 1985 (NSW). Section 13 (3) of the Act includes a provision for the presentation of annual reports of departments to parliament if a House is not sitting, and incorporates tabling out of session within a proceeding of parliament by stating that:

> (3) An annual report or statement presented to the Clerk of a House of Parliament shall:
>
> a) on presentation and for all purposes, be deemed to have been laid before the house of Parliament;
> b) be printed by authority of the Clerk of the House;
> c) for all purposes be deemed to be a document published by order or under the authority of the House; …

This statutory provision started the trend of making reports more readily available to the public, rather than waiting for one of the Houses to physically meet before a report could be tabled. Similar provisions have been almost universally included in a vast number of Acts to cover annual reports of bodies other than departments, as well as documents of a varied nature such as reports of investigations or compliance of other bodies.[17]

Statutory Based Parliamentary Committees

Since 1983 a number of statutory based parliamentary committees have been established. These are the:
Public Accounts Committee;
Legislation Review Committee;
Committee on the Independent Commission Against Corruption;
Committee on the Office of the Ombudsman;
Committee on the Health Care Complaints Commission;
Committee on the Police Integrity Commission; and
Committee on Children and Young People.

Each of the establishing Acts contains a similar set of provisions for procedure, membership, chairs and vacancies as well as the distinct functions of the respective committees. During the period of this survey each Act[18] has had a provision for the tabling of a committee report, in a similar manner to:

> (1) If a House of Parliament is not sitting when the Joint Committee seeks to furnish a report to it, the Committee may present copies of the report to the Clerk of the House.

---

[17] The following list is not meant to be complete but is a sample of the wide nature of bodies that have provisions to present papers to the parliament either through the Presiding Officers or the Clerks: reports of the variety of independent bodies such as the Independent Commission Against Corruption under s 78 (2) of the Independent Commission Against Corruption Act 1988, the Office of the Ombudsman under s 31 AA of the Ombudsman Act 1974, and the Police Integrity Commission under s 103 of the Police Integrity Commission Act 1996; s 14B of the Royal Commissions Act 1923; s 20X of the State Owned Corporations Act 1989; reports of inquiries through s 740 of the Local Government Act 1993, s 46D of the Passenger Transport Act 1990, and s 68 of the Rail Safety Act 2002; s 88 of the Electricity Supply Act 1995; s 121 of the Crimes (Forensic Procedures) Act 2000; s 64 of the James Hardie Former Subsidiaries (Winding Up and Administration) Act 2005.

[18] s 10 of the Legislation Review Act 1987 (NSW) with respect to the Legislation Review Committee; s 68A of the Independent Commission Against Corruption Act 1988 (NSW) with respect to the Committee on the ICAC; s 31FA of the Ombudsman Act 1974 (NSW) with respect to the Committee on the Office of the Ombudsman and the Committee on the Police Integrity Commission; s 70A of the Health Care Complaints Act 1993 (NSW) with respect to the Committee on the Health Care Complaints Commission; schedule 1 clause 4 of the Commission for Children and Young People Act 1998 (NSW) with respect to the Committee on Children and Young People. The Public Accounts Committee has a similar provision in s 63C of the Public Finance and Audit Act 1983 (NSW).

(2) The report:
(a) on presentation and for all purposes is taken to have been laid before the House, and
(b) may be printed by authority of the Clerk, and
(c) if printed by authority of the Clerk, is for all purposes taken to be a document published by or under the authority of the House, and
(d) is to be recorded in the Minutes, or Votes and Proceedings, of the House on the first sitting day of the House after receipt of the report by the Clerk.

This legislative provision enables the statutory based parliamentary committees to report when parliament is not sitting.

Reporting Out of Session by Other Parliamentary Entities

The legislative provision enabling the statutory based committee to report when parliament is out of session has also been adopted into the Standing Orders of the Legislative Assembly to apply to non statutory based parliamentary committees. To further facilitate the accessibility of information, prior to each summer recess the Legislative Assembly has in recent years passed resolutions to authorise the tabling of the annual reports of the Legislative Assembly and of the Joint Services Departments of the New South Wales parliament out of session.

Interpretation Act

The *Interpretation Act* 1987 (NSW) pre-empted the Privy Council decision *Pepper v Hart* [19] by specifically providing, in s 34, for the use of extrinsic material by courts for assistance in the interpretation of Acts and statutory instruments. Among the types of materials which may be used are: reports of parliamentary committees; explanatory notes, memoranda or other relevant documents that are furnished to members when a Bill is introduced; the minister's second reading speech; and relevant material in both the Votes and Minutes of Proceedings and Hansard debates.

In 1992, during the Legislative Assembly's hung parliament, the Act was amended to make it clear that regard could be had to the types of material above if the Bill for the Act were introduced by a private member. This is a practical example of a situation where the parliament has given up exclusive cognisance of its proceedings to assist courts in the interpretation of Parliament's intentions.

Parking Space Levy Act

In 1992 the *Parking Space Levy Act* was passed. The purpose of the legislation is to discourage the use of cars in certain business districts of the Sydney metropolitan area by charging a levy on off-street commercial and office parking spaces. The

[19] Pepper v Hart (1993) AC 593; 1 All ER 42.

revenue is used to finance the development of public transport infrastructure. Section 17 of the Act provides for the obligations of persons in the public sector, with s 17 (7) (b) and (d) respectively specifying that the legislation applies to positions in the service of the parliament, and the office of a member of the Legislative Council or of the Legislative Assembly. Therefore, there is no doubt that the statute applies with respect to Parliament House as members and staff with car parking rights at Parliament House are charged the annual levy.

Members' Code of Conduct

In April 1992 a member resigned his seat in the Legislative Assembly, and was almost immediately appointed to a senior public service position. Both Houses resolved to refer to the Independent Commission Against Corruption to investigate and report on whether there was any corrupt conduct in the appointment, based on a possible inducement for the member to resign. The report contained findings of corrupt conduct against both the then Premier Greiner and then Minister Moore.

Greiner and Moore each commenced proceedings in the Supreme Court challenging the ICAC findings. The matter was referred to the Court of Appeal.[20] The majority judges concluded that the conduct in question constituted a reviewable error in relation to the conclusion that Greiner and Moore's conduct fell within the meaning of s 9 which defined corrupt conduct. Therefore, the Court declared that the ICAC had made the decision without, or in excess of, its jurisdiction. That is, in the absence of a code of conduct the ICAC could only make a finding of corruption if the conduct were criminal. This led to an amendment to s 9 of the *Independent Commission Against Corruption Act* (NSW) to broaden the limitation on the nature of corrupt conduct, by providing that relevant codes of conduct apply to both ministers and members: a ministerial code of conduct prescribed or adopted for the purposes of the Act; and a code of conduct for members adopted for the purposes of the Act, by resolution of the House concerned.

Finally, on 5 May 1998 the Legislative Assembly adopted a Code of Conduct for its members. It has been re-adopted in every session since. The preamble to the code states that:

> Members of Parliament recognise that they are in a unique position of being responsible to the electorate. … Members of Parliament accordingly acknowledge their responsibility to maintain the public trust placed in them by performing their duties with honesty and integrity, respecting the law and institution of Parliament, and using their influence to advance the common good of the people of New South Wales.[21]

[20] Greiner v ICAC (1992) 28 NSWLR 125

[21] Code of Conduct adopted by the Legislative Assembly of New South Wales 22 May 2006.

Whilst arising from the Court of Appeal challenge, this is another situation where members have placed a boundary on the scope of their activities. The code of conduct, though aspirational in nature, provides the formal linkage of members to the ICAC's jurisdiction in relation to corruption. The preamble reminds members of their connectedness to the people of New South Wales.

Citizens' Right of Reply

Following the election of the Carr Government in 1995 John Murray, MP, became the new Speaker of the Legislative Assembly. He held the view that the parliament should be opened up and made more accessible to the public. One of the more significant manifestations of this was his commissioning of a discussion paper on a procedure for a citizen to be able to make a right of reply to adverse references made about them. The discussion paper canvassed the various issues involved, and noted the Senate resolution and that of the Legislative Assembly for the ACT. The ACT version was preferred, as its procedure included both persons and corporations adversely affected, or a person's privacy unreasonably invaded. A resolution was adopted on 27 November 1996. Part of the purpose of the resolution is to remind members to use their right to freedom of speech responsibly. When moving the required motion the then Leader of the House, Paul Whelan, MP, noted that the House:

> will no longer be a coward's castle. In the past certain members of this House have overstepped the line. … With the passing of this motion all honourable members will be more accountable for the statements they make in this place.[22]

The Legislative Assembly has re-adopted the resolution every session since, to provide an opportunity to effect some remedy for outsiders that have been subject to an abuse of the privilege of freedom of speech in the House.

Sexual Harassment

The main purpose of the *Anti-Discrimination Amendment Act* 1997(NSW) was to provide sexual harassment as a separate grounds of unlawful conduct by employers and employees under the *Anti-Discrimination Act* 1977 (NSW). In second reading speeches it was highlighted that Ministers and members of parliament would be liable for their acts of sexual harassment. It was pointedly stated in the Attorney General's second reading speech that it was 'not just one law for private enterprise and another law for government'.[23] Parliament House, ministerial and electorate offices as well as other places connected with ministerial, parliamentary or electoral duties are also included in the definition of a workplace. The particular legislative provisions are found in s 22B:

---

[22] New South Wales Parliamentary Debates (Hansard) 25 September 1996, p. 4625.

[23] New South Wales Parliamentary Debates (Hansard) 20 November 1996, p. 6265.

(7) It is unlawful for a member of either House of Parliament to sexually harass:
(a) a workplace participant at a place that is a workplace of both the member and the workplace participant, or
(b) another member of Parliament at a place that is a workplace of both members.

…

(10) Without limiting the definition of ***workplace***, the workplace of a member of either House of Parliament is taken to include the following:
(a) the whole of Parliament House,
(b) any ministerial office or electoral office of the member,
(c) any other place that the member otherwise attends in connection with his or her Ministerial, parliamentary or electoral duties.

Liquor Licence

Following what seems a central issue, the sale of liquor, in regard to the internal affairs at Westminster and following a much publicised incident in the Legislative Assembly chamber the *Liquor Amendment (Parliamentary Precincts) Act* 2004 (NSW) was passed. This required the Parliament to apply for a liquor licence for the first time in almost 100 years, a change aimed at bringing Parliament House within the NSW liquor licensing regime. The parliament was issued with a Governor's licence under the *Liquor Act* 1982 (NSW). Under the licence the parliament is authorised to sell and dispose liquor for consumption within the parliamentary precinct. The Act was relatively quickly repealed but the provisions relating to the Governor's licence were incorporated into section 19 of the *Liquor Act*:

(1) The Governor may, on the recommendation of the Minister and subject to such conditions as the Minister may impose, authorise the court to issue a licence authorising the sale of liquor:

…

(a1) in the Parliamentary precincts (within the meaning of the Parliamentary Precincts Act 1997)…

This is a situation in which parliament was prepared — although perhaps prompted by an incident in the Chamber — as the Minister said in the second reading speech to make itself subject to the operation 'of the same rules that apply to the community at large.'[24]

Child Related Conduct Declarations

In November 2006, prior to the 2007 general election, in response to the resignation of Milton Orkopoulos, the *Parliamentary Electorates and Elections Amendment (Child Sexual Offences Disclosures) Act* 2006 (NSW) was passed. The minister when introducing the Bill in the Legislative Assembly stated that the:

[24] p 8936 New South Wales Parliamentary Debates (Hansard) 12 May 2004.

> legislation will ensure that politicians are transparent about their backgrounds so that the community has adequate information when it votes as to whether the candidate will meet community expectations in relation to the protection of our young people.[25]

Under s 79 & s 81B of the *Parliamentary Electorates and Elections Act 1912* (NSW) candidates for election to either House are now required to submit must a child related conduct declaration to the Electoral Commissioner together with their nomination form. A candidate's nomination will not be valid without the declaration.

In s 81L the declaration covers whether or not the candidate has ever been convicted of the murder of a child, or a child sexual offence, or criminal proceedings for such an offence have ever been commenced against the candidate regardless of whether the candidate was not convicted or any conviction was subsequently quashed on appeal, and if a relevant apprehended violence order has ever been made against the candidate. It is an offence for a candidate to make a declaration knowing it to be false, or not believing it to be true. The offence, punishable by 5 years' imprisonment, will result in any elected candidate will be disqualification from their seat, pursuant to s 13A of the *Constitution Act 1902*.

Pursuant to s 81N, following an election it is the Commission on Children and Young People conducts the audit of the declarations. The Commission then must present a report on the result of the audit to the Presiding Officer of the respective House of the members concerned.

Rather than leaving it to the House to adjudge whether a member has conducted themselves in a manner unworthy of a member of Parliament and then expelling the member, in relation to child related conduct, the both Houses have made it clear in legislation the standards expected required of candidates. Further the Houses have delegated to an outside body the function of conducting the audit of the declarations and checking the criminal records of the elected candidates.

Employment

Section 4 (b) of the *Public Sector Employment and Management Act 2002* (NSW) makes it clear that that Act does not apply to: 'any position of officer of either House of Parliament or any position under the separate control of the President or Speaker, or under their joint control.'

By an order of the Executive Council under s 47 of the *Constitution Act 1902* (NSW), the Speaker is vested with the power of making minor appointments of the

[25] p 4065 New South Wales Parliamentary Debates (Hansard) 15 November 2006.

Legislative Assembly[26] and is deemed to be the employer of the staff of the Legislative Assembly for the purposes of the *Industrial Relations Act 1996* (NSW). Up until the 2006 restructure of Committee staffing arrangements, the Legislative Assembly employed Committee Managers on a contract basis. In 2002 the Public Service Association [PSA] sought relief in the Industrial Relations Commission to halt recruitment for the positions of Committee Manager until agreement could be reached with the Speaker on the method and placement of the then staff in a permanent manner.[27] The then Speaker felt that Committee Managers should continue to be employed on a contract basis. On the other hand, the PSA did not think the Speaker had the power to continue employing Committee Managers on contract and that they should be permanent appointments.

The matter was listed for mention before Justice Schmidt on 7 February 2002. Her Honour came down from the bench to preside over some conciliation talks between the parties, indicating that the case would not be an easy one. On the one hand she conceded the point relating to the fair and equitable treatment of long term staff in the Public Sector and on the other she felt that the Speaker had the power to employ staff however he or she wanted. She suggested further negotiations between the parties. Nonetheless, it was clear the Speaker had the power to retain Committee Managers on the contract policy. The matter was ultimately settled by negotiation.

It would have been interesting for the Industrial Commission to rule on the matter, so as to define the scope of the Speaker's powers as an employer. The Legislative Assembly has taken the view that the Speaker has very broad powers, unencumbered by the parameters of the *Public Sector Employment and Management Act*, but obviously within the bounds of the *Industrial Relations Act* which under s 106 the Industrial Relations Commission can declare a contract void if it holds it to be unfair. Clearly the Legislative Assembly does not believe the employment of staff is an aspect of exclusive cognisance. Accordingly, whilst it is not required to, the Legislative Assembly has over the past twenty years proceeded to systematically incorporate public sector standards and policies as a part of the conditions for the employment of its officers. Further, it is rightly subject to the controls of a wide range of legislation in employment matters, such as Occupational Health and Safety and Anti-Discrimination.

Use of Technology

The extraordinary developments of modern technology has provided the parliament with an effective means of more widely disseminating information about itself, such as proceedings, in greater volumes, to a wider audience and in a much more timely manner than our predecessors could ever have dreamt of. Nothing demonstrates this more visibly — literally — than the broadcast of proceedings since 1995. The

[26] Published in Government Gazette No. 97 of 2 May 1952.

[27] Industrial Dispute New South Wales IRC 2/599.

Speaker has allowed cameras for the filming of broadcast of proceedings on the in house system, television, and video streaming to the world on the Internet.

The application of technology has also impacted on the ways committees operate. For instance, in the pre-electronic age submissions and reports could initially only be viewed in hard copy form; delays were endured as reports were physically printed and transcripts or minutes became available only when they were tabled.

In recent years, it has become policy for parliamentary committees administered by the Legislative Assembly to utilize the provisions of s 4 of the *Parliamentary Papers (Supplementary Provisions) Act 1975* for the publication of parliamentary papers. This includes the power for a committee to authorise the publication of a document received by it or evidence given before it. This is done by a committee resolving standard motions such as: that the committee authorises the publication of the uncorrected transcripts of evidence this day (at the end of a public hearing day); that the minutes of the meeting on 6 June 2005 be confirmed and published; and that the committee authorises the publication on the committee website the submissions (including subsequent submissions) received in relation the first inquiry.

The information is then placed in the appropriate place on the parliament's website at www.parliament.nsw.gov.au. Moreover, and importantly, the Internet versions receive the same privilege status as attached to the hard copy. This means that information that ultimately would become publicly available becomes available to interested individuals or groups without the lengthy time lags of reporting, tabling and printing documents, thereby, I would argue, enhancing the exposure of committee work to the public.

The uploading of information on the Parliament's website has also created a new unforeseen problem for the Legislative Assembly. As the electronic record of historical *Parliamentary Debates* increases in scope and scale, and search engines become more powerful and sophisticated, some individuals when they Google their name find very dated references to themselves in Hansard. For example, there have been some cases of adverse references made by former Ministers for Consumer Affairs amongst others about sharp business practice. As such references might date back ten or more years there really is not much that the Legislative Assembly can do due to the time limit for the making of a citizen's right of reply nor would it be likely that the House would pass a specific resolution.

Conclusion

It is now twenty-two years since the report of the JSC upon Parliamentary Privilege in New South Wales. Apart from the *Parliamentary Precincts Act*, the majority of the recommendations of the committee have not implemented. The *Freedom of Information Act* also confirms an exclusivity of certain material that cannot be accessed by the public by exempting the Parliament and its committees from

provisions of the Act. These two pieces of legislation have removed some uncertainties in some of the ways the New South Wales parliament undertakes some of its core functions.

However, there have also been a number of developments that have relaxed any absolutist view of exclusive cognisance. These selected developments are analogous to some of the issues tested and canvassed within the scope of exclusive cognisance in many other jurisdictions. The developments in New South Wales include: procedure proscribed by legislation; evolution of standing orders; evolving practice in response to technological advances; the publication and use of documents; the sale of liquor; employment of staff; standards in regard to certain behaviour; and others concerning aspects of internal affairs such broadcasting proceedings.

They clearly indicate a strong tide of opening up the functions and proceedings of the parliament. At the same time, this opening up has not adversely impacted upon, nor impaired the Legislative Assembly in carrying out its core functions. Arguably, therefore, it is not absolutely or even reasonably necessary that they should be subject to a wider exclusive cognisance. These developments, perhaps not in any co-ordinated or conscious manner, have kept some faith to the endeavour of the JSC upon Parliamentary Privilege in maintaining 'the parliament as a living institution interacting with and responsible to the community it serves'.[28] ▲

[28] Report of the JSC upon Parliamentary Privilege in NSW op cit, p 130.