

Executive Accountability to the Senate and the NSW Legislative Council[#]

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It is well accepted in Australia that the functions of an upper House include the scrutiny of the executive. The challenge is how to achieve effective scrutiny without undermining privilege and damaging the public interest. This article considers and contrasts how the Senate and the New South Wales Legislative Council deal with this dilemma. It focuses on orders for the production of documents, but also briefly considers the exercise of powers to compel witnesses to appear and give evidence before the Houses or their committees. It contends that both the Houses and the executive should be more reasonable and moderate in their behaviour and not exploit their respective powers to the detriment of the public interest.

Introduction

Executive accountability to the Parliament is not only fundamental to our system of responsible government but also forms one of the checks and balances involved in the system of separation of powers. It is therefore of fundamental constitutional importance. Accordingly, it is surprising that the rules governing its operation are so unclear and its effectiveness so tenuous.

This article compares executive accountability to the Senate and the NSW Legislative Council, in theory and in practice, by focussing on orders for the production of state papers and the compulsion of evidence from witnesses. It calls for moderation and reasonableness in the face of abuses of the system from both sides.

[#] This article has been double blind refereed to academic standards.

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Orders for the Production of Documents

Orders for the production of government documents to an upper House, although used in the early years of the operation of the NSW Legislative Council and the Senate, fell into disuse in both Houses for much of the twentieth century. They were revived in both Houses towards the end of the century and have become particularly powerful weapons for use when the government does not control the upper House.

The source of the power is different. The Senate's power to order the production of documents is derived from s 49 of the Commonwealth Constitution which gives it the same power as the British House of Commons had in 1901. This relationship is preserved by s 5 of the *Parliamentary Privileges Act 1987* (Cth). In contrast, the NSW Legislative Council has such inherent powers as are recognised at common law as being 'reasonably necessary' for it to fulfil its legislative and scrutiny functions.

Production of Documents — the Senate

The Senate has claimed that it has the *power* to require the production of all government documents but also acknowledged that there are some documents which *ought* not be disclosed.¹ Much of the debate about orders concerns which categories of documents ought not be disclosed and who should decide whether or not particular documents ought to be disclosed.

The Senate has generally accepted claims for public interest immunity where the documents, if disclosed, could: prejudice legal proceedings (especially where a jury is involved, but not in relation to appellate court proceedings); prejudice law enforcement investigations; damage commercial interests (such as disclosing tenders before the call for tenders is closed); unreasonably invade the privacy of individuals; disclose the deliberations of Cabinet or the Executive Council; prejudice national security or defence; or prejudice Australia's international relations or relations with the States.

The Senate has rejected claims for privilege on the ground that a document is a 'working document' or provides advice to government. Unless some form of particular harm to the public interest could be identified if it were to be disclosed, the Senate has concluded that internal government papers and advice must be provided. It has also expressly rejected as excuses the claim that disclosure will 'confuse the public debate' or 'prejudice policy considerations'.²

¹ Commonwealth, *Journals of the Senate*, 16 July 1975, p. 831; and H. Evans (ed.), *Odgers' Australian Senate Practice*, (CanPrint Communications, Canberra, 11th edn, 2004) p. 464.

² Commonwealth, *Parliamentary Debates*, Senate, 25 November 1999, p. 10751. See also: Evans, above n. 1, pp. 479–80.

Governments of course take a much broader view of what may be claimed as privileged. Along with the usual categories set out in the guidelines for official witnesses (largely drawn from *Freedom of Information Act* exemptions), is this scarcely comprehensible category of claimed privilege which appears to encompass most government documents:

material disclosing matters in the nature of, or relating to, opinion, advice or recommendation obtained, prepared or recorded, or consultation or deliberation that has taken place in the course of, or for the purpose of, the deliberative processes involved in the functions of Government where disclosure would be contrary to the public interest.

Who then decides whether a document is privileged and whether it has to be produced? The one agreed ground here is that the courts should not make that decision. The Australian Democrats in 1994 introduced the *Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill* 1994 that would have allowed the courts to enforce the production of government documents and decide whether the prejudice to the public interest in disclosing privileged documents outweighed the public interest in the House fulfilling its functions. However, the proposal was roundly rejected, with the Senate Privileges Committee concluding that such matters should be dealt with by the Houses rather than the courts.³ Courts too, have been reluctant to play such a role, preferring to leave it to political compromise.⁴

In practice what happens is that the government refuses to produce the documents that it does not wish to produce, as long as it thinks it can get away with it politically.⁵ The Senate may impose punitive measures that make it more difficult for the government to govern, such as extending question time, removing procedural advantages for ministers, delaying government legislation and restricting the ability of ministers to handle government business. Alternatively, the Senate might use other means to try and obtain information, through committee inquiries or the use of independent office holders.⁶

The difficulty with the claim that the Senate must decide upon privilege is that the point of maintaining privilege may be destroyed if the documents are revealed to the Senate for it to decide upon the claim of privilege. From time to time the use of

³ Evans, above n. 1, p. 478. See also: G. Lindell, 'Parliamentary Inquiries and Government Witnesses' (1995) 20 MULR 383 at 407.

⁴ *Halden v Marks* (1995) 17 WAR 447; and *Crane v Gething* (2000) 97 FCR 9.

⁵ After the Howard Government gained control of the Senate in 2005, the Senate stopped passing orders for the production of government documents. In 2002, 36 orders were made, with 35 orders in 2003 and 21 in 2004. In contrast from mid 2005 to the end of 2007 only 1 order was made: Australian Senate, Consolidated General Statistics 2001–7.

⁶ R. Laing, 'Remedies Against the Executive for Non-Compliance with Orders for the Production of Documents – Recent Developments in the Australian Senate' (2001) 69 *Table 29*, at 30.

a third party adjudicator of privilege has been mooted.⁷ Sometimes the Auditor-General has filled such a role, or a former senior public servant or barrister.⁸ This has, however, been relatively rare and there is no systematic procedure in place.

The Senate has not tested the extremes of its powers. It has not punished ministers or public servants for contempt for failing to produce documents. This may be so for a number of reasons. First, any Opposition contemplating the prospect of election to government is aware that what it does unto others it will have done unto itself. Secondly, there has been a marked reluctance to have courts become involved, lest the Senate's powers be found to be wanting. Thirdly, it has generally been regarded as unfair to make findings of contempt against public servants who are acting on ministerial direction. Finally, a policy of moderation and reasonableness makes great sense. Extreme actions would be likely, in the end, to bring the Senate into disrepute.

Production of Documents — the Legislative Council

In contrast, the Legislative Council has not been reluctant to explore the extremes of its powers. It suspended one of its members, the Treasurer, for refusing to produce documents. Inevitably the courts became involved, clarifying the powers of the House. The courts in *Egan v Willis* held that the Legislative Council has such powers as are 'reasonably necessary' to fulfil its legislative function and its function of scrutinising the executive.⁹ It did not matter that the Treasurer was suspended by the Legislative Council for failing to produce papers within the portfolio of a minister of the Legislative Assembly. The Legislative Council was able to bring the whole of the executive to account by suspending one of its members in the Legislative Council until such time as there was compliance with its order.

In *Egan v Chadwick*, the NSW Court of Appeal held that the Legislative Council has the power to require the production of state papers that are privileged, including those subject to client legal privilege, commercial confidentiality and public interest immunity.¹⁰ The only exception was Cabinet documents, as the production of Cabinet documents that directly or indirectly reveal the deliberations of Cabinet would undermine the collective responsibility of ministers, which is an essential aspect of responsible government.

Priestley JA pointed out in *Egan v Chadwick* that the Legislative Council must also pay heed to the public interest, and not publish beyond itself documents if their disclosure would be contrary to the public interest.¹¹ Hence special procedures were

⁷ Lindell, above n. 3, at 404; and E. Campbell, *Parliamentary Privilege* (Federation Press, Sydney, 2003) pp. 175–6.

⁸ Senate Committee of Privileges Committee, *52nd Report*, March 1995, Parliamentary Paper 21/1995, p. 5. See also: Evans, above n. 1, p. 479.

⁹ (1996) 40 NSWLR 650 at 664–5; and *Egan v Willis* (1998) 195 CLR 424 at [45].

¹⁰ (1999) 46 NSWLR 563.

¹¹ (1999) 46 NSWLR 563 at [142].

put in place to assess the validity of claims of privilege and to confine access to privileged documents to members only.

The Legislative Council's Standing Order No 52 now sets out the rules for ordering the production of documents. Where the government claims that a document is privileged, it may prepare a return describing the document and the reasons for the claim of privilege. The privileged documents are deposited with the Clerk and may be made available only to members. They may not be published or copied without an order of the House. A member may dispute the validity of the claim of privilege, in which case the matter is referred to an 'independent legal arbiter' who assesses the claim within seven days. This report is normally tabled in the House. In practice, if the arbiter disallows a claim of privilege the documents are made public and if the arbiter upholds the claim of privilege, they are usually restricted to members only and not made public. However, they remain in the control of the House and can legally be made public at any time if the House so wishes, regardless of privilege.

The task of the 'independent legal arbiter' is to evaluate and report on the validity of a claim for privilege. Standing Order 52 provides that the arbiter, who is appointed by the President of the Legislative Council, must be a Queen's Counsel, Senior Counsel or a retired Supreme Court judge. This is because the assessment to be made is a legal judgment based upon the rules of privilege developed by the common law and statute.

This all sounds perfectly reasonable. Privileged documents are not made public, but members of the Legislative Council still have full access to them in order to inform themselves and better scrutinise the executive. If the government were to try and exploit privilege by sneaking in documents that were not privileged, members could challenge the categorisation and the independent legal arbiter would advise on whether the document genuinely falls within accepted categories of privilege.

However that is not how it works in practice. The most frequently appointed arbiter has taken the view that his role is far more significant. He has contended that 'Parliament is supreme' in determining the public interest with respect to the disclosure of documents,¹² that he is the 'delegate of the Parliament',¹³ and that he makes 'determinations in the exercise of the plenary parliamentary authority that has been delegated to [him].'¹⁴ He has further stated that it is 'plainly wrong' to assert that the 'arbiter is bound, as for example is a Court, to uphold a claim of privilege that is technically valid', adding that:

The arbiter's duty, as the delegate of Parliament, is to evaluate the competing public interests in, on the one hand, recognizing and enforcing the principles upon

¹² Report of Sir Laurence Street (hereafter 'Street') — Papers on Sale of PowerCoal Assets, 27 June 2006, pp. 5–6.

¹³ Street — Papers on Cross City Motorway, 20 October 2005, p. 2; Street — Papers on the Lane Cove Tunnel, 22 May 2006, p. 3; and PowerCoal, above n. 12, p. 5.

¹⁴ Lane Cove Tunnel, above n. 13, p. 4.

which legal professional privilege is recognized and upheld in the Courts, and, on the other hand, recognizing and upholding an over-riding public interest in disclosure of the otherwise privileged documents.¹⁵

Thus the independent legal arbiter has gone beyond being a legal adviser — beyond even a court — and now purports to exercise the powers of the Parliament.

In my view, however, it is wrong to assert that the independent legal arbiter is a ‘delegate of the Parliament’. According to s 3 of the *Constitution Act 1902* (NSW), the New South Wales Parliament (or ‘Legislature’, as it is described) is comprised of the Queen (i.e. the executive), the Legislative Assembly and the Legislative Council. Of the three arms of the Parliament, the independent legal arbiter only has the authority of one and his or her actions in many cases would be rejected by the other two.¹⁶

No Act of the New South Wales Parliament delegates any power to the independent legal arbiter. At most, the arbiter fulfils an advisory function conferred upon him or her¹⁷ by the Legislative Council. Standing Order 52 provides that the Clerk is authorised to release disputed documents to an independent legal arbiter ‘for evaluation and report within seven calendar days as to the validity of the claim [of privilege]’. It does not delegate the powers of the House to the independent legal arbiter. Nor does it confer any powers on him or her. It merely provides that the arbiter may view the disputed documents to evaluate and report on (not even ‘determine’) the validity of the claims for privilege.

Further, there is doubt as to whether a House could, if it so desired, delegate its powers to a person who is not a member or officer of the House.¹⁸ Certainly the Parliament as a whole may delegate legislative power to a statutory office holder¹⁹ or permit a parliamentary committee to appoint a person to conduct an inquiry.²⁰ A House can also ask a person to assess documents for it, as has occurred at the Commonwealth level.²¹ It is a different thing altogether, however, for a House to purport to delegate its powers to a non-member or non-officer, or for that person to

¹⁵ Ibid.

¹⁶ Note Spigelman CJ’s observation that while the proceedings in *Egan v Chadwick* were ‘in form a conflict between the Executive and the Legislative Council, in substance they are a conflict between the Legislative Assembly and the Legislative Council’: (1999) 46 NSWLR 563, at [8].

¹⁷ So far only three persons have been appointed as arbiter, all of whom have been male.

¹⁸ R. Grove (ed.), *NSW Legislative Assembly Practice, Procedure and Privilege* (NSW Parliament, Sydney, 2007), p. 295.

¹⁹ *Cobb and Co Ltd v Kropp* [1967] 1 AC 141; and *VAW (Kurri Kurri) Pty Ltd v Scientific Committee* (2003) 58 NSWLR 631.

²⁰ See, for example, *Public Finance and Audit Act 1983* (NSW), s. 48A.

²¹ For example, Stephen Skehill was engaged twice by the Senate as a consultant to examine documents to assess parliamentary privilege, but he was not a ‘delegate’ of the Senate: Commonwealth, *Parliamentary Debates*, Senate, 5 December 2000, p. 20668 and 27 August 2001, p. 26625; and Senate, Committee of Privileges, ‘Execution of Search Warrants in Senators’ Offices — Senator Harris’, 114th Report, August 2003.

assert that he or she is exercising the powers of a House in making a decision. This would be a radical and probably unprecedented step, giving rise to all sorts of issues concerning parliamentary privilege.²² The terms of Standing Order 52 do not suggest that the House has purported to take such a step.

Legal Professional Privilege

Spigelman CJ observed in *Egan v Chadwick* that:

One feature which distinguishes a claim of legal professional privilege from a claim of public interest immunity is that in the case of the former there is no process of balancing conflicting public interests. The law has already undertaken the process of balancing in determining the rule.²³

The courts are therefore only called upon to ascertain whether claimed documents fall within the category of legal professional privilege. They do not consider how sensitive the documents are or balance their value against the public interest in their availability to the court in legal proceedings.

The independent legal arbiter, seeing his role as that of a delegate of the Parliament rather than a legal adviser, has instead decided that even though a claim for legal professional privilege is 'technically valid' he will reject the claim in relation to documents that are not sufficiently sensitive, in his view, to be withheld.²⁴

Further, where matters of current interest to the public are raised, such as the reliability and safety of trains, all legitimate legal professional privilege claims have been overruled. In the case of the Millennium Trains, the arbiter decided that public confidence in the trains would only be reassured by the public release of privileged documents.²⁵ It is hard, however, to imagine that the reasonable person on the Bondi train would feel particularly reassured if they knew (which is unlikely) that the legal correspondence between the State Rail Authority and its lawyers was now available to be viewed in the office of the Clerk of the Legislative Council.

Legitimate claims to legal professional privilege have been overruled on public interest grounds on a number of other occasions in relation to tunnels and air ventilation stacks,²⁶ whereas there was considered to be no overriding public

²² See, for example, *Hamilton v Al Fayed* [1999] 1 WLR 1569 at 1584, where an inquiry and report of the UK House of Commons Parliamentary Commissioner for Standards (who was an officer of the House, not a delegate) were held to fall within the 'proceedings of Parliament' and were therefore the subject of parliamentary privilege.

²³ (1999) 46 NSWLR 563, at [75].

²⁴ Street — Papers on M5 Motorway and Tunnel, 27 April 2001, p. 3; Street — Papers on Cross-City Motorway, 4 September 2003, p. 5; and Street — Papers on Lane Cove Tunnel, 24 January 2006, p. 3.

²⁵ Street — Papers on Millennium Trains, 22 August 2003, p. 9.

²⁶ Street — Papers on M5 East, Lane Cove and Cross City Tunnel Ventilation, 4 November 2003, p. 10; Street — Papers on Ventilation of M5 East, Lane Cove and Cross City Tunnels, 26 August

interest in disclosing documents concerning the contemplated prosecution of the Department of Mineral Resources concerning the Gretley Mine Disaster.²⁷ There does not appear to be any objective criteria by which such judgments are made — simply an assessment of the degree of public interest in, or concern about, a topic.

However, another independent legal arbiter has noted that ‘if privileged documents are not necessary for the exercise by the Legislative Council of its constitutional function of review, the claim for privilege should be upheld. That is the position in relation to draft advices, or advices in relation to draft documents not executed.’²⁸ Indeed, it is arguable that if documents are not necessary for the exercise of the constitutional functions of the Legislative Council, then there is no power to compel their production at all.²⁹

Public Interest Immunity

When it comes to public interest immunity, courts balance the public harm from the disclosure of documents against the significance of the information to the issues at trial.³⁰ The rules concerning public interest immunity are therefore directed at identifying the category of documents, the disclosure of which may cause public harm. It is then up to the judge to balance that potential harm against the relevance and significance of that information for the legal proceedings in question. In order to minimise harm, a court may sever the parts of a document most relevant to the litigation so they can be used while keeping confidential the parts that would cause most harm if disclosed.³¹ Alternatively, it might restrict disclosure to the legal advisers of the parties or impose restrictions upon the reporting of proceedings. There is also the further limitation that documents disclosed in discovery may only be used ‘for the purposes of the litigation in question, and not for any ulterior purpose, even after being put in evidence in open court.’³²

It is a different matter when parliamentary proceedings, rather than court proceedings, are involved. While the rules for the identification of the category of privileged documents remain the same, the balancing exercise ought then to involve

2004, p. 8; Street — Papers on Cross City Motorway, 15 November 2005, p. 3; Street — Papers on Tunnel Air Quality, 24 January 2006, pp. 4-5; Street — Papers on Road Tunnel filtration, 24 January 2006, pp. 5-6; Street — Papers on M5 East, Cross City Tunnel and Lane Cove Tunnel, 24 January 2006, p. 4; Lane Cove Tunnel, above n. 13, pp. 1-2; and Street — Papers on M5 East, Cross City and Lane Cove Tunnels, 1 November 2006, p. 4.

²⁷ Street — Papers on Gretley Mine Disaster, 9 May 2007, p. 2.

²⁸ Report of the Hon T R H Cole — Papers on the Desalination Plant, 20 December 2005, p. 10.

²⁹ *Attorney-General (Cth) v MacFarlane* (1971) 18 FLR 150.

³⁰ *Egan v Chadwick* (1999) 46 NSWLR 563 at [51]-[52]; *Alister v R* (1983) 154 CLR 404; and *Sankey v Whitlam* (1978) 142 CLR 1 at 38-40, 49 and 58.

³¹ *Burmah Oil Co Ltd v Bank of England* [1980] AC 1090 at 1135.

³² J. D. Heydon, *Cross on Evidence* (Butterworths, 6th Australian edn, 2000), p. 785, referring to *Riddick v Thames Board Mills Ltd* [1977] QB 881; and *Harman v Secretary of State for the Home Department* [1983] 1 AC 280.

an assessment of the significance and relevance of the documents for parliamentary proceedings, as opposed to legal proceedings.³³ As Spigelman CJ has pointed out, judges do not have the relevant experience to balance the public harm from disclosure of documents against the significance of the information for the legislative or accountability functions of a House of Parliament. Moreover, he considered it inappropriate for a court to determine the importance of information for a parliamentary function.³⁴

It is arguable that the evaluative role of the independent legal arbiter should be confined to deciding the first point — whether the documents fall within a privileged category. There are good grounds for arguing that the independent legal arbiter should not undertake the second balancing task as, like a judge, the arbiter does not have the relevant experience to make such an assessment. This is consistent with the fact that the arbiter is a ‘legal’ arbiter with legal qualifications who is engaged to undertake a ‘legal’ evaluation of the validity of the claim to privilege.

However even if the arbiter’s task extends further to making this balancing assessment the public harm from disclosure ought to be balanced against the relevance and significance of the document to the proceedings of the Legislative Council and the need for it to be made public in the course of those proceedings. It should be remembered that the documents for which privilege is claimed are already made available to members of the Legislative Council and therefore already may be used to inform members in fulfilling their functions of voting, introducing bills or asking questions of ministers in Parliament.

Two questions therefore ought to be asked. First, whether the production of the documents is reasonably necessary for the fulfilment of the Legislative Council’s constitutional functions. Secondly, whether the public harm caused by disclosure outweighs the need for such material to be made public in the fulfilment of the constitutional functions of the Legislative Council (e.g. in parliamentary debate or a committee report). As with the courts, consideration ought to be given to whether the potential harm involved in making a document public could be limited by restricting access to the document (e.g. maintaining the limitation to access by members of the House only) or by limiting the use which can be made of the document (e.g. only for the purposes of parliamentary proceedings, with any other use being treated as contempt of Parliament).

The independent legal arbiter has taken a different and arguably incorrect view of this balancing process. Instead, the arbiter has considered whether the general public is ‘interested’ in the topic and balanced the public harm from disclosure against the public interest in ‘contributing to the common stock of public knowledge and awareness’.³⁵ He has therefore decided that the public interest in the

³³ *Egan v Chadwick* (1999) 46 NSWLR 563 at [52].

³⁴ *Egan v Chadwick* (1999) 46 NSWLR 563 at [52]-[53].

³⁵ Street — Papers on Delta Electricity, 14 October 1999, p. 3.

State's river systems outweighs Delta Electricity's 'legitimate claim for public interest immunity'.³⁶ Public interest in the Sydney Harbour foreshore and the Quarantine Station, the ventilation of tunnels and the 'place of Luna Park as part of the cultural heritage of Sydney' have all been regarded as grounds for overriding public interest immunity.³⁷ How, one wonders, is a retired judge qualified to make the judgment, as he has, that the public interest in the cross-city tunnel was lower than the public interest in millennium trains?³⁸ Should the public interest in new schools be measured, as it has been, by reference to the architectural magnificence of the sandstone headquarters of the Department of Education in Sydney?³⁹

The arbiter has set himself up as a barometer for changing public opinion. Documents upheld as privileged in 2003 were later reassessed by the same arbiter as no longer being privileged. In 2006, the arbiter noted that since his report of November 2003, 'the public interest pendulum has swung significantly in favour of disclosure of what can be generically described as tunnel documentation'.⁴⁰ He argued that privileged documents should be released because they will reassure the public by showing that the government acted 'responsibly' with a 'commendable degree of careful attention' and that the documents showed an 'impressive record of the administration and formulation of policy'.⁴¹

Unsurprisingly the headlines in the press did not declare 'Government acts responsibly on Cross-City Tunnel' or 'Shock commendable degree of care by Government'. If the justification for the public release of privileged documents is the reassurance of the public, this strategy has not been notably successful.

Moreover, this reasoning bears little if any connection with the rationale for the power to require their production: that production of the documents is reasonably necessary for the Legislative Council to fulfil its legislative and scrutiny roles. The arbiter has not made clear how or to what extent the publication of documents is needed to perform those functions. For example, could they be fulfilled by members quoting in the House from the parts of those documents that are necessary to bring the executive to account, rather than publishing all of the documents and not using them at all in parliamentary proceedings?

³⁶ *Ibid*, pp. 4–5.

³⁷ Street – Papers on Quarantine Station, 31 July 2001, p. 3; Street — Papers on Ventilation of M5 East, Lane Cove and Cross City Tunnels, 26 August 2004, p. 7; and Street — Papers on Luna Park Leases, 19 June 2006, p. 3.

³⁸ Millennium Trains, above n. 25; and Cross City Motorway, above n. 24, p. 3.

³⁹ Sir Laurence regarded the 19th century sandstone building as 'eloquent of the comparable stature accorded to it alongside other great Departments of State': Street — Papers on Axiom Education Consortium, 15 July 2004.

⁴⁰ Street – Papers on M5 East, Lane Cove and Cross City Tunnel Ventilation, 24 January 2006, p. 2.

⁴¹ Cross City Motorway, above n. 13; Street – Papers on M5 East, Cross City and Lane Cove Tunnels, 1 November 2006, p. 4; Street – Papers on Audit of Restricted Rail Lines, 16 June 2005, p. 10; and M5 East, Lane Cove and Cross City Tunnel Ventilation, 4 November 2003, p. 5.

What do these Orders Achieve?

The action of the NSW Legislative Council in establishing the Standing Order 52 procedure and the role of an independent legal arbiter is unprecedented in Australia. It is also a model that other Legislative Councils may choose to adopt. The Victorian Legislative Council in 2007 introduced Sessional Order 21,⁴² which is based upon the NSW Legislative Council's Standing Order 52. Indeed, the Victorian Legislative Council also went so far as to suspend the Victorian Treasurer for his failure to produce documents ordered by the Legislative Council, but has not pursued the matter further.⁴³ An assessment of the costs, risks and consequences of such a procedure is therefore relevant not only to New South Wales, but to other States that contemplate adopting a similar procedure.

Since 1999 there have been at least 181 orders by the NSW Legislative Council for the production of documents, of which privilege was claimed by the government for some or all of the documents on at least 108 occasions and reports were issued by the independent legal arbiter on at least 39 occasions. Indeed, more orders were made for papers in 1999-2003 than in the previous 99 years.⁴⁴ Government estimates of the cost of collecting, copying and indexing these documents run into millions. The Legislative Council has also faced significant costs in engaging Senior Counsel or former Supreme Court judges as independent legal arbiters and storing massive numbers of documents. The costs would be worth it if the result were better government. Whether this is in fact the case may be doubted.

The Legislative Council is often more effective in achieving the production of documents than it is in using them to hold the executive to account or for the purposes of introducing legislation. On 6 April 2000, the NSW Treasurer made a speech noting the use made by members of the state papers that had been produced because they were 'reasonably necessary' for the fulfilment of the Legislative Council's functions. He noted that with respect to documents tabled about Walsh Bay the previous December, not one member had looked at the papers. With respect to an order concerning the M5 motorway, one member had looked at the privileged documents and none had looked at non-privileged documents. With respect to the M2 motorway documents, one member had looked at the privileged ones and none had looked at the non-privileged ones.⁴⁵

Most remarkable was the consideration of documents concerning Sydney Water and the contamination of Sydney's water supply. It was the withholding of the

⁴² Note that unlike NSW, the Victorian order gives access to privileged documents only to the mover of the motion for the order, not all members (unless the House orders otherwise).

⁴³ Victoria, *Parliamentary Debates*, Legislative Council, 19 September 2007, p. 2752; 10 October 2007, p. 2983; 31 October 2007, p. 3234; 21 November 2007, pp. 3535-3548; and 22 November 2007, p. 3630.

⁴⁴ D. Clune and G. Griffith, *Decision and Deliberation – The Parliament of New South Wales 1856-2003* (Federation Press, Sydney, 2006), p. 654.

⁴⁵ NSW, *Parliamentary Debates*, Legislative Council, 6 April 2000, p. 4285, per Mr Egan.

privileged Sydney Water documents which had led the Legislative Council to suspend the Treasurer, resulting in the *Egan v Chadwick* ruling that that the House could compel their production because it was reasonably necessary for the proper exercise of its functions. After the Court of Appeal's judgment in *Egan v Chadwick* was handed down, the Legislative Council again called on 23 June 1999 for the tabling of these privileged documents on the basis that the House, on behalf of the people of New South Wales, had the right to know about the safety of the water supply. The documents were tabled on 29 June 1999. Apparently, these documents were so 'necessary' for the House to fulfil its functions that by 6 April 2000 only one member had been to look at them.⁴⁶ Subsequently, on 17 November 2000, the Legislative Council resolved that all these privileged documents be published without any restriction on access, presumably so that others, such as the media, could hold the government to account instead of the Legislative Council.

As there have now been over 180 orders for the production of documents, it would be interesting to find out how often, if at all, the documents produced were actually looked at by members. Susan Want, the Acting Director Procedure of the Legislative Council, wrote in 2007 that 'anecdotal evidence suggests that some returns receive only a cursory inspection.'⁴⁷ There is no need for anecdotal evidence, as Standing Order 52 requires the Clerk to keep a register recording who looks at the documents tabled under that order. However, on 31 October 2007 the author was denied access to the register, apparently on the ground that it might result in the House being held in disrepute. Transparency, it appears, is only a burden to be imposed by the Legislative Council upon the executive, but not to be exercised by the Legislative Council itself.

One might well ask for whom is the production of these documents really intended if members themselves do not wish to read them? Most often the orders appear to be made to satisfy the demands of private lobby groups, such as those concerned about the ventilation of tunnels. On some occasions it may simply be a fishing expedition in the hope that media representatives might be sufficiently interested to find something that embarrasses the government. Occasionally disgruntled litigants lobby for orders to be made to help them in their litigation against a government body. Certainly commercial organisations make use of public access to documents, as there is some anecdotal evidence that companies putting proposals to government have copied from tabled commercial-in-confidence documents the innovative financial structures of their competitors.

It also appears that Standing Order 52 is being used as a backdoor means to thwart the exemptions in the *Freedom of Information Act*. People denied access to material that is exempt, by law, under the *Freedom of Information Act* can instead lobby a

⁴⁶ Ibid.

⁴⁷ S. Want, 'Orders for Papers in the Legislative Council of New South Wales: Developments and Challenges' (2007) 22(1) *Australasian Parliamentary Review* 76, at 84.

member of the Legislative Council to seek the production of documents.⁴⁸ Such a motion is likely to receive sufficient support if there is a possibility that it might cause the government trouble.

However requiring the production of state papers for these purposes is not reasonably necessary for the House to fulfil its functions. As the President of the Legislative Council, Peter Primrose, has previously observed:

This House can order the production of documents only for the purposes of its legislative function or executive accountability. It cannot order the production of documents for other purposes such as assisting others in litigation.⁴⁹

From a policy point of view, one must also ask oneself whether this process has in fact resulted in better government. Does the prospect of documents being made public on sensitive matters lead to better behaviour by governments or reluctance to put matters in writing, resulting in government by Chinese whispers?

What Can be Done?

Despite the above criticism of the practice of the Legislative Council in requiring the production of state papers, it is overall quite a sensible system. It just needs to be refocussed and rebalanced so that it fulfils its purpose while at the same time not damaging or undermining the system of government. As Gibbs ACJ stated in *Sankey v Whitlam*, '[n]o Minister, or senior public servant, could effectively discharge the responsibilities of his office if every document prepared to enable policies to be formulated was liable to be made public.'⁵⁰ There is good reason for some matters being regarded as privileged. The challenge is to get the right balance between privilege and accountability. How then might the operation of the system be improved?

1. The production of documents should only be ordered if it *truly* is reasonably necessary for the exercise of the functions of the Legislative Council. Are the documents necessary for a committee to complete its inquiry? Are they needed to inform members with respect to a Bill? Are they intended to be used to bring ministers to account *in the Legislative Council*?
2. The scope of the requests should be narrowed to those documents that are actually needed, not broad fishing expeditions.⁵¹

⁴⁸ For example, members of the 'Save Beacon Hill High School Committee' sought the production of documents under Order 52 after failing to obtain access to information through freedom of information requests: NSW, *Parliamentary Debates*, Legislative Council, 22 November 2006, p. 4580.

⁴⁹ NSW, *Parliamentary Debates*, Legislative Council, 17 November 2000, p. 10247.

⁵⁰ *Sankey v Whitlam* (1978) 142 CLR 1 at 40.

⁵¹ See also the criticism by Want that members should better target orders and not undertake trawling exercises. 'Members should ensure that orders are not unnecessarily burdensome on the government nor capture documents not required.': Want, above n. 47, at 84.

3. If members order the production of documents, they ought to be committed to using them for the purpose for which they were ordered, that is, for the purposes of the functions of the Legislative Council.
4. While non-privileged documents should be made public (unless there is a good reason to limit access to them, such as security), privileged documents should be limited to members and used only in the House or its committees for the purposes of the Legislative Council.
5. The role of the independent legal arbiter should be confined to ensuring that the Government does not 'try one on' by attempting to include with the privileged documents other documents that could not reasonably be characterised as falling within an established category of privilege. These documents are all available to members anyway.

Compelling Evidence from Witnesses

Powers of the NSW Legislative Council to Compel Evidence

There is no inherent power in the Houses of the NSW Parliament to compel witnesses to attend and give evidence. That is why, in New South Wales, the power of the Legislative Council to summon witnesses and require them to answer questions is dealt with by the *Parliamentary Evidence Act* 1901 (NSW). Subsection 4(1) provides that *any person* (not being a member of the Council or Assembly) may be summoned to attend and give evidence before the Council or Assembly. Accordingly, as a matter of law, any other person may be summoned, including private citizens, public servants, ministerial advisers and former state members of Parliament. Official guidelines advise NSW public servants that if summoned by a committee, they must attend as ordered.⁵² Former ministers and current ministerial advisers have appeared before committees from time to time, voluntarily or under summons.⁵³

The only exclusion is for members of the Legislative Council or Assembly who are dealt with by s5. It provides that their attendance to give evidence 'shall be procured in conformity (so far as practicable) with the mode of procedure observed in the British House of Commons'. In practice, this means that one House will request the other to authorise the attendance of one of its members before the first House or its committee. The second House may authorise its member to attend the first House or its committee, but the decision as to whether to do so is usually left to the member.⁵⁴

⁵² 'Guidelines for Appearing Before Parliamentary Committees' Premier's Department Circular C2003-47.

⁵³ See, for example: NSW, Joint Select Committee on the Cross City Tunnel, *Cross City Tunnel, First Report*, February 2006, p. 4; and Legislative Council General Purpose Standing Committee No. 4, *The Designer Outlets Centre, Liverpool*, Report No. 11, December 2004, p. 5 and .p 109.

⁵⁴ NSW, Legislative Assembly, Standing Orders 325-328; and Grove, above n. 18, pp. 248-9.

Once a witness appears before a House or committee, regardless of whether or not he or she is a member, the witness is subject to sections 11 and 13. Section 13 makes it a criminal offence for a witness wilfully to make a false statement. Conviction is a matter for a court and the maximum punishment is five years gaol. Section 11 provides that if any witness refuses to answer any 'lawful question', the 'witness shall be deemed guilty of contempt of Parliament'. The Presiding Officer may issue a warrant for the witness to be committed into custody and, if the House so orders, to gaol, for any period not exceeding one calendar month. In this case there need be no court involvement.

The key to this provision is the reference to 'lawful question'. It has been held that a lawful question is one that the witness is compellable to answer according to the established usage of law.⁵⁵ Accordingly, a witness could not be held to be in contempt of *court* if he or she declined to answer a question on the ground of a legally recognised privilege. It has not yet been established whether this reference to 'lawful question' in the *Parliamentary Evidence Act* permits the exclusion of privileged matters. This has been the subject of several opinions by NSW Solicitors-General and the Crown Solicitor.⁵⁶ A question that falls outside a committee's terms of reference is also likely not to be a 'lawful question'.

Powers of the Senate to Compel Evidence

In contrast, there is no legislation dealing with the compulsion of witnesses to give evidence before the Senate or one of its committees. The *Parliamentary Privileges Act 1987* (Cth) only deals with the matter of findings of contempt. The Senate however passed a resolution on privilege on 25 February 1988 which recognises that witnesses may raise objections to the giving of evidence. Witnesses are permitted to object to questions on grounds such as relevance and privilege. They may not refuse to answer a question except with a 'reasonable excuse'.

Clause 3 of the Senate's privilege resolution also declares that the Senate will use its contempt power 'only where it is necessary to provide reasonable protection for the Senate and its committees and for Senators against improper acts tending substantially to obstruct them in the performance of their functions.' It must also take into account whether a person who committed the alleged act of contempt 'had any reasonable excuse for the commission of the act'. What is a 'reasonable excuse' or an 'improper act' is not defined.

The Senate has taken the view that it cannot summon members of the House of Representatives or members of State Parliaments for constitutional reasons and reasons of comity.⁵⁷

⁵⁵ *Crafter v Kelly* (1941) SASR 237.

⁵⁶ See the opinions listed in: Grove, above n. 18, p. 251, fn. 28.

⁵⁷ Evans, above n. 1, p. 423; and Senate Select Committee on the Victorian Casino Inquiry, *Compelling Evidence*, 5 December 1996, pp. 7–19 and Advice by Professor Pearce, Appendix 3.

In 2002 there was a controversy in the Senate during the ‘children overboard’ inquiry as to whether the Senate could summons Mr Reith, a former member of the House of Representatives, who was the minister at the time of the relevant events. There were duelling opinions from the clerks of the two Houses, each procuring support from Senior Counsel, with academics also entering into the fray.⁵⁸ The ultimate question was whether the immunity of members of the House of Representatives from being summoned and questioned by the Senate continues after they cease to be members.

There is no judicial authority on this issue and no clear cut answer. There are good arguments to be made on both sides. In my view, however, the most important point is that, as was pointed out in *Egan v Willis*, the executive is accountable to the upper House even when executive acts are performed by ministers who are members of the lower House.⁵⁹ Subject to the application of privilege, there is no immunity attaching to information concerning the acts of ministers. Such information can be obtained by the Senate from the minister representing the relevant minister in the House of Representatives, through orders for the production of documents, questions on notice or without notice, and by the examination of public servants before Senate committees. Any immunity only attaches to a member of the House of Representatives, as a member.

This is consistent with provisions such as s14 of the *Parliamentary Privileges Act* 1987 (Cth) and s 15 of the *Evidence Act* 1995 (Cth) that give members an immunity from attending courts or tribunals while the House is sitting and for periods before and after. Both are based upon the principle that members should not be impeded from performing their duties. For the same reason, one House cannot compel a member of the other House to appear before it and answer questions. Nor could a House enforce any power to do so as this would most likely interfere with the duties of the member to his or her own House.

These principles, which were developed to protect the freedom of members to perform their duties and the independence of the two Houses, do not prevent scrutiny of the executive. A Senate committee can still inquire into matters that involve actions by a minister who belongs to the other House, even if it cannot compel his or her appearance before the committee. Once a member ceases to be a member and no longer has responsibilities to the House or Representatives, there appears to be no reason why he or she cannot be summoned to appear before the Senate.

⁵⁸ Senate, Select Committee on a Certain Maritime Incident, *Report*, October 2002, Appendices, including opinions by Bret Walker SC, Alan Robertson SC and the Clerks of both Houses. See also the papers by Ian Harris, Harry Evans and Geoff Lindell in (2002) 17(2) *Australasian Parliamentary Review* at 97, 131 and 111.

⁵⁹ *Egan v Willis* (1998) 195 CLR 424 at [45]; *Egan v Chadwick* (1999) 46 NSWLR 563 at [38].

Equally there is no longer a strong reason why ministerial advisers should not be compelled to give evidence. In the past it was argued that ministerial advisers merely provided support to ministers and that all decisions were made by ministers who were responsible for them to the Parliament. However, the role of ministerial advisers has changed. They now take substantive decisions and control what information is passed to ministers.⁶⁰ Ministers now deny responsibility on the basis that they were 'not told' of matters by their advisers. If ministers no longer accept responsibility for the actions of their advisers, then their advisers ought to become accountable to both Houses for their actions.⁶¹

Conclusion

There is a strong public interest in both the accountability of the executive to the Houses of the Parliament and the ability of a government to govern without undue interference. Governments should not abuse their position by refusing to produce documents and provide evidence that is reasonably necessary for the Houses to fulfil their functions appropriately. The Houses of Parliament should not abuse their position by trawling for documents that they do not genuinely need or intend to use for parliamentary purposes and publishing privileged documents when it is not reasonably necessary to do so. What is needed are moderation, balance and a dose of that comity that is so often discussed but so little applied between the executive and upper Houses.

There is also much to be said for clarifying the powers of the Houses by statute, such as the *Parliamentary Evidence Act*. This would give greater certainty to all parties and avoid the awkward dilemmas otherwise faced by public servants as to whether to obey their minister or the House. Legislation also has the advantage of establishing a consensus position, as it must be agreed by both Houses and the executive.

Finally, the use of an independent third party to ensure that claims for privilege are being made appropriately and are not being abused by the executive is a good idea if it is properly managed. The New South Wales approach has already spread to Victoria⁶² and is likely to spread to other upper Houses. If so, care should be taken to clarify better the role of the independent legal arbiter and the respect that should be afforded to legitimate claims of privilege. ▲

⁶⁰ A Certain Maritime Incident, above n. 58, pp. 173–87. See also: Campbell, above n. 7, p. 175.

⁶¹ H. Evans, 'The Parliamentary Power of Inquiry: Any Limitations?' (2002) 17(2) *Australasian Parliamentary Review* 131 at 137; and R. Ray, 'Compulsion? Privilege Claimed by the Executive: recent cases and debates' (2002) 17(2) *Australasian Parliamentary Review* 190 at 193–4.

⁶² Victoria, Legislative Council, Sessional Order 21, 2007, discussed above.