PARLIAMENTARY PRIVILEGE:

NEW SOUTH WALES STILL AT THE CUTTING EDGE

Paper presented by **Mr David Blunt**

Clerk of the Parliaments and

Clerk of the Legislative Council

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Introduction

While Parliaments are primarily legislative bodies, members' roles in representing their constituents and scrutinising government conduct are also cornerstones of parliamentary democracy. The performance of these functions is protected by a number of immunities from the ordinary law, such as members' freedom to speak in Parliament without threat of legal liability, and by a range of powers such as the power of parliamentary chambers and committees to inquire into matters of public concern. Such powers and immunities, collectively known as parliamentary privilege, may override competing legal rights and are in effect an exception to the general principle of the rule of law. However, under the constitutional settlement elaborated centuries ago such an outcome is considered to be justified by the overriding public interest in the effective operation of the legislature.

In a bicameral legislature parliamentary privilege has particular significance for the upper House, which must perform its constitutional oversight role with the appropriate degree of independence from the lower House and the executive government which generally controls that House. However, tension between the exercise of that role and the perceived imperatives of the executive can lead to differing views as to where the boundaries of parliamentary privilege lie.

In New South Wales the upper House has a long tradition of asserting its powers in support of its constitutional role, due in part to the nature of its electoral system which has meant that no government has gained a majority in the House since 1988. In this context, on occasions, the lack of a comprehensive statutory definition of parliamentary privilege in New South Wales has left room for debate about its boundaries. This paper examines three recent manifestations of that tradition, where the House directly or through its committees has asserted privilege in 'grey areas' which are untested in the courts and lacking in a fully coherent body of precedent. The issues in question concern the power of committees of the House to obtain information covered by statutory secrecy provisions, the extent of the House's power to call for documents from statutory bodies, and the applicability of the privilege against self-incrimination to parliamentary inquiries.

Background: sources of parliamentary privilege in New South Wales

While other Parliaments in Australia have legislated to define their powers and immunities in a comprehensive manner, there are three separate sources of parliamentary privilege in New South Wales: the common law principle of reasonable necessity; Article 9 of the *Bill of Rights 1689* which has been adopted by local enactment; and miscellaneous statutory provisions. It is worth briefly delineating these sources before examining issues relating to their application and scope.

The common law principle of reasonable necessity

The common law has long recognised that the Houses of the 'mother' Parliament at Westminster possess extensive powers by virtue of their origin as a court and their ancient usage and practice (*lex et consuetudo parliament*), including the power to punish. However, the Houses of subordinate legislatures such as those of the former Australian colonies possess only such

powers as are 'necessary to the existence of such a body, and the proper exercise of the functions it is intended to execute' in the absence of legislative grant.[1]

Early cases applying this principle were mainly concerned with the powers of parliamentary chambers to discipline their own members. Thus, for example, it was held that a House could remove a disorderly member from the chamber to protect itself from obstruction or disturbance[2] but not suspend such a member for an indefinite period by way of punishment.[3] In the 1990s, however, a series of cases concerning the upper House in New South Wales applied the principle to a broader context which took account of the nature of the functions that the House performs.

The dispute which led to those cases being brought before the courts involved a resolution by the Legislative Council suspending the then Treasurer, Mr Michael Egan, following his refusal to comply with an order requiring the production of certain documents to the House. In the first two decisions in the series, the Court of Appeal, with which the High Court subsequently agreed, held that a power to order the production of documents by the executive government and to coerce compliance with the order by suspending the Treasurer from the House is reasonably necessary for the exercise of the Council's functions.[4] In the final instalment, the Court of Appeal went on to hold that the power extends to documents which at common law would be protected from disclosure by legal professional privilege or public interest immunity, although the majority took the view that the power did not extend to Cabinet documents, the disclosure of which would conflict with the principle of ministerial responsibility.[5]

As to the functions of the Legislative Council for which a power to call for documents was considered to be 'reasonably necessary', Gleeson CJ in the Court of Appeal observed:

> The capacity of both Houses of Parliament, including the House less likely to be 'controlled' by the government, to scrutinise the workings of the executive government, by asking questions and demanding the production of State papers, is an important aspect of modern parliamentary democracy. It provides an essential safeguard against abuse of executive power.[6]

Similarly, in the High Court, the majority (Gaudron, Gummow and Hayne JJ) reviewed authorities concerning the nature of responsible government including John Stuart Mill, who in 1861 had spoken of the task of the legislature as 'to watch and control the government: to throw the light of publicity on its acts'.[7] The majority then went on to observe that in a bicameral parliament ministers are liable to scrutiny by the chamber to which they belong in respect of the conduct of the executive government even where that chamber is not the House in which the fate of the government is determined.[8] Indeed, the majority suggested that in a bicameral

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[1] See, for example, *Kielley v Carson* (1842) 4 Moo PC 63; 13 ER 225; *Gipps v McElhone (*1881) 2 LR (NSW) 18*; Barton v Taylor* (1886) 11 App Cas 197; *Armstrong v Budd* (1969) 71 SR (NSW) 386.
[2] *Doyle v Falconer* (1886) Law Rep. 1 PC 328 at 340.
[3] *Barton v Taylor* (1886) 11 App Cas 197.
[4] *Egan v Willis and Cahill* (1996) 40 NSWLR 650; *Egan v Willis* (1998) 195 CLR 424.
[5] *Egan v Chadwick* (1999) 46 NSWLR 563.
[6] *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 665.
[7] *Egan v Willis* (1998) 195 CLR 424 at 451.
[8] *Egan v Willis* (1998) 195 CLR 424 at 453.

parliament the fact that one of the Houses is not controlled by the party or parties which determine the government may well assist the attainment of the object of responsible government to which Mill had referred.[9]

While only some of the Council's powers have been the subject of specific adjudication by the courts, many of the powers regularly exercised by the House have no statutory basis and are founded on the common law principle of reasonable necessity. These include the power to conduct inquiries on matters of public concern and to delegate such inquiries to committees.

Article 9 of the Bill of Rights 1689

Following a lengthy struggle by the House of Commons to assert its independence against the Crown in the courts, Article 9 of the *Bill of Rights 1689* provided the first statutory recognition of the right to freedom of speech in Parliament. The provision applies in New South Wales by virtue of section 6 and schedule 2 of the *Imperial Acts Application Act 1969* (NSW) and as a matter of common law.[10] In modern language Article 9 provides:

> That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

The effect of this immunity is to protect members of Parliament, witnesses and others taking part in parliamentary proceedings from civil or criminal action and examination in legal proceedings and to prevent parliamentary proceedings being impeached or questioned in the courts. While Article 9 may thus conflict with the administration of justice it has been recognised that the public interest in ensuring the legislature can exercise its powers freely on behalf of the electors, with access to all relevant information, prevails over the interests of justice in ensuring that all relevant evidence is available to the courts.[11]

The immunity extends not only to proceedings in the courts but to any 'place out of Parliament', including executive inquiries such as royal commissions and the proceedings of statutory investigatory bodies. In that regard the statutes constituting the ICAC and the Police Integrity Commission also expressly preserve 'the rights and privileges of Parliament in relation to the freedom of speech, and debates and proceedings, in Parliament'.[12] Given its effect in restraining judicial or executive inquiry into parliamentary proceedings, Article 9 is in essence a safeguard of the separation of powers.[13]

There is no definition in the *Bill of Rights* of the expressions appearing in article 9. However, section 16 of the Commonwealth Parliament's *Parliamentary Privileges Act 1987* includes provisions which define matters such as the extent of 'proceedings in Parliament' and the particular uses of evidence of parliamentary proceedings which are prohibited in courts and tribunals. While the

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[9] *Egan v Willis* (1998) 195 CLR 424 at 453.
[10] See Enid Campbell, *Parliamentary privilege* (The Federation Press, 2003), p 10.
[11] *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 336.
[12] *Independent Commission Against Corruption Act 1988*, s 122; *Police Integrity Commission Act 1996*, s 145.
[13] Harry Evans and Rosemary Laing (eds), *Odgers' Australian Senate Practice* (Department of the Senate, 13th ed, 2012), p 44.

Commonwealth Act does not apply in New South Wales its provisions have been referred to as a guide.

Miscellaneous statutory provisions

Apart from the *Bill of Rights* a number of other statutes in New South Wales define aspects of the powers and immunities of the Houses. Among the most important of these is the *Parliamentary Evidence Act 1901* which confers various powers to compel the production of evidence. Under the Act, for example, a person who fails to comply with a summons to attend and give evidence before a House or committee may be apprehended, retained in custody and brought from time to time for the purpose of giving evidence (sections 7-9), while a person who, having attended, fails to answer a 'lawful question' may be committed to gaol for up to one month (section 11). The punitive sanctions provided by the Act have never been applied and there is debate as to whether in their current form they accord with contemporary notions of the Parliament's role.[14] However, given the limitations of the principle of 'reasonable necessity' a statutory compulsion power of some sort would appear to be desirable to support the operations of committees.

Statutory secrecy provisions and committee inquiries[15]

The first aspect of the recent application of parliamentary privilege to be considered concerns the interaction between the inquiry power and statutory secrecy obligations.

A range of statutes in New South Wales include provisions which make it a criminal offence for information to be disclosed. Such provisions are usually aimed at preventing disclosure by officials who have access to the information in the course of duties performed under the Act. The penalties imposed can be steep. For example under the *Ombudsman Act 1974* and the *Police Integrity Commission Act 1996*, contravention attracts up to 50 penalty units ($5,500) and/or imprisonment for 12 months.[16] Under the *Crime Commission Act 2012* the maximum penalty is 100 penalty units ($11,000) and/or two years imprisonment.[17]

The general parliamentary view has long been that such provisions 'have no effect on the powers of the Houses and their committees to conduct inquiries, and do not prevent committees seeking information covered by such provisions'.[18] *Odgers' Australian Senate Practice* notes that the basis of this view is that the law of parliamentary privilege provides absolute immunity to the giving of evidence before a House or a committee, and that 'it is a fundamental principle that the law of parliamentary privilege is not affected by a statutory provision unless the provision alters that law by express words'.[19] There is also judicial authority to the effect that parliamentary

[14] Beverly Duffy and Sharon Ohnesorge, 'Out of step? The New South Wales Parliamentary Evidence Act 1901', (2016) 27 PLR 37.
[15] The following section draws on papers by Stephen Reynolds, Samuel Griffith and Tina Higgins, 'Asserting the inquiry power: parliamentary privilege trumps statutory secrecy in New South Wales', presented at the 46th Presiding Officers and Clerks Conference in Hobart, Tasmania, in 2015, and David Blunt, 'Parliamentary sovereignty and parliamentary privilege', Legalwise seminar presentation, 16 June 2015.
[16] *Ombudsman Act 1974*, s 19A(3); *Police Integrity Commission Act 1996*, s 52(3).
[17] *Crime Commission Act 2012*, s 45(3).
[18] Evans and Laing (eds), *op cit*, p 66.
[19] *Ibid.*

privilege may in general only be abrogated by express statutory words.[20] Where there is a genuine public interest in protecting the confidentiality of evidence the relevant House or committee itself has the power to take the evidence *in camera*.

Despite the parliamentary view on this issue and the cases cited above, executive governments in New South Wales have traditionally maintained that statutory secrecy provisions do indeed prevent the disclosure of information to parliamentary inquiries. On that view a witness who provides a parliamentary committee with information the disclosure of which is prohibited by statute is at risk of prosecution. Recently, however, there have been signs of a shift in the government's position on the issue, as outlined below.

The conflict between parliamentary privilege and statutory secrecy came to prominence in New South Wales in 2000 during a budget estimates hearing before a Council committee when witnesses from the Crown Casino Authority refused to provide information on the basis of secrecy provisions in the *Casino Control Act 1992*.[21] Following the hearing the committee sought advice from Mr Bret Walker SC, who advised that the secrecy provisions did not prevent disclosure to the committee, as deprivation of the pre-existing powers of committees to obtain information would have required express provision in the relevant legislation.[22] However, by the time Mr Walker's advice was received a majority of the members of the committee had decided not to press the relevant questions.

The issue next arose in 2012 during another budget estimates hearing, this time concerning the police portfolio. In that instance questions were asked about a police probe into alleged illegal 'bugging' of police officers during the course of several police corruption investigations over a decade earlier. The relevant witness, Deputy Commissioner Catherine Burn, advised that she could not answer questions in relation to the matter because of secrecy provisions in the *Crime Commission Act 2012*. The committee again sought advice from Mr Walker, who concluded that a person otherwise subject to secrecy provisions of the *Crime Commission Act 2012* or *Police Integrity Commission Act 1996* or to any relevant provisions which go to confidentiality in the *Police Act 1990* would not be in breach if he or she disclosed the information during questioning by a committee of the Council. By the time of the next committee hearing, however, the committee had decided not to pursue the proposed line of questioning in light of an announcement by the Minister that the Ombudsman would conduct an investigation into the illegal bugging allegations, known as 'Operation Prospect'. The committee did, however, pass a resolution declaring that it had the power 'to ask and compel answers to questions that would require the disclosure of information that may otherwise be caught by statutory secrecy provisions'.[23]

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[20] *The Duke of Newcastle v Morris* 1870) LR 4 HL 661; see also *CJC v Dick* [2000] QCS 272 and *Criminal Justice Commission v Parliamentary Criminal Justice Commissioner* [2002] 2 Qd R 8 at 23. In Queensland the principle has been enshrined in legislation, s 13B of the *Acts Interpretation Act 1954* declaring that: 'An Act enacted after the commencement of this section affects the powers, rights or immunities of the Legislative Assembly or of its members or committees only so far as the Act expressly applies'.

[21] General Purpose Standing Committee No. 4, NSW Legislative Council, *Budget Estimates 2000-2001* (2000), p 2.

[22] General Purpose Standing Committee No. 4, NSW Legislative Council, *Budget Estimates 2012-2013* (2012), Appendix 3, containing Mr Walker's advice.

[23] *Ibid*, p 46.

Similarly, in 2013-2014, a committee investigating allegations of bullying in WorkCover NSW was frustrated by that agency's refusal to provide information on certain issues on the basis of privacy obligations under the *Privacy and Personal Information Protection Act 1998*. The committee concerned refrained from seeking to invoke its statutory powers to coerce answers to the questions. However, in its report on the inquiry the committee stated that WorkCover NSW had shown 'a serious disregard for the Legislative Council's role in scrutinising the executive'.[24]

In April 2014, however, an opinion by the Solicitor General tabled in the Legislative Council concerning aspects of the Council's power to order the production of documents took an apparently different line. The opinion referred to various authorities concerning the powers of parliamentary committees, including texts on parliamentary practice published by the Legislative Council and the Australian Senate, and acknowledged that such authorities 'would support the view that a statutory non-disclosure provision only affects the powers of the Council by express reference or necessary implication'. It went on to state, 'we are inclined to agree that this view accords with the role of the Parliament in a system of responsible and representative government', albeit with the rider that 'the matter can hardly be free from doubt and it is not possible to predict with confidence what view a court might take on this issue.[25]

A few months later the Legislative Council established a select committee to inquire into the conduct and progress of the still-incomplete Ombudsman's Operation Prospect investigation. Despite the suggestion in the Solicitor General's advice that the government might have shifted its stance on statutory secrecy, the House took the unusual step of including within the terms of reference an explicit declaration that statutory secrecy provisions do not affect the power of the House or its committees to conduct inquiries and to require answers to lawful questions unless by express words.[26] Further, the select committee itself, once established, sought advice from Mr Walker, who once again confirmed the parliamentary view, on this occasion pointing out that the *Ombudsman Act 1974*, far from constraining the provision of information to the Parliament, in fact suggests that 'Parliament does not intend that the Executive or executive agencies be paramount over one of its Houses (or its committees) with respect to the assessment of the public interest in obtaining and publishing information about official activities'.[27]

As events transpired this inquiry proved to be a turning point, resulting in the disclosure of information which had never previously come to light. During the inquiry, for example, the committee received public submissions from former and serving police officers, former Crime Commission officials and other public officials, many of whom provided detailed information that would otherwise have been covered by statutory secrecy provisions. Further, Deputy Commissioner Burn, who in 2012 had refused to answer questions about the alleged bugging, in 2015 was far more fulsome in her responses, in reliance on the protection of parliamentary

[24] General Purpose Standing Committee No. 1, NSW Legislative Council, *Allegations of bullying in WorkCover NSW* (2014), p 12.
[25] Michael Sexton SC and Anna Mitchelmore, 'Question of powers of Legislative Council to compel production of documents from executive', p 7, contained in the attachment to correspondence from the Acting Secretary of the Department of Premier and Cabinet to the Clerk of the Parliaments dated 16 April 2014, tabled by the Clerk in the Legislative Council: *Minutes*, NSW Legislative Council, 6 May 2014, p 2458.
[26] *Minutes*, NSW Legislative Council, 12 November 2014, p 277.
[27] Select Committee on the Conduct and Progress of the Ombudsman's Inquiry 'Operation Prospect', *The conduct and progress of the Ombudsman's inquiry 'Operation Prospect'* (2015), Appendix 5, p 128.

privilege.[28] Moreover, the Ombudsman himself, while claiming public interest immunity in relation to certain information, presented a lengthy document to the committee detailing the conduct of his investigation, and in oral evidence revealed further details not previously in the public domain such as the number of times certain persons had been the subject of listening device warrants. Given the nature of some of the evidence, certain material was kept confidential where the committee considered it to be in the public interest. However, all of the evidence, public and private, was ultimately used to inform the committee's eventual findings and recommendations concerning the conduct of the Ombudsman's investigation and the laws relating to listening device warrants.

The reason why the government refrained from insisting on its usual view in this inquiry – in such stark contrast to the WorkCover inquiry only months before – is unknown. A recent paper speculated that the continual assertion by the Council of its powers over time may have influenced the issue; that the understanding of Mr Walker and the Solicitor General had come to be accepted as correct; or, more pragmatically, that once individuals started to provide under privilege information covered by secrecy, the NSW Police Force and the Ombudsman had little option if they wanted to avoid only one side of the story being told.[29] The bigger question now is whether the executive has definitively conceded that parliamentary privilege 'trumps' statutory secrecy, or whether the position adopted in this particular inquiry was a one-off; only time will tell.

Orders for the production of documents from statutory bodies

From the establishment of responsible government in New South Wales in 1856 to the early 1900s the Legislative Council routinely exercised its power to order the production of government documents. Such orders ceased to be a common feature of the Council's operation during the second decade of the 20th century, with the occasional exception until 1948. During the 1990s the power was revived, leading to the *Egan* cases discussed above.

Given the nature of the dispute in the *Egan* litigation, the resulting court decisions were concerned with the Council's power to order the production of documents which were described in its standing orders at the time as 'State papers'. In the Court of Appeal, 'State papers' were characterised as 'papers which are created or acquired by ministers, office-holders, and public servants by virtue of the office they hold under, or their service to, the Crown in right of New South Wales'.[30]

Questions as to whether the House's power might extend to other types of documents such as those held by statutory bodies or indeed private individuals did not arise on the facts of the case. However, Priestly JA gave the following guidance in the Court of Appeal on what documents might be 'reasonably necessary' for the operation of the House:

> In my opinion it is well within the boundaries of reasonable necessity that the Legislative Council have power to inform itself of any matter relevant to a subject on which the

[28] Reynolds, Griffith and Higgins, *op cit*, p 11.
[29] Reynolds, Griffith and Higgins, *op cit*, p 15.
[30] *Egan v Willis* (1996) 40 NSWLR 650 at 654 per Gleeson CJ.

> legislature has power to make laws. The common law as it operates in New South Wales today necessarily implies such a power, in my opinion, in the two parts ordinarily called parliament of the three part legislature. This seems to me to be a necessary implication in light of the very broad reach of the legislative power of the legislature and what seems to me to be the imperative need for both the Legislative Assembly and Legislative Council to have access (and ready access) to all facts and information which may be of help to them in considering three subjects: the way in which existing laws are operating; possible changes to existing laws; and the possible making of a new laws.[31]

This position was cited with approval by the majority in the High Court in *Egan v Willis*.[32] The majority also cited with approval the broad definition of State papers provided by Gleeson CJ in the Court of Appeal,[33] and the statement in *Lange v Australian Broadcasting Corporation*[34] the previous year that:

> Moreover, the conduct of the executive branch is not confined to Ministers and the public service. It includes the affairs of statutory authorities and public utilities which are obliged to report to the legislature or to a Minister who is responsible to the legislature.[35]

Despite the broad reach of parliamentary scrutiny function, most orders for papers in New South Wales have sought the production of State papers held by agencies of the executive government, rather than agencies created under statutory regimes with a purportedly 'independent' charter. In the rare instances where documents held by statutory bodies have been targeted the documents have not been provided, as detailed below.

- In 2005 the Council ordered the production of documents concerning road filtration in the possession, custody or control of the Audit Office, among other agencies.[36] In the return to the order the Department of Premier and Cabinet advised that no response to the order had been received from the Auditor General.[37]

- In 2011 the Council ordered the production of documents in the possession, custody or control of SAS Trustee Corporation, among other bodies, concerning the eligibility of Mr John Flowers MP to be elected to the Legislative Assembly.[38] However, the Crown Solicitor advised that the Council has no power to require the production of documents from statutory corporations such as SAS Trustee Corporation, that SAS Trustee Corporation could not provide the documents in any event by reason of the *Privacy and Personal Information Protection Act 1998*, and that the minister administering the

[31] *Egan v Willis and Cahill* (1996) 40 NSWLR 650, per Priestley JA at 692.
[32] *Egan v Willis* (1998) 195 CLR 424, per Gaudron, Gummow and Hayne JJ at 454.
[33] (1998) 195 CLR 424 at 442.
[34] (1997) 189 CLR 520 at 561.
[35] *Egan v Willis* (1998) 195 CLR 424, per Gaudron, Gummow and Hayne JJ at 452.
[36] *Minutes*, NSW Legislative Council, 24 February 2005, p 1251.
[37] Correspondence from the Director General of the Department of Premier and Cabinet to the Clerk of the Parliaments dated 10 March 2005, tabled by the Clerk in the Legislative Council: *Minutes*, NSW Legislative Council, 22 March 2005, p 1283.
[38] *Minutes*, NSW Legislative Council, 6 May 2011, p 64.

superannuation legislation had no power to require the production of documents relating to an individual MP or a minister.[39]

- In 2013 the Council ordered the production of certain documents in the possession, custody or control of the Office of Liquor, Gaming and Racing or of Greyhound Racing NSW.[40] The return to the order included documents from the former agency but not the latter and asserted that: 'Greyhound Racing NSW does not represent the Crown and is not subject to direction or control by or on behalf of the Government'.[41]

A similar, though more nuanced, view was adopted in the Solicitor General's opinion referred to earlier which stated that the question of whether a minister can call for documents from a statutory body in response to an order by the Council depends on the terms of the body's constituting statute. To illustrate that proposition, the opinion examined three separate statutes in turn but concluded that two of the three (those constituting the ICAC and the Public Service Commission respectively) would *not* permit the provision of information to a minister to comply with an order by the Council.[42]

While the issue has been addressed by the House's Privileges Committee, which in 2013 endorsed the view that a statutory body not responsible to a minister may nevertheless possess papers access to which may be reasonably necessary for the performance of the Council's functions, [43] no comparable assertions have yet been made by the House. Recently, however, following a new order seeking documents held by Greyhound Racing NSW, advice has been obtained as to the options available to the House should it decide to pursue the issue of compliance.

The new order, made on 9 September 2015, again required the production of documents in the possession, custody or control of Greyhound Racing NSW concerning alleged instances of 'live baiting' and other aspects of greyhound welfare.[44] As required by the standing order which regulates the making of such orders by the Council,[45] the order was communicated to the Department of Premier and Cabinet. In response, the General Counsel of the Department of Premier and Counsel advised:

> Section 5 ("GRNSW independent of Government") of the *Greyhound Racing Act 2009* provides that Greyhound Racing NSW does not represent the Crown and is not subject to direction or control by or on behalf of the government.

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[39] State Crown Solicitor's advice, 'Flowers J F – SO 52 Call for Papers', p 2, contained in the attachment to correspondence from the General Counsel of the Department of Premier and Cabinet to the Clerk of the Parliaments dated 20 May 2011, tabled by the Clerk in the Legislative Council: *Minutes*, NSW Legislative Council, 24 May 2011, p 115.

[40] *Minutes*, NSW Legislative Council, 27 November 2013, pp 2268-2269.

[41] Correspondence from the Acting Director General of the Department of Premier and Cabinet to the Clerk of the Parliaments dated 4 December 2013, tabled by the Clerk in the Legislative Council: *Minutes*, NSW Legislative Council, 30 January 2014, p 2304.

[42] Sexton and Mitchelmore, *op cit*, pp 4-5.

[43] Privileges Committee, NSW Legislative Council, *The 2009 Mt Penny return to order* (2013), pp 90-91, 98-99.

[44] *Minutes*, NSW Legislative Council, 9 September 2015, pp 373-374.

[45] Standing Order 52(1) relevantly provides that: 'The Clerk is to communicate to the Premier's Department, all orders for documents made by the House'.

> Accordingly, although I have taken the opportunity to forward your correspondence (as well as this reply) to Greyhound [Racing] NSW, the Legislative Council may need to liaise directly with Greyhound [Racing] NSW in relation to the resolution.[46]

Section 5 of the *Greyhound Racing Act 2009* does indeed provide that Greyhound Racing NSW 'does not represent the Crown and is not subject to direction or control by or on behalf of the government' as noted in the General Counsel's correspondence. On the other hand, Greyhound Racing NSW is established under a New South Wales statute, is required to produce an annual report to Parliament, and its members are appointed by the minister on the recommendation of a selection panel which is also appointed by the minister.

In light of the General Counsel's response, and following the expiry of the deadline for receipt of the documents, advice was sought from Mr Walker. The advice was provided on 18 November 2015 and was tabled by the President in the House the same day.

Mr Walker took the view that, following the *Egan* cases, the general nature of the Council's scrutiny function continues to provide 'the departure point for consideration of the existence and extent of the powers necessary for [the Council's] appropriate performance'.[47] As to the extent of that 'appropriate performance' he advised that despite the lack of House of Commons equivalency, guidance can be obtained from Westminster, where the House of Commons has the power to call for documents relating to 'any public matter, in which the House or the Crown has jurisdiction' including documents from 'corporations, bodies or officers constituted for public purposes by Act of Parliament or otherwise'.[48] Having considered the scope of the activities which lie within the House's power, Mr Walker went on to advise that the practice of committing public administration to entities not subject to ministerial control is not capable of shrinking the range of the documents the Council may compel. Indeed, he observed that:

> It would be perverse to suppose that Parliament has enacted the existence and nature of such authorities in order to remove the public affairs for which they are responsible from Parliament's own scrutiny. At least, plain language or necessary intendment would be called for before reaching such a startling conclusion.[49]

Mr Walker concluded that 'so-called "independent" entities, groups or persons with public functions, such as Greyhound Racing NSW, are amenable to orders for papers addressed to them by the Council',[50] and that Greyhound Racing NSW is compelled to comply with the House's order in this case on pain of its responsible officers being in contempt of the House. He further advised that resort may also be had to a summons under the *Parliamentary Evidence Act* to

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[46] Correspondence from the General Counsel of the Department of Premier and Cabinet to the Clerk of the Parliaments dated 10 September 2015, tabled by the Clerk in the Legislative Council: *Minutes*, NSW Legislative Council, 15 September 2015, p 396.
[47] Bret Walker SC, 'Parliament of New South Wales, Legislative Council: Orders for Papers from bodies not subject to direction or control by the Government', p 8, tabled by the Clerk in the Legislative Council: *Minutes*, NSW Legislative Council, 18 November 2015, p 608.
[48] *Ibid*, pp 9-10.
[49] *Ibid*, p 11.
[50] *Ibid*, p 15.

compel a responsible officer of Greyhound Racing NSW to attend and give evidence including by the production of documents to the Council or a committee.[51]

The day after Mr Walker's advice was tabled in the House a member of the House gave notice of a motion reaffirming the order of 9 September 2015, requiring that the documents referred to in the order to be provided to the House within 28 days of the passing of the motion, and stipulating that notwithstanding the terms of the relevant standing order, the terms of the order be communicated directly to the Chief Executive Officer of Greyhound Racing NSW. The motion has not yet been moved and remains on the Council's Notice Paper. If it is moved and passed by the House and if the documents are still not provided, the House may decide to consider the further steps outlined in Mr Walker's advice.

Parliament's inquiry power and the privilege against self-incrimination[52]

The application of statutory secrecy provisions to Parliament and the amenability of statutory authorities to orders for state papers are both issues that exemplify the tension between the executive government and the Council in performing its constitutional scrutiny role. In contrast, the final issue this paper explores is located at the intersection between the parliament's inquiry power – an aspect of parliamentary privilege – and an individual legal right, namely the common law privilege against self-incrimination. Does parliamentary privilege trump the privilege against self-incrimination?

Background: the privilege against self-incrimination

Before addressing this question, it is useful to briefly map out some key principles concerning the privilege against self-incrimination. The privilege against self-incrimination, an aspect of the 'right to silence',[53] is not merely a rule of evidence but a fundamental and substantive common law right, most commonly encompassing an immunity from being compelled to give self-incriminating evidence in criminal matters and an immunity from self-exposure to civil or administrative penalties.

As a fundamental common law right, the privilege against self-incrimination can only be abrogated by sufficiently clear statutory words, known as the principle of legality. In court proceedings, the privilege against self-incrimination can be abrogated in certain circumstances.[54] In such a case, the witness is given a certificate granting him or her both 'direct' and 'derivative'

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[51] *Ibid*, pp 15-16.

[52] The following section draws on an article by Beverly Duffy and Sharon Ohnesorge, 'Out of step? The New South Wales Parliamentary Evidence Act 1901' (2016) 27 PLR 37, drawn from a paper originally presented at the Australasian Study of Parliament Group conference 2015.

[53] The expression 'the right to silence', while sometimes used synonymously with the privilege against self-incrimination, in fact describes a group of specific and general immunities associated with a person's ability to lawfully resist the coercive powers of the state to obtain information from him or her; see *R v Director of Serious Fraud Office; ex parte Smith* [1993] AC 1 at 30-31 per Lord Mustill; NSW Joint Legislation Review Committee, *The Right to Silence – Discussion Paper* (2005), p 4.

[54] Section 128 of the *Evidence Act 1995* provides that a witness may raise objection to giving particular evidence on the ground that the evidence may 'tend to prove' that the witness has committed an offence against Australian or foreign law or is liable to a civil penalty. However, the witness can nevertheless be required to give the particular evidence (under threat of being charged with contempt of court) where it is in the 'interests of justice', and it will not expose him or her to an imposition pursuant to a law of another country.

use immunity in relation to the particular evidence.[55] The absolute protection available under the common law has also been extensively modified in recent years in the context of permanent and ad hoc commissions of inquiry and the like, such as the Independent Commission Against Corruption.[56] This reflects the approach taken by legislatures 'when confronted with the need, based on perceptions of public interest, to elevate that interest over the interests of the individual in order to enable the true facts to be ascertained'.[57] The loss of the right to claim the privilege in these contexts is commonly offset by providing for direct use immunity in respect of answers given.[58]

Does parliamentary privilege trump the privilege against self-incrimination?

One of the issues anticipated to arise during the course of the committee inquiry into the Ombudsman's Operation Prospect investigation was how to deal with a witness who refused to answer a question on the grounds of self-incrimination. Muddying the waters in this regard is s 11(1) of the *Parliamentary Evidence Act*, which provides:

> Except as provided by section 127 (Religious confessions) of the Evidence Act 1995, if any witness refuses to answer any **lawful question** during the witness's examination, the witness shall be deemed guilty of a contempt of Parliament, and may be forthwith committed for such offence into the custody of the usher of the black rod or serjeant-at-arms, and, if the House so order, to gaol, for any period not exceeding one calendar month, by warrant under the hand of the President or Speaker, as the case may be. [Emphasis added]

In advice provided to the Operation Prospect select committee in January 2015, Mr Walker identified the self-incrimination issue as one of 'real systemic significance to the Legislative Council and its procedures'. He ultimately concluded that 'there is no privilege against self-incrimination before the Select Committee by force of law', noting that as a matter of law, Article 9 of the *Bill of Rights* will prevent any self-incriminating statement made to a committee from being used against the person in question. However, Mr Walker also noted the absence of any directly applicable authority on the matter, emphasising that any claim of the privilege should 'be regarded with utmost care' and urging the committee to exercise 'a judicious delicacy'.[59]

This advice is consistent with the Council's own view that the privilege against self-incrimination – as with other privileges and immunities available at general law – has no application in parliamentary proceedings, including committee inquiries.[60] This view is also shared by Enid Campbell, who notes that '[t]here is certainly nothing in Australian judicial case law to suggest that parliamentary powers of inquiry are *prima facie* constrained by the privilege against self-

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[55] This means that the (direct) evidence itself, as well as (derivative) evidence of any information, document or thing obtained as a consequence of the person having given the evidence, cannot be used against the witness.

[56] Examples of such legislation in New South Wales include the *Special Commissions of Inquiry Act 1983* (s 23(1)), *Criminal Assets Recovery Act 1990* (s 13A(1)), and the *Independent Commission Against Corruption Act 1988* (s 37(2)).

[57] *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 503 per Mason CJ and Toohey J.

[58] Legislation Review Committee, *The Right to Silence – Discussion Paper* (2005), pp 34-35.

[59] Select Committee on the Conduct and Progress of the Ombudsman's Inquiry "Operation Prospect", NSW Legislative Council, *The conduct and progress of the Ombudsman's inquiry "Operation Prospect"* (2015), Appendix 5, pp 130-132.

[60] Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice* (The Federation Press, 2008), p 504.

incrimination'.[61] This is also the position in the Senate, although it should be noted that the Australian Parliament has codified its parliamentary privileges in statute.[62]

Having outlined the Council's position, it is worth drilling down into the reasoning behind it. In his advice to the select committee, Mr Walker identified parliamentary proceedings as being '**by their special nature** an exception'[63] to the privilege against self-incrimination, which, as already noted, would normally require sufficiently clear statutory words to abrogate it. According to this line of reasoning, it is irrelevant whether the *Parliamentary Evidence Act* abrogates the privilege against self-incrimination, because that Act is not the source of Parliament's power to compel the provision of information. As to what *is* the source of this power, Mr Walker advised that the nature and function of the Houses of the New South Wales Parliament, as recognised in *Egan v Willis*[64] and *Egan v Chadwick*,[65] in his view justified 'cautious resort' to House of Commons precedents.[66]

The position in the United Kingdom House of Commons is that '[a] witness is bound to answer all questions which the committee sees fit to put to him, and cannot excuse himself, for example, on the ground that … he is advised by counsel that he cannot do so without incurring the risk of incriminating himself or exposing himself to a civil suit'.[67] This is based on a series of precedents dating back to the 19th century.[68]

In New South Wales, prior to 1881 there was no statute governing the attendance of witnesses before the House or its committees, with the Council relying on its common law power to require the attendance of witnesses.[69] While the passage of the *Parliamentary Evidence Act 1881* provided statutory power to the House and its committees to send for and examine persons, Council committees continued to encounter difficulties in relation to the calling of witnesses and taking of evidence, including witnesses claiming the privilege against self-incrimination in refusing to answer questions.[70]

Unfortunately, the introduction of the *Parliamentary Evidence Act* in 1901 did not serve to finally settle the question whether Council committees can compel incriminating evidence. In a 1990 advice to the Clerk of the Parliaments, the New South Wales Crown Solicitor agreed with the following opinion expressed by his predecessor in 1960:

> Possibly the most striking difference between the powers exercisable by a Committee in accordance with the *Parliamentary Evidence Act* and those exercisable by a Committee of the House of Commons, is the position of the witness. The witness called under the

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[61] Enid Campbell, *Parliamentary Privilege* (The Federation Press, 2003), p 166.
[62] Evans and Laing (eds), *op cit*, p 531.
[63] Emphasis added.
[64] (1998) 195 CLR 424.
[65] (1999) 46 NSWLR 564.
[66] Select Committee on the conduct and progress of the Ombudsman's inquiry "Operation Prospect", NSW Legislative Council, *Inquiry into the conduct and progress of the Ombudsman's inquiry "Operation Prospect"* (2015), Appendix 5, pp 130-131.
[67] Sir Malcolm Jack (ed), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (LexisNexis, 24th ed, 2011), p 823.
[68] These precedents are detailed in Duffy and Ohnesorge, *op cit* at 41-42.
[69] Lovelock and Evans, *op cit*, p 494.
[70] Lynn and Evans, *op cit*, p 495.

> *Parliamentary Evidence Act* may, in general, refuse to answer questions in the like circumstances that a witness called in any civil or criminal proceedings could refuse to answer.[71]

In support of this position, the Crown Solicitor cited the South Australian case of *Crafter v Kelly*, in which Angas Parsons J held that the expression 'lawful question' 'connotes one which calls for an answer according to law, one that the witness is compellable to answering according to the established usage of the law'.[72] Applied to s 11 of the *Parliamentary Evidence Act*, this reasoning has the effect of bringing the general law as it relates to the compellability of witnesses to bear upon parliamentary committees. On this basis the Crown Solicitor advised that the Council's State Development Committee could not compel a witness to give self-incriminating evidence.[73] This is also the position taken by the executive government in New South Wales in its advice to public servants appearing before parliamentary committees.[74]

This interpretation of the expression 'lawful question' conflicts with Mr Walker's 2000 advice concerning the secrecy provisions in the *Casino Control Act 1992*, referred to above. In that advice, Mr Walker observed that a 'lawful' question 'must have the quality that an answer to it may be compelled by lawful means', concluding that a question may be lawful, 'notwithstanding an answer to it requires information to be divulged which would, anywhere else, be prohibited by [statute]'.[75] Applied to the issue presently under discussion, this interpretation means that an incriminating question is a 'lawful question' a witness can be compelled to answer under s 11 of the *Parliamentary Evidence Act*.

Turning now to practicalities: what should a committee do when faced with a witness who objects to a question on the grounds of self-incrimination? For one thing, the issue has never been tested in the Council and in the end did not arise during the Operation Prospect inquiry. Given the diverging views on the issue and the fact that it has yet to be settled by the courts, any objection to a question must therefore be considered by a committee on its merits, having regard to factors including the basis for the objection, the significance of the information to the committee's inquiry, the possible repercussions if the question is pressed, and any alternative means of obtaining the information.[76]

Accordingly, notwithstanding its position that the privilege against self-incrimination does not apply, a committee would be advised to consider seriously any request by a witness that he or she

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[71] State Crown Solicitor's advice, 'Re: Power of Standing Committee on State Development to require Production of Documents and things', 16 March 1990, p 4. This passage has been referred to with approval in advice by New South Wales Solicitor General Keith Mason QC, 'Powers and procedures of Joint Select Committees', 20 October 1992, consistent with advice by his predecessor, Solicitor General Mary Gaudron QC, 'Re: Parliamentary Evidence Act', 8 September 1983.

[72] [1941] SASR 237 at 242. Given that the *Evidence Act 1995* displaces the common law privilege against self-incrimination in legal proceedings in New South Wales, an interesting question is whether the common law privilege still reflects the 'established usage of the law' as referred to by Angas Parsons J.

[73] State Crown Solicitor's advice, 'Re: Power of Standing Committee on State Development to require Production of Documents and things', 16 March 1990, pp 4-5.

[74] New South Wales Department of Premier and Cabinet, *Guidelines for Appearing Before Parliamentary Committees*, Circular C2011-27, para 3.

[75] General Purpose Standing Committee No. 4, NSW Legislative Council, *Budget Estimates 2012-2013* (2012), Appendix 3, p 30.

[76] Lovelock and Evans, *op cit*, p 509.

not be obliged to give incriminating evidence.[77] The committee may decide not to press the question, to take the evidence *in camera*, or to allow the witness to take the question on notice and consider keeping the written answer confidential.

However, as pointed out in a recent article by Beverly Duffy and Sharon Ohnesorge, a committee is not currently obliged to take, or even consider taking, any of these steps.[78] They point out that this is particularly problematic in light of the punitive nature of s 11. Should a witness object to a question on the basis of self-incrimination, the current terms of s 11 would leave a committee – not to mention the witness – in a difficult position if it was decided that the question should be pressed, leaving open the possibility of a legal challenge to determine the correct interpretation of the provision, but perhaps not until a person had been imprisoned for a period within the parliamentary precinct.[79]

Duffy and Ohnesorge argue that reform is required to ensure committees in New South Wales exercise their powers fairly, balancing the interests of an individual in withholding incriminating information with the public interest in the committee obtaining information that may be critical to its ability to conduct an effective inquiry.[80] At a systemic level, it is that public interest and the essential nature of the Parliament's inquiry power in a system of responsible government that means committees *should* have the power to compel self-incriminating evidence in appropriate circumstances. In addition, since the grant of direct use immunity has been enacted by the Parliament to effectively compensate a witness for being compelled to incriminate themselves before bodies such as the ICAC, the protection of Article 9, which offers an analogous protection, should similarly be considered to offer a sufficient safeguard for witnesses appearing before Legislative Council committees. However, clearly with great power comes great responsibility.

Concluding remarks

As noted in the introduction, the three issues explored in this paper are examples of the Legislative Council, either directly or through its committees, asserting its powers in areas of parliamentary privilege which are untested in the courts and lacking in a fully coherent body of precedent. In reflecting on these examples, a number of concluding observations come to mind.

The first is that the importance of the three *Egan* decisions to the Legislative Council – and the institution of Parliament more broadly – cannot be underestimated. Reflecting on developments in the area parliamentary privilege in the Council in the 20 or so years since, it is clear that the *Egan* decisions have placed the Council in a powerful position vis-à-vis the executive government. The powers available to the House under the principle of reasonable necessity, as articulated in those decisions, have enabled the Council to become an even more effective body in exercising its key functions of executive scrutiny and law-making. The implications of the *Egan* cases will continue to play out, not only in the three areas this paper has focused on, but no

[77] Lovelock and Evans, *op cit*, p 517. In addition, it is Council practice that a witness appearing voluntarily should not be pressed to answer a question to which they have objected, on the basis of procedural fairness.
[78] Duffy and Ohnesorge, *op cit* at 45.
[79] Duffy and Ohnesorge, *op cit* at 46.
[80] Duffy and Ohnesorge, *op cit* at 52-53.

doubt in other areas in the future. That being said, it is also important to recognise that other statutes, especially the *Parliamentary Evidence Act* and Article 9 of the *Bill of Rights*, are important parts of the law of parliamentary privilege in New South Wales.

The second observation is that there are options the Legislative Council could consider in the future to clarify its privileges. The first option, privileges legislation, would provide the Council with an opportunity to codify the statutory immunities that apply in New South Wales under Article 9 of the *Bill of Rights*. It would also provide an opportunity to make abundantly clear committees' power to compel incriminating answers (as well as answers that would otherwise be covered by other types of immunities available under the general law, such as legal professional privilege). Notwithstanding that, on the Council's view, such clarification is not strictly necessary, such a reform would put the matter beyond doubt. However, in developing any such privileges legislation, great care would need to be taken to ensure that the Council's common law powers are preserved. As pointed out in a recent paper by Stephen Frappell, the advantage of the common law principle of reasonable necessity as the basis of privilege in New South Wales is its flexibility: 'it is not set at a particular date, for example by reference to the powers of the House of Commons at a particular instant, and nor is it constrained by statutory interpretation'.[81] A further reform that could be considered is the passing of Senate-style privilege resolutions, to put in place a binding framework to ensure that committees deal with reluctant witnesses fairly and appropriately.[82]

Whether or not any of these reforms are taken up in the future, what is clear is that the Council's role in a system of responsible government and the nature of its electoral system means the sorts of issues traversed in this paper are almost certain to arise again in the future.

[81] Stephen Frappell, 'A Case for a Parliamentary Privileges Act for New South Wales', (2015) 30(1) *Australasian Parliamentary Review*, p 19.
[82] For further discussion on the advantages of privileges resolutions, see Duffy and Ohnesorge, *op cit* at 53.