The Challenge of Change: A possible new approach for the independent legal arbiter in assessing orders for papers?

Workshop 5A: Parliamentary Privilege in Contemporary Society- Jenelle Moore

The NSW Legislative Council has a well established system for orders for the production of documents from the Executive. This includes provision for an independent legal arbiter to report on the validity of claims of privilege made on documents returned to the House.

Recently, it appeared that a new arbiter appointed to the position may have brought with him a new approach. This paper provides a brief background to the history and operation of the arbitration process under standing order 52 and the circumstances that led to examination of the arbiter's role. The paper then discusses the outcome of the review process, together with a number of other recent development in the orders for papers process in New South Wales, with a view to exploring how the Legislative Council has responded to the 'challenge of change' and the opportunities those challenges have provided to assist members and others to clarify the exercise of the Council's powers and the purpose that lies behind some of its core procedures.

A brief background to the Legislative Council's power to order documents

In New South Wales, the immunities and powers of Parliament rely primarily on the common law principle of 'reasonable necessity', together with the protections afforded to debates and proceedings in Parliament under Article 9 of the *Bill of Rights 1688,* which apply by virtue of certain statutory provisions.[1] One of the key mechanisms by which the Council exercises the practical application of these powers is through orders for the production of state papers held by the Executive. While this power is common to other Parliaments, the Legislative Council is somewhat unique in that its power to order papers was challenged by the Executive and subsequently upheld by the courts in a series of legal decisions in the late 1990s.

By way of brief background, the Legislative Council routinely exercised its power to order the production of documents between 1856 and 1934, however the practice fell into disuse from 1934 to 1995. From 1988, the government ceased to have a majority in the Legislative Council, and during the 1990s the House once again attempted to exercise its power to order the production of documents. These orders were resisted by the Government and culminated in the House ordering the suspension of the then-Leader of the Government, the Hon Michael Egan. Mr Egan in turn challenged the House's power both to suspend him and to order the production of documents, triggering a series of three legal cases referred to as the *Egan* decisions.

In the first of these, *Egan v Willis and Cahill*[2], the NSW Court of Appeal unanimously held that 'a power to order the production of state papers… is reasonably necessary for the proper exercise by the Legislative Council of its functions'. The second case, *Egan v Willis*[3], confirmed that it is reasonably necessary for the Council to have the power to order one of its members to produce certain papers. The third case, *Egan v Chadwick & Ors*[4], held that the Council's power to order the

[1] Section 6 and Schedule 2 of the *Imperial Acts Application Act 1969.*
[2] (1996) 40 NSWLR 650.
[3] (1998) 195 CLR 424.
[4] (1999) 46 NSWLR 563.

production of documents extended to documents in respect of which a claim of legal professional privilege or public interest immunity could be made. However, the majority (Spigelman CJ and Meagher JA) held that the public interest may be harmed if access was also extended to documents which would conflict with individual or collective responsibility, such as records of Cabinet deliberations.

Following from these decisions, the Executive in New South Wales does not dispute the Council's right to order State papers, except with regard to Cabinet documents. Since the Egan decisions, over 300 orders for papers have been made and the Executive has routinely complied with each order. The process is now well established.

The arbitration process

The Legislative Council's standing order 52 lays out the procedure for orders for papers. (Attachment A)

If documents are returned without a claim of privilege, they are automatically tabled and made public. Documents that **are** subject to a claim of privilege are kept in the custody of the Clerk and made available for inspection by members of the Legislative Council only – the information cannot be copied or made public without an order of the House. It is relevant to note that, in recent evidence given before the Senate Legal and Constitutional Affairs References Committee, the Clerk of the Legislative Council observed that in the 15 years since the *Egan* decisions members have not breached that confidentiality.[5] (It should also be noted that, in addition to claims of legal professional privilege and public interest immunity, the Executive has lodged documents and claimed immunity from publication citing a claim of 'parliamentary privilege'. This is discussed further in subsequent pages.)

If a member disputes the validity of a claim of privilege, in writing to the Clerk, the President authorises the Clerk to appoint an independent legal arbiter, being a Queen's Counsel, Senior Counsel or retired Supreme Court Judge, to assess and report on the validity of the claim. That report is in turn used by the House to inform, but not dictate, a subsequent decision as to whether the claim of privilege should be overturned and the documents be made public.

This provision for an independent arbiter first came about as a result of a recommendation by the Privileges Committee in 1996 during the events connected to the Egan cases.[6] The process has been included in all order for papers agreed to since that time, and was finally incorporated into the standing orders in 2004.

In his recent evidence to the Senate committee, the Clerk of the Legislative Council stated that 'the appointment of the arbiter has never been a partisan matter. There has never been any disputation

[5] Evidence, Mr David Blunt, Clerk of the Parliaments and Clerk of the Legislative Council, Parliament of New South Wales, Australian Senate Legal and Constitutional Affairs References Committee, Tuesday 11 February 2014, p. 1.

[6] Legislative Council Privileges Committee, *Report on inquiry into sanctions where a minister fails to table documents*, Report No. 1, May 1996.

or disquiet amongst members that I am aware of', and the appointment carries the confidence of the chamber.[7]

The role of the arbiter in practice

Since the Egan decisions, and prior to 2014, three independent arbiters had been appointed and together had reported on 48 disputes. The body of precedent produced had highlighted a number of key features specific to the role:

- The arbiter does not report on claims of privilege *against the production* of documents to the House, but rather on the validity of claims of privilege made on documents *returned*.
- The arbiter's report is used to inform members by recommending whether a claim of privilege should be upheld, but does not in itself change the status of the document/s. That decision rests with the House.

It would also be fair to say that there had emerged a general view within the Legislative Council that the approach taken by the arbiters entailed consideration first of the merits, or validity, of the specific claim of privilege made, then secondly consideration as to whether the public interest in disclosure *overrode* the claim, even if it was validly made.

Sir Laurence Street QC, former Chief Justice of New South Wales, had been appointed as the arbiter in the majority of the disputes reported on, and articulated this approach as follows:

> Ordinarily the House gives great weight to validly based claims of Legal Professional Privilege, Public Interest Immunity and Commercial in Confidence Privilege; and such claims, where validly based, will frequently be allowed by the House, although none is legally binding on the House in absolute terms. The essential question to be addressed in dealing with such claims will always be whether the public interest in disclosure justifies over-riding such a claim notwithstanding that it is validly based.[8]

Sir Laurence later explicitly referred to this process as entailing 'two stages':

> In ruling on the issue of whether the claim of privilege should or should not prevail in considering whether or not to make public the contents of administrative documents, the essential issue is to balance the public interest in upholding a technically valid claim for immunity against the public interest in disclosure. This is a two stage process: first to determine whether the claim is technically valid; and secondly to determine which public interest should prevail.[9]

Although this two stage or public interest test has traditionally applied to claims of public interest immunity in the courts, it has not generally applied to valid claims of legal professional privilege, so is significant in setting the arbiter's system in the Legislative Council in contrast to a judge's role in

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[7] Evidence, Mr David Blunt, Clerk of the Parliaments and Clerk of the Legislative Council, Parliament of New South Wales, Australian Senate Legal and Constitutional Affairs References Committee, Tuesday 11 February 2014, pp 3-4.

[8] Sir Laurence Street, *Disputed claim of privilege – papers on Millennium Trains: Report of Independent Legal Arbiter*, 22 August 2003, p 6.

[9] Sir Laurence Street, *Disputed Claim of Privilege - Tunnel Ventilation Documents [Tunnel Ventilation Systems] — Report of Independent Legal Arbiter*, dated 24 January 2006, p 4.

the courts. Commentators such as Professor Anne Twomey have pointed to this as a controversial feature of the arbiter's approach.[10]

While the approach taken by each arbiter has tended to evolve within the context of each dispute, the process undertaken Sir Laurence and other arbiters appointed prior to 2014, namely the Hon Terrence Cole AC RFD QC and Mr M J Clarke QC, generally reflected this approach. It was settled and established.

Recent developments – A possible new approach?

WorkCover documents

For some time prior to 2014, the Legislative Council had been aware that due to the limited availability of some of individuals previously appointed as arbiter, there would be a need to approach other individuals to ascertain their interest in undertaking the task should a dispute be received. In 2014, for the first time, the President appointed the Honourable Keith Mason AC QC to report on a dispute on an order for papers connected to a committee inquiry into allegations of bullying in WorkCover. The dispute related to a document returned by the Government with a claim of privilege citing that the report contained 'personal information'.[11]

Mr Mason's appointment was significant because he had held the position of NSW Solicitor General during the period in which the Government was arguing the *Egan* cases.

The comments made by Mr Mason in his subsequent report on the WorkCover dispute were significant because they suggested that, contrary to the practice of his predecessors, he may have determined that the role of the arbiter was to report ***only*** on the validity of the claim at law. He observed:

> The stated functions [of the arbiter] are to evaluate and report to the House as to the (disputed) claim of privilege. Naturally this involves examining the document(s) and the reasons advanced for the claim of privilege… The word 'validity' in Order 52(6) further confirms that the arbiter's role is to apply his or her understanding of the law relating to privilege in this context. The relevant privilege is what, as a matter of law, exists as between the Executive and the Upper House of the New South Wales Parliament.[12]

Mr Mason also stated that if a valid claim of privilege applied to a document, then it may 'justify the independent arbiter recommending to the House that it uphold the claim.[13]

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[10] See Anne Twomey, "Executive Accountability to the Senate and the NSW Legislative Council", *Australian Parliamentary Review*, Autumn 2008, Vol 23(1), pp 257-273. The article was quite critical of the approach of independent legal arbiters to their role. The former Clerk of the Legislative Council responded to a number of these comments in a subsequent article, Lynn Lovelock, "The Power of the New South Wales Legislative Council to Order the Production of State Papers Revisiting the Egan Decisions Ten Years On", *Australasian Parliamentary Review*, Spring 2009, Vol 24(2), pp 197-218.

[11] Return to order, Schedule of documents, 20 November 2013, Report on actions of former WorkCover NSW Employee, Department of Premier and Cabinet, Annexure C.

[12] Honourable K Mason AC QC, Disputed claim of privilege on the report regarding a former WorkCover NSW employee: Report of the Independent Legal Arbiter, 5 March 2014, p 2.

[13] Honourable K Mason AC QC, Disputed claim of privilege on the report regarding a former WorkCover NSW employee: Report of the Independent Legal Arbiter, 5 March 2014, p 2.

In doing so, the traditional 'two-step test' favoured by past arbiters, which weighed the public interest in disclosure as a justification to override an otherwise valid claim, had seemingly been set aside. This would have the possible effect of restricting the volume of documents published in future.

The WorkCover dispute unfortunately did not provide the opportunity to resolve whether the arbiter had adopted this new approach. The claim of privilege was overturned on the basis that it was not legally valid as the privacy concerns advanced did not establish a relevant privilege known to law.[14] There was therefore no opportunity to determine whether the Arbiter would have deemed it appropriate to apply a second test, as to the public interest in publication, if the first, technical test had failed. There was also no opportunity to determine how the Arbiter would assess a dispute of legal professional or public interest immunity privilege in practice, as the claim was made on the basis of 'confidentiality'.

In his report, Mr Mason indicated that, while he proposed to set out his understanding of the relevant principles regarding the role of the arbiter, he would 'be in no way offended if, were I to be retained again, any party affected were to offer submissions (disclosed to others) addressing any relevant consideration', including his comments on the role of the arbiter.[15] In the following weeks, both the Deputy Leader of the Government and the Deputy Leader of the Opposition in the Legislative Council took advantage of this invitation to make statements in the House on their preliminary views on the observations made by Mr Mason, noting that the matters would likely be further elaborated within the context of a future referral to the arbiter.[16]

WestConnex documents

This opportunity soon arose when the Clerk received a disputed claim of privilege on documents related to the WestConnex infrastructure project. Mr Mason was again appointed to assess the documents in question and report on the validity of the claim.

At the suggestion of Mr Mason, the Clerk invited members to make submissions either in respect to the role of the arbiter or in respect to the disputed claim of privilege. Parties who lodged submissions were then provided with an opportunity to review other submissions made and provide a further response before the arbiter provided his report.

This was a significant step, as it was the first occasion on which an arbiter had sought input from the House as to his role.

Of the submissions received in response, four addressed the role of the arbiter – those from Mr David Blunt, Clerk of the Legislative Council; the NSW Crown Solicitor, writing on behalf of the Department of Premier and Cabinet; the Honourable Adam Searle MLC, Deputy Leader of the Opposition in the Legislative Council; and Greens member Mr David Shoebridge MLC. In response to

[14] Honourable K Mason AC QC, Disputed claim of privilege on the report regarding a former WorkCover NSW employee: Report of the Independent Legal Arbiter, 5 March 2014, p 2.
[15] Honourable K Mason AC QC, Disputed claim of privilege on the report regarding a former WorkCover NSW employee: Report of the Independent Legal Arbiter, 5 March 2014, p 1.
[16] *Hansard,* Legislative Council, 6 March 2014,pp 27157-58.

the matters raised in the initial round of submissions, further submissions were then received from the Clerk, the Crown Solicitor and Mr Searle.

The submissions canvassed a number of different views and interpretations, but the views expressed regarding the role of the arbiter fell into three broad camps.

1. *The role of the arbiter is to report on the validity of the claim of privilege – a 'one-step test'.*

This view favoured the arbiter's role as a legal or technical one – to report only on the validity of the arguments put forward in support of the claim. It would then be the role of the House to perform any second step as regards the public interest in publication, the decision being ultimately political rather than legal. This view was favoured by Mr David Shoebridge, a member of the Greens.

Citing Mr Mason's observation that the word 'validity' in standing order 52 confirms that the arbiter's role is to apply his understanding of the relevant privilege, at law, Mr Shoebridge's stated in his submission:

> I endorse the approach taken by the arbiter. It accords with authority and with a rational approach to the exercise of the powers under SO52. Importantly it also recognises the appropriate body to consider issues of public interest is, as a general rule, the Parliament and its elected members exercising their powers in the interests of the people of NSW.[17]

While Mr Shoebridge acknowledged that this approach did 'not wholly accord with the practice of previous arbiters', he argued that 'while there are clearly some attractions in the Legislative Council gaining the advice of an arbiter on these important public interest considerations, they are not properly the role of the arbiter under SO52 but rather matters for the House' the decision being ultimately political rather than legal.[18]

This view echoed that previously articulated by Professor Anne Twomey, who in 2008 published an article critical of the approach taken by the arbiter in overturning a 'technically valid' claim of legal professional privilege because the documents were not deemed to be sufficiently sensitive to be withheld from the public.[19] She argued that the role of the arbiter should be confined only to deciding whether documents fall within a privileged category, and stated:

> 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 of privilege.[20]

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[17] Submission of Mr David Shoebridge MLC, Disputed claim of privilege – WestConnex Business Case, p 5.
[18] Submission of Mr David Shoebridge MLC, Disputed claim of privilege – WestConnex Business Case, p 5.
[19] Anne Twomey, 'Executive Accountability to the Senate and the NSW Legislative Council', *Australasian Parliamentary Review,* Autumn 2008, Vol 23(1), pp 257-273. The former Clerk of the Parliaments, Ms Lynn Lovelock, later published an article that responded to some of Professor Twomey's criticisms: Lynn Lovelock, 'The Power of the New South Wales Legislative Council to Order the Production of State Papers: Revisiting the Egan Decisions Ten Years On', *Australasian Parliamentary Review*, Spring 2009, Vol 24(2), pp 197-218.
[20] Twomey, Ibid, p 265.

2. *The role of the arbiter is to perform a 'two-step test'.*

This view favoured the approach taken by past arbiters, as endorsed by the House, and emphasised that, in addition to considering the validity of the arguments put forward in support of the claim of privilege, it was necessary to then weigh those arguments against the public interest in transparency, accountability and disclosure. This view was favoured by the Clerk of the Legislative Council and Mr Searle.

The Clerk commenced his submission by acknowledging that while the judgements in *Egan v Chadwick* did not provide guidance in relation to the approach to be taken by the arbiter, Priestly JA had observed that the approach to be taken by the Legislative Council in deciding the government's claims to confidentiality must be determined by balancing the competing public interests:

> In exercising its powers in respect of such documents the Council has the same duty to prevent publication beyond itself of documents the disclosure of which will… be inimical to the public interest… When the Executive claims immunity on such grounds, the Council will have the duty, analogous to the duty of the court mentioned by Mason J in… *Commonwealth v Fairfax*[21], of balancing the conflicting public interest considerations.[22]

The Clerk undertook a detailed analysis of each of the arbiter's previous reports to identify the role observed and methodology used, from which he observed that whilst not every arbiter's report includes an explicit description of the approach/role or methodology of the arbiter, the evaluations undertaken by each were consistent with the approach outlined by Sir Laurence Street in his report on the first disputed claim of privilege, in which he stated:

> It should be emphasised that the question upon which I am required to make an evaluation and report is wholly distinct from the entitlement of the House to require the production of documents and from the entitlement of members of the Legislative Council to inspect them. The question is whether documents produced to the House are protected from general publication…
>
> The respective interests to be balanced against each other for present purposes are the legitimate interests of Delta Electricity in protecting its commercially sensitive information on the one hand, and, on the other hand, the public interest in making documents available to the public for the purposes of contributing to the common stock of public knowledge and aware in relation to the information; in a sense, this could be seen as an aspect of transparency and public accountability…[23]

The Clerk observed that central to each arbiter's approach was a consistent focus on the need to balance competing public interests in confidentiality and accountability/transparency in evaluating

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[21] Priestly JA had previously quoted Mason J in *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39: 'Accordingly, the court will determine the government's claim to confidentiality by reference to the public interest. Unless disclosure is likely to injure the public interest, it will not be protected'.

[22] Submission no. 1 of the Clerk of the Legislative Council, Disputed claim of privilege – WestConnex Business Case, p 4, citing Priestly JA, *Egan v Chadwick* [1999] NSWCA 176, as referred at 36 NSWLR 563.

[23] Submission no. 1 of the Clerk of the Legislative Council, Disputed claim of privilege – WestConnex Business Case, p 5, citing Sir Laurence Street, *Disputed claim of privilege – Papers on Delta Electricity, Report of Independent Legal Arbiter,* 4/10/1999, pp 2-8.

claims of privilege. However, over time that balancing role and the factors considered in weighing up the competing interests, had been expressed in various ways, with each report assisting to further explain and develop the role.[24]

The Clerk went on to observe that the high value past arbiters had ascribed to the public interest in disclosure had facilitated 'to the maximum possible extent' fulsome parliamentary debate on important matters of public policy. He concluded that, in view of the House's endorsement of the approach taken by past arbiters, and the considerable precedent available to provide guidance as to that favoured approach, while it is inevitable that each arbiter will emphasise different aspects of the role of the arbiter, and explain the role in their own unique way, 'the role should continue to be undertaken in a manner consistent with the approach of previous arbiters'.[25]

The Hon Adam Searle, Deputy Leader of the Opposition, also advocated that the arbiter adopt the two-step process, but suggested that it would be open to the arbiter to restrict privilege only to 'Cabinet documents, high level communications within government or between Ministers and the Crown', as these are the categories of privilege that, 'as a matter of law, exist between the Executive and the Upper House of the New South Wales Parliament'.[26]

3. *The role of the arbiter is to determine whether there is a valid claim that the documents should not be made public, having reference to the specific scrutiny function the Council would be seeking to perform in publishing the information the subject of the dispute. This is in keeping with the principle that the House exercise its powers only to the extent to which it is 'reasonably necessary' to enable it to hold the Government to account.*

This final view was favoured by the NSW Crown Solicitor, writing on behalf of the Department of Premier and Cabinet, and rested on three tenets.

Firstly, the Crown Solicitor concurred with the Clerk and Mr Searle that a determination as to the public interest in publication was fundamental to arbiter's role.[27]

Secondly, also echoing the submission made by the Clerk, the Crown Solicitor stated that although the principles underlying traditional categories of privilege may offer guidance to the arbiter, 'the term 'privilege' in standing order 52 is used as a convenient way to describe a claim by the Executive that, on balance, certain documents which the Executive was compelled to produce should not be made public and does not purport to prescribe or confine the nature of the arbiter's approach in evaluating and reporting to the House on the Executive's claim'.[28] It is the arbiter's role to determine whether there is a valid claim that the documents should not be made public.[29]

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[24] Submission no. 1 of the Clerk of the Legislative Council, Disputed claim of privilege – WestConnex Business Case, p 5.
[25] Submission no. 1 of the Clerk of the Legislative Council, Disputed claim of privilege – WestConnex Business Case, p 11.
[26] Submission no. 2 of the Hon Adam Searle MLC, Disputed claim of privilege – WestConnex Business Case, p 6.
[27] Submission no. 1 of the NSW Crown Solicitor, Disputed claim of privilege – WestConnex Business Case, pp 4-5.
[28] Submission no. 1 of the NSW Crown Solicitor, Disputed claim of privilege – WestConnex Business Case, p 8.
[29] Submission no. 1 of the NSW Crown Solicitor, Disputed claim of privilege – WestConnex Business Case, p 1.

Thirdly, the Crown Solicitor argued that, as the *Egan* cases had found that the power to order documents existed only because it was 'reasonably necessary' to support the exercise of the House's functions in making laws and scrutinising the Executive, the arbiter must also determine which function the House was exercising in ordering the documents, and how the publication of the documents was reasonably necessary for the House to fulfil that function.[30]

This position was in keeping with similar arguments previously articulated by the Department of Premier and Cabinet.[31]

In response to the Crown Solicitor's suggestions, the Clerk of the Parliaments lodged a supplementary submission in which he queried the feasibility of tying an order for the production of documents to one particular function of the Council.[32] He stated:

> The exercise by members individually and collectively of their functions no doubt often involves a mix of motives, roles and constitutional functions. The functions of making laws and holding the executive government to account, recognised as the roles of the Legislative Council in the system of responsible government, are not so easily separated… What is to say that the tabling of documents and their publication itself is not just as valid a means of holding the executive government to account as [asking of questions, the presentation of petitions, moving of motions, parliamentary debate and committee inquiries]? Indeed, it could be argued that it is a more effective mechanism than some of the processes outlined above.[33]

The Clerk also pointed to the long standing existence of standing orders and legislation regulating the tabling and publication of documents, and the long standing body of precedents in which the House had exercised its power to order the production of documents, to demonstrate the importance of tabling and publication as a key parliamentary function.[34]

<u>Mr Mason provides his report on the WestConnex documents</u>

Mr Mason provided his report on the disputed WestConnex documents, and on the submissions made concerning his duties as arbiter, on 8 August 2014.

The report began by reiterating some of the overarching principles applying that apply to the assessment of disputed claims of privilege, such as that the arbiter evaluates and reports

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[30] Submission no. 1 of the NSW Crown Solicitor, Disputed claim of privilege – WestConnex Business Case, p 2.

[31] In 2013, in the course of the Legislative Council Privileges Committee's inquiry into a possible non-compliance with an order for papers, the committee invited the Department of Premier and Cabinet to make a submission regarding any the operation of the order for papers process under standing order 52. In their subsequent submission, the Department had suggested that the scope of orders should be drafted to identify the documents specifically needed for the Legislative Council's functions, in order to exclude documents not required and avoid 'fishing expeditions'. See Privileges Committee, *The 2009 Mt Penny return to order,* Legislative Council, Report No. 69, October 2013, pp 73-74.

[32] Submission no. 2 of the Clerk of the Legislative Council, Disputed claim of privilege – WestConnex Business Case, p 2.

[33] Submission no. 2 of the Clerk of the Legislative Council, Disputed claim of privilege – WestConnex Business Case, pp 2-3.

[34] Submission no. 2 of the Clerk of the Legislative Council, Disputed claim of privilege – WestConnex Business Case, pp 2-3.

independently of the House and is in no sense the delegate of the House; that the arbiter is to report on the validity of the privilege claimed, taking into account any documents and submissions duly received; that the House is not bound by the report of the arbiter; and that the burden for demonstrating the existence of a particular privilege lies upon the body asserting the privilege.[35] Mr Mason then proceeded onto the matters the subject of the submissions.

His position did not *directly* align with any of the submissions made, but drew on aspects of each.

The role of the arbiter and a definition of 'privilege'

Mr Mason stated that 'the arbiter's primary task, as I see it, is to report whether legally recognised privileges as claimed apply to the disputed documents notwithstanding their production to the House and the restricted access adhering to them pending an order of the House for their publishing or copying. If, in the present situation one asked: 'Privileged from what?' the answer must be: 'From dissemination to the general public either through unconditional release, or through disclosure of their particular contents'.[36]

Having made clear his role as he saw it, he went on to reject the use of references to 'technical legal privilege'[37] and a one-step or two-step arbitration process, contrary to the reports of other arbiters and to some of the submissions made to him. He stated:

> Some of the debate in the submissions placed before me involving close analysis of the language sometimes used in the reports of my predecessors has been bedevilled by semantic and at times confusing invocation of the 'technical legal' expressions that I am anxious to avoid. Likewise with the debate 'one-stage' or 'two-stage' approaches by the arbiter'.[38]

Response to the Crown Solicitor's submission

In response to the Crown Solicitor's arguments, Mr Mason stated that he was not persuaded that his task extended to inquiring into the particular goals being pursued with the papers in question. He stated:

> I would have thought that the House should be taken to have decided that a reasonable basis existed for the original call for papers and that the Government should be taken to have accepted as much by producing the papers...[39]

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[35] The Hon Keith Mason AC QC, *Report under standing order 52 on disputed claim of privilege: WestConnex Business Case*, 8 August 2014, p 5.
[36] The Hon Keith Mason AC QC, *Report under standing order 52 on disputed claim of privilege: WestConnex Business Case*, 8 August 2014, p 8.
[37] In reference to the term 'technical legal privilege', Mr Mason stated that while he accepted that the arbiter's evaluative role is both technical and legal, the context in which it takes place Is not that of a courtroom faced with a claim to resist production of information for the purpose of particular litigation (The Hon Keith Mason AC QC, *Report under standing order 52 on disputed claim of privilege: WestConnex Business Case*, 8 August 2014, p 7.)
[38] The Hon Keith Mason AC QC, *Report under standing order 52 on disputed claim of privilege: WestConnex Business Case*, 8 August 2014, p 7.
[39] The Hon Keith Mason AC QC, *Report under standing order 52 on disputed claim of privilege: WestConnex Business Case*, 8 August 2014, p 9.

The arbiter went on to stress that the onus is not on a member or the House to make good their reasons for wanting to publish the information, or 'declare their hands in advance'. Instead, the onus is on both the member/s disputing the claim and the Executive in making the claim to make good their arguments regarding the public interest in or against disclosure.[40]

The substance of his approach in assessing the WestConnex documents

In some respects, Mr Mason appeared to favour the role articulated by Mr Shoebridge, as he placed particular emphasis on his role to determine whether a legally recognised privilege applied to the documents, protecting them from publication. His assessment of the claim of both legal professional and public interest immunity privilege gave particular weight to the validity of the claim made. In his assessment of the public interest immunity claim, he noted that 'commercial in confidence' and 'privacy' are not in themselves recognised heads of privilege, setting his approach in contrast to that of Sir Laurence, and he overturned the claim made on a number of documents.[41]

Nevertheless, in determining whether the public interest would be harmed by the publication of the documents, he went on to uphold the claim as it applied to certain personal information.[42]

Similarly, while he overturned the claim of legal professional privilege as it was not legally valid, Mr Mason went on to acknowledge that 'there may conceivably be some circumstances in which the House has a constitutionally-derived *legal right* to more unrestricted access than the strict application of the common law rules of legal professional privilege', such as for if the House was concerned to explore whether the government had followed legal advice in a particular matter.[43]

The arbiter was quick to note that he was not indicating that public interest immunity factors would necessarily apply in this type of setting. Rather, he was simply flagging the issue, noting that it is one on which 'there is presently no guidance from the courts', and indicated that if the issue is raised in a later matter, he would 'anticipate further assistance through the exchange of submissions'.[44] This suggested his position may, in time, align somewhere more closely towards that articulated by the Clerk and former arbiters, however his approach regarding the public interest test is likely to remain more conservative than that of his predecessors.

Parliamentary privilege

As noted earlier, claims of 'parliamentary privilege' from publication have been made by the Executive in returns to orders on a number of occasions. These claims have been surprising in some respects, as parliamentary privilege, at its essence, exists to protect the parliament from obstruction or curtailment of its powers by the courts and other such bodies. The privilege does not exist to

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[40] The Hon Keith Mason AC QC, *Report under standing order 52 on disputed claim of privilege: WestConnex Business Case*, 8 August 2014, p 9.
[41] The Hon Keith Mason AC QC, *Report under standing order 52 on disputed claim of privilege: WestConnex Business Case*, 8 August 2014, p 10-11.
[42] The Hon Keith Mason AC QC, *Report under standing order 52 on disputed claim of privilege: WestConnex Business Case*, 8 August 2014, p 12.
[43] The Hon Keith Mason AC QC, *Report under standing order 52 on disputed claim of privilege: WestConnex Business Case*, 8 August 2014, p 7.
[44] The Hon Keith Mason AC QC, *Report under standing order 52 on disputed claim of privilege: WestConnex Business Case*, 8 August 2014, p 7.

protect the Executive from scrutiny by the Parliament. Nevertheless, the orders to which these claims have applied have never previously been the subject of a dispute.

In the WestConnex return, lawyers for Roads and Maritime Services suggested that, while NSW's freedom of information legislation, the Government Information (Public Access) Act 2009 (GIPA Act), does not apply directly, its principles inform the consideration of public interest immunity, and the GIPA Act conclusively presumes an overriding public interest against the disclosure of information the public disclosure of which would, but for any immunity of the Crown, infringe the privilege of Parliament.[45]

In reply, Mr Mason noted that while there are decisions by the courts in Queensland and New South Wales upholding claims of 'parliamentary privilege' with respect to briefing notes, these all stem from the relationship between courts and tribunals on the one hand and *Parliament* on the other, and they involve the application of Article 9 of the *Bill of Rights 1688*. Therefore, they have no bearing on the activities of Parliament itself or privileges that the *Executive* may assert against the House. Mr Mason concluded:

> The conclusive presumption in the GIPA Act does not bear directly on the present issue. This is for two reasons: first, because the GIPA Act deals with freedom of information applications made by members of the public against the Executive; and secondly, because Parliament's privileges could not, by definition, be infringed by something done under the authority of the House.[46]

The House considers of the WestConnex report

Following the WestConnex process, the House went on to implement the recommendations made by the arbiter, so has not challenged his approach. The House has similarly implemented the recommendations made in two subsequent reports by the arbiter, though in both cases these have first been referred for consideration and report by the Privileges Committee. These are discussed below.

Other recent developments in the arbitration or orders for papers process

In the months since the publication of the WestConnex report, the House has considered a number of other matters that have related to the process for assessing claims of privilege on returns.

The House refers the recommendations of the arbiter to the Privileges Committee for inquiry and report

In October 2014, the House resolved that the Privileges Committee inquire into and report on the implementation of a report by the independent legal arbiter, again the Hon Keith Mason AC QC, on papers relating to the VIP Gaming Management Agreement entered into between the Independent Liquor and Gaming Authority (ILGA) and Crown Casino, which had recommended that information claimed by the Executive to be commercially sensitive and confidential be published as the claim was

[45] The Hon Keith Mason AC QC, *Report under standing order 52 on disputed claim of privilege: WestConnex Business Case*, 8 August 2014, p 14.
[46] The Hon Keith Mason AC QC, *Report under standing order 52 on disputed claim of privilege: WestConnex Business Case*, 8 August 2014, p 14.

not valid.[47] The committee invited submissions from the member who had lodged the dispute and, through the Department of Premier and Cabinet, from Crown Resorts Limited and the ILGA. The committee reported that, having reviewed the matter in reference to the submissions received, it supported the recommendation made by Mr Mason in his report, and the House in turn resolved to publish the arbiter's report and the information the subject of the dispute.[48]

The House authorises a committee to determine the publication of papers not *subject to a claim of privilege*

On 12 November 2014, the House established a new select committee to inquire into and report on the conduct and progress of the Ombudsman's inquiry "Operation Prospect". Operation Prospect is a large-scale inquiry by the Ombudsman into allegations about the conduct of officers of the NSW Police Force, the New South Wales Crime Commission and the Police Integrity Commission.

Later that month, the House agreed to an order for papers or the report of Police Strike Force Emblems and a series of other related documents. Included in the resolution was an unprecedented provision that, notwithstanding anything to the contrary in standing order 52, any documents returned over which a claim of privilege is *not* made will:

a) subject to (b) below, remain confidential and available for inspection by members of the House only, and
b) stand referred to the Select Committee on the conduct and progress of the Ombudsman's inquiry 'Operation Prospect', which is authorised to determine whether the documents should subsequently be made public.[49]

This is the first occasion on which the House has resolved to take a role in determining the publication status of documents over which a claim of privilege has not been made. In response to the order, General Counsel for the Department of Premier and Cabinet lodged legal advice from the Crown Solicitor, which stated that information concerning the administration of justice must be ordered from the Governor under standing order 53 rather than from the Executive under standing order 52. The committee has yet to publish its final report on the inquiry.

The House (temporarily) delegates the decision to publish privileged documents to the Privileges Committee

Also on 20 November 2014, the last sitting day prior to the summer adjournment and the prorogation of the House for the 2015 periodic election, the House agreed to a motion noting that, in view of the fact that the House was currently awaiting receipt of a number of returns to orders, and a number of disputed claims of privileges had been referred to the independent legal arbiter for evaluation and report, the House authorise the Privileges Committee to undertake the role usually performed by the House in dealing with disputed claims of privilege over returns to order while the House is not sitting. The motion specified that:

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[47] *Minutes*, Legislative Council, 23 October 2014, pp 201-202.
[48] Privileges Committee, *The Crown Casino VIP Gaming Management Agreement*, Legislative Council, Report No. 72, November 2014.
[49] *Minutes*, Legislative Council, 20 November 2014, pp 363-4.

- this would extend to taking the decision to make public any documents over which privilege has been claimed but not upheld by the arbiter, and
- any member of the Council who had disputed a claim of privilege would be entitled to participate in the deliberations of the committee, but could not vote, move any motion or be counted for the purposes or any quorum or division unless they were a member of the committee.[50]

While the motion was moved and amended by members of the Opposition, the terms were similar to another motion given by the Leader of the Government, and both sides spoke in favour of the motion.[51]

The decision was particularly interesting given that the Privileges Committee, like all standing committees in the Legislative Council, has a government majority. However, the procedure provides a clear mechanism for dealing with disputed claims of privilege during lengthy adjournments of the House. When the House last sought to set up a system for dealing with disputes during a lengthy adjournment in 2005, the resolutions agreed to authorised the Clerk to automatically publish any documents for which the claim of privilege was not upheld by the arbiter.[52] This in turn prompted concern that the resolutions may be interpreted, or misinterpreted, to have been an instance of the House effectively delegating its power to overturn the claims for privilege to the arbiter.[53] The current procedure makes clear that the House continues to guard its powers concerning orders for papers, and has delegated the function to the committee as an arm of the House, much the same as it delegates its inquiry power.

Conclusion

Recent events concerning orders for papers and the role of the independent legal arbiter have provided an interesting opportunity to observe the House and others connected to the business of Parliament respond to the 'challenge of change'. These developments pose a number of questions, both for the Legislative Council and for other Houses considering the practical process that applies to a power to order papers.

In regards to the submission process utilised during the WestConnex process, these questions include:

- Should members, who are essentially political creatures, be encouraged to continue to make submissions on every dispute, and every new question?
- Was that not why the standing order requires the appointment of a qualified person who is experienced in making those types of assessments?
- Or does the submission process result in greater engagement from members in the process, and ownership of the outcome?
- If the process does remain, should it be restricted only to the Executive to lodge submissions in support of the claims for privilege disputed?

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[50] *Minutes*, Legislative Council, 20 November 2014, pp 365-367.
[51] *Hansard,* Legislative Council, 20 November 2014, p 3190.
[52] *Minutes,* Legislative Council, 1 December 2005, p 1815.
[53] Legislative Council Privileges Committee, *The 2009 Mt Penny return to order*, Report No. 69, October 2013, p 94.

In regards to the provisions of standing order 52, and the process provided for the arbiter, these questions include:

- Should consideration could be given to providing further clarity to the terms of SO52 as to the nature of the role, and the test to be undertaken in assessing claims of privilege? The reference to 'privilege' in the standing order could also be clarified.
- Conversely, would any attempt to formalise the current system unintentionally curtail the process into the future?

In my view, these questions speak to the essence of the ‘challenge of change’ in the parliamentary context: striking the balance between safeguarding processes that are established and work well, and encouraging the development and evolution of those processes to enable the House to better exercise its powers and functions.

Attachment A – Standing order 52

Order for the production of documents

(1) The House may order documents to be tabled in the House. The Clerk is to communicate to the Premier's Department, all orders for documents made by the House.

(2) When returned, the documents will be laid on the table by the Clerk.

(3) A return under this order is to include an indexed list of all documents tabled, showing the date of creation of the document, a description of the document and the author of the document.

(4) If at the time the documents are required to be tabled the House is not sitting, the documents may be lodged with the Clerk, and unless privilege is claimed, are deemed to be have been presented to the House and published by authority of the House.

(5) Where a document is considered to be privileged:

- (a) a return is to be prepared showing the date of creation of the document, a description of the document, the author of the document and reasons for the claim of privilege,
- (b) the documents are to be delivered to the Clerk by the date and time required in the resolution of the House and:
  - (i) made available only to members of the Legislative Council,
  - (ii) not published or copied without an order of the House.

(6) Any member may, by communication in writing to the Clerk, dispute the validity of the claim of privilege in relation to a particular document or documents. On receipt of such communication, the Clerk is authorised to release the disputed document or documents to an independent legal arbiter, for evaluation and report within seven calendar days as to the validity of the claim.

(7) The independent legal arbiter is to be appointed by the President and must be a Queen's Counsel, a Senior Counsel or a retired Supreme Court Judge.

(8) A report from the independent legal arbiter is to be lodged with the Clerk and:

- (a) made available only to members of the House,
- (b) not published or copied without an order of the House.

(9) The Clerk is to maintain a register showing the name of any person examining documents tabled under this order.