A Case for a Parliamentary Privileges Act for New South Wales

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INTRODUCTION

Over 150 years after the adoption of responsible government, New South Wales remains unusual amongst Australian jurisdictions for the degree to which it does not codify in statute the immunities and powers – collectively the privileges – of the two Houses of its Parliament. The most important immunities – the immunities attaching to speeches and debate and to other proceedings – are today largely expressed by reference to Article 9 of the *Bill of Rights 1689*. The Houses also have the right of exclusive cognisance to regulate and control their own internal proceedings. The powers of the two Houses are largely, although not solely, founded on the common law concept of necessity – that the Houses have such powers as are reasonably necessary for their effective functioning.

These arrangements have on the whole served the Parliament and people of New South Wales well. In particular, the landmark *Egan* decisions of the late 1990s, which confirmed the power of the New South Wales Legislative Council to order the production of papers from the executive government, were founded on necessity. However, this paper examines the case for further limited codification of the statutory immunities that apply in New South Wales under Article 9 of the *Bill of Rights 1689*, together with codification or consolidation of certain other immunities. This follows recent controversial court decisions in New Zealand which prompted the New Zealand Parliament to respond with the *Parliamentary Privileges Act 2014*, drawing in turn on the successful Australian *Parliamentary Privileges Act 1987*. Such a step could be undertaken relatively easily, provided that care was taken to preserve all immunities currently in place. There is also a case for very limited legislative codification of the powers of the Houses in New South Wales in relation to the conduct of members and arguably former members, again provided that care was taken to preserve all existing powers under the common law. This case will be given extra force if foreshadowed reforms to strengthen the ethics regime for members of Parliament in New South Wales proceed.

PREVIOUS ATTEMPTS AT MORE COMPREHENSIVE PARLIAMENTARY PRIVILEGE LEGISLATION IN NEW SOUTH WALES

At the achievement of responsible government in 1855, the New South Wales *Constitution Act 1855*[1] did not include any express grant of privilege to the new Parliament; nor did its successor, the *Constitution Act 1902*, which remains in force today. Even now, the codification of privilege in New South Wales remains quite limited. Article 9 of the *Bill of Rights 1689* is in force in New South Wales by virtue of section 6 and schedule 2 of the *Imperial Acts Application Act 1969*. The *Parliamentary Evidence Act 1901*, which replaced a previous 1881 Act, enables the Houses and their committees to compel witnesses to attend and give evidence. Certain other statutes also bear on privilege.[2] However, there is no statute that attempts to codify more fully the privileges of the Parliament, for example by connecting them with those of the House of Commons in the Westminster Parliament, or by defining the power to punish contempts.

New South Wales is joined in this unusual status by Tasmania, at least in part. By contrast, other Australasian jurisdictions adopt the privileges of the House of Commons. Victoria adopts the privileges of the House of Commons as at 21 July 1855, South Australia as at 24 October 1856, New Zealand as at 1 January 1865, the Commonwealth and Queensland as at 1 January 1901 and Western Australia as at 1 January 1989. Other jurisdictions have also passed further privileges legislation, as notably the Commonwealth did with the *Parliamentary Privileges Act* in 1987, and Queensland did with the *Parliament of Queensland Act* in 2001. As will be discussed, New Zealand has also recently enacted significant privileges legislation.

It is not entirely clear why the *Constitution Act 1855* did not include an express grant of privilege to the new Parliament of New South Wales, or even a specific provision enabling the Parliament to define its privileges. One possible explanation may be that such a provision was simply not considered necessary. All that was thought necessary could be done via the standing orders or by relying on common law principles, in the realisation that if needed, a separate bill could be introduced to deal with the matter at any time.[3]

1 18 & 19 Vic, c 54, Sch 1, cited at www.foundingdocs.gov.au/item-sdid-78.html.

2 For example, Section 27 of the *Defamation Act 2005*, which replaced a previous 1974 Act, provides absolute privilege to the publication of records and proceedings of the Parliament of New South Wales, and section 6 and schedule 1 of the *Jury Act 1977* provide that members of the Parliament are ineligible to serve as jurors. Other relevant legislation includes the *Parliamentary Papers (Supplementary Provisions) Act 1975*, the *Parliamentary Precincts Act 1997* and provisions which explicitly preserve privilege such as section 122 of the *Independent Commission Against Corruption Act 1988*.

3 The omission of a specific privileges provision in the *Constitution Act 1855* in no way limited the power of the Parliament to codify its privileges in a separate Act under the general law making power in section 1 of the Act.

While privilege was not addressed at the advent of responsible government in New South Wales, there were six attempts to introduce more comprehensive privileges legislation in New South Wales between 1856 and 1912. All failed. The first bill, introduced in the New South Wales Legislative Assembly in the months following the establishment of the new Parliament in 1856, foundered following extensive public opposition, with the *Sydney Morning Herald* suggesting that contempt provisions in the bill would 'destroy the liberty of the press'.[4] Two further bills, each entitled the Parliamentary Powers and Privileges Bill, were introduced in the Assembly in 1878. The first was defeated at the second reading stage in the Council on 16 May 1878.[5] The second was the subject of ongoing negotiation between the two Houses, including a free conference, before ultimately being dropped.[6] Both bills foundered in the Legislative Council out of concern that they extended contempt powers to deal with contempts outside of Parliament. A fourth bill was introduced in 1901 by a private member in the Assembly[7] but subsequently lapsed on prorogation. Two further bills, both introduced in 1912 in the Assembly[8] also did not progress, again lapsing on prorogation.

However, while attempts at passing more comprehensive privileges legislation failed, in 1881 the Parliament did pass the *Parliamentary Evidence Act 1881*, which provided statutory power to the House and its committees to send for and examine persons.[9] The *Parliamentary Evidence Act 1881* was replaced in 1901 by the *Parliamentary Evidence Act 1901*, which is still in force today.

It is also notable that the *Bill of Rights 1689* formally became law in New South Wales on 1 January 1971 by virtue of section 6 and schedule 2 of the *Imperial Acts Application Act 1969*. Section 6 of the Act declares, among other things, that the *Bill of Rights*, so far as it was in force in England on 25 July 1828, was and remains in force in New South Wales on and from that day.

Proposals for enactment of more comprehensive privileges legislation have also arisen in more recent times. In 1985, a Joint Select Committee on Parliamentary Privilege recommended that 'the *Constitution Act 1902* be amended to place beyond doubt that the powers, privileges and immunities of the Houses of the New South Wales Parliament are those of the British House of Commons as at the establishment of responsible government in 1856.'[10] This recommendation has not been adopted.

4 *Sydney Morning Herald*, 2 September 1856, p 2.
5 *New South Wales Legislative Council Minutes*, 16 May 1878, p 100.
6 *New South Wales Legislative Assembly Votes and Proceedings*, 14 May 1979, p 511.
7 *New South Wales Legislative Assembly Votes and Proceedings*, 31 October 1901, p 290.
8 *New South Wales Legislative Assembly Votes and Proceedings*, 19 March 1912, pp 279–280; 14 November 1912, p 214.
9 The bill was based in part on the provisions of the second Parliamentary Powers and Privileges Bill of 1878.
10 New South Wales Joint Select Committee on Parliamentary Privilege, *Parliamentary Privilege in New South Wales*, September 1985, p 21.

In 1997, the Leader of the Opposition in the Legislative Council, the Hon John Hannaford, prepared in consultation with Parliamentary Counsel a draft Parliamentary Powers, Privileges and Immunities Bill 1997, referred to in this paper as the Hannaford bill. Notice for the bill's introduction was given, but it never proceeded.[11]

The Privileges Committee of the Legislative Council on six occasions between 1993 and 2006 recommended the adoption of privileges legislation.[12] In 2006 it recommended the statutory codification of the privileges and immunities of both Houses in a similar form to the Commonwealth *Parliamentary Privileges Act 1987*. In November 2009, the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics also recommended the introduction of legislation similar to section 16 of the *Parliamentary Privileges Act 1987* to confirm the immunities in Article 9 of the *Bill of Rights 1689*.[13]

Finally, on 2 December 2010, the Speaker of the Legislative Assembly, the Hon Richard Torbay, tabled in that House a draft Parliamentary Privileges Bill 2010, referred to in this paper as the Torbay Bill.[14] It being the second last sitting day of the 54th Parliament, the draft bill was not progressed before prorogation.

For all these repeated attempts at enacting privileges legislation, New South Wales remains an outlier in the degree to which it does not codify its privileges in statute. The immunities of the two Houses of the New South Wales Parliament – notably the immunities attaching to speeches and debate and to other proceedings – are today largely expressed by reference to Article 9 of the *Bill of Rights 1689*. Using modern wording,[15] Article 9 declares:

> 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.

11 Notice of motion of the bill was given in the New South Wales Legislative Council on 28 November 1996.

12 New South Wales Legislative Council Privileges Committee, *Report concerning the publication of an article appearing in the Sun Herald newspaper containing details of in camera evidence*, 28 October 1993, Recommendation 5; *Report on Inquiry into sanctions where a minister fails to table documents*, Report No 1, 10 May 1996, Recommendation 3; *Report on Inquiry into Statements made by Mr Gallacher and Mr Hannaford*, Report No 11, 30 Nov 1999, Resolution 4; *Report on sections 13 and 13B of the Constitution Act 1902*, Report No 15, 1 December 2001, Recommendation 2; *Parliamentary privilege and seizure of documents by ICAC*, Report 25, 3 December 2003, Recommendation 3; *Review of Members' Code of Conduct and draft Constitution (Disclosures by Members) Amendment Regulation 2006*, Report 35, October 2006, Recommendation 9.

13 New South Wales Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics, *Memorandum of Understanding – Execution of Search Warrants by the Independent Commission Against Corruption on Members' Offices*, November 2009, Recommendation 3.

14 *New South Wales Legislative Assembly Votes and Proceedings*, 2 December 2010, p 2562.

15 As originally enacted, Article 9 declares: 'That the Freedome of Speech and Debates or Proceedings in Parlyament ought not to be impeached or questioned in any Court or Place out of Parlyament.'

The Houses also have the right of exclusive cognisance, that is, the right of each of the two Houses of the New South Wales Parliament to regulate and control its own internal proceedings.[16]

The powers of the two Houses are largely, although not solely, founded on the common law concept of necessity – that the Houses have such powers as are reasonably necessary for their effective functioning.

A CASE FOR FURTHER PARTIAL CODIFICATION OF THE IMMUNITIES OF THE HOUSES OF THE NEW SOUTH WALES PARLIAMENT

There is no crisis of parliamentary privilege in New South Wales; the current arrangements, a reflection of the fragmented history of privilege in New South Wales, nevertheless remain entirely viable. However, recent case law concerning privilege in other jurisdictions, notably New Zealand, give pause for thought as to whether New South Wales should finally adopt privileges legislation to define in part the immunities of the Houses of the New South Wales Parliament under Article 9 of the *Bill of Rights 1689*, drawing on the model used in the Commonwealth *Parliamentary Privileges Act 1987*.

In 2013 and 2014, the New Zealand Parliament debated and passed the Parliamentary Privilege Bill. The *Parliamentary Privileges Act 2014* received assent on 7 August 2014, and came into force the next day.[17] As articulated in section 3 (Purpose of this Act), the main purpose of the Act was to 'reaffirm and clarify the nature, scope, and extent of the privileges, immunities, and powers exercisable by the House of Representatives, its committees, and its members', whilst 'avoid[ing] comprehensive codification of, parliamentary privilege', and whilst also 'ensur[ing] adequate protection' of "proceedings in Parliament" under Article 9. In clarifying the law of privilege in New Zealand, the bill also 'replace[d] with modern legislation the law formerly contained in the *Legislature Act 1908*, the *Legislature Amendment Act 1992*, and certain provisions of the *Defamation Act 1992*.'

The introduction and passage of the Parliamentary Privilege Bill was a direct response by the New Zealand Parliament to the decision of the New Zealand Supreme Court in *Attorney-General and Gow v Leigh*,[18] in which the Supreme Court found that statements made by an official (Mr Gow) to a Minister for the purposes of replying to questions for oral answer in the New Zealand Parliament were not themselves parliamentary proceedings, and as such, could be the subject of court proceedings as they were

16 See for example the statement of Justice McHugh in the High Court in *Egan v Willis* (1998) 195 CLR 424 at 478 concerning the right of the Legislative Council of New South Wales to control its own business.

17 *Parliamentary Privileges Act 2014*, section 2.

18 [2011] NZSC 106.

not protected by absolute privilege.[19] In effect, the statements made by Mr Gow to the Minister were protected by qualified privilege only under the law of defamation. Previously, it had been generally understood that the protection of absolute privilege under Article 9 extended not only to what a minister had said in the House, but also to the information supplied to a minister for the purposes of "proceedings in Parliament".

By any measure, the decision in *Leigh* was controversial. The decision moved the common law in New Zealand away from the reasonably settled principle, as articulated in *Prebble v Television New Zealand*,[20] that where there are two competing interests at play – the need to ensure the independence of parliament, and the right of an individual to access justice – the public interest test must be struck in favour of parliament, although the interests of justice cannot be ignored.[21]

In addition to the judgment in *Leigh*, the New Zealand Parliament and its Privileges Committee was also very concerned about the earlier matter of *Buchanan v Jennings*, dating back to 2004, in which it was ultimately held by the Privy Council that what a member said in the House could be used for the purposes of court proceedings where the member had "effectively repeated" what was said in the House outside Parliament.[22] In 2005, the New Zealand Privileges Committee recommended abolition of the doctrine of 'effective repetition' by legislation.[23]

In response to the decision in *Leigh*, and also to address the matter in *Buchanan v Jennings*, the New Zealand Parliament enacted in section 10 of the new *Parliamentary Privileges Act 2014* a definition of "proceedings in Parliament" based on that contained in section 16(2) of the Australian *Parliamentary Privileges Act 1987*. Section 10 defines "proceedings in Parliament" as meaning 'all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of the House or of a committee' (emphasis added). In section 11, the New Zealand Parliament went on to articulate the meaning of 'prohibited impeaching or questioning', drawing directly on section 16(3) of the Australian Act. It is notable that in *Prebble v Television New Zealand Ltd*, Lord Browne-Wilkinson stated that section 16(3) of the *Parliamentary Privileges Act 1987*, 'contains … the true principle to be applied' as to the effect of article 9 and the admissibility of evidence.

It is particularly significant that the New Zealand Parliament chose to adopt a definition of "proceedings in Parliament" which includes words spoken or acts done which are 'incidental to' the transacting of the business of the House or of a committee. In its

19 For a more extensive summary of the court proceedings, see New Zealand Privileges Committee, 'Question of privilege concerning the defamation action *Attorney-General and Gow v Leigh*', June 2013, pp 8–10.

20 [1994] 3 NZLR 1 (PC).

21 [1994] 3 NZLR 1 (PC) at 337.

22 New Zealand Privileges Committee, 'Question of privilege concerning the defamation action *Attorney-General and Gow v Leigh*', June 2013, p 17.

23 New Zealand Privileges Committee, 'Question of privilege referred 21 July 1998 concerning Buchanan v Jennings, May 2005.

decision in *Leigh*, the New Zealand Supreme Court rejected the submissions of counsel for the Speaker, Mr Pike, that the proper test of whether a matter constituted part of the "proceedings in Parliament" was whether the occasion in question was "reasonably incidental" to the discharge of the business of the House – the so called 'reasonable incidentality' test. This 'test' drew directly on section 16(2) of the Australian Act, and the previous views articulated in *Prebble*.[24] Rather, the Supreme Court applied the seemingly narrower 'necessity test' – that the test of whether a matter constituted part of the "proceedings in Parliament" was whether it was strictly necessary for the proper and efficient functioning of the House of Representatives.[25] In doing so, the Supreme Court relied heavily on the recent decisions of the House of Lords in *Chaytor*[26] and the Supreme Court of Canada in *Vaid*.[27] The Court also rejected the conclusion reached in *Parliamentary Practice in New Zealand* that privilege in New Zealand is firmly rooted in statute, and that the scope of privilege is a question of law to be determined by the court by reference to the statute rather than on any ground of necessity.[28]

This approach adopted by the Supreme Court in *Leigh* subsequently came in for significant criticism by the New Zealand Privileges Committee. Citing the advice of Professor Philip Joseph, the Privileges Committee argued that the application of Article 9 is a matter of statutory interpretation, in this instance the meaning of the words "proceedings in Parliament", whereas necessity is more appropriately applied to the common law right of the New Zealand Parliament to control its own internal proceedings, referred to as exclusive cognisance. In jurisdictions overseas, notably the United Kingdom, the protection available under Article 9 is seemingly regarded as a subset of the broader concept of exclusive cognisance,[29] whereas at least in New Zealand, the Privileges Committee drew a sharp distinction between the two: 'freedom of speech

24 *Attorney-General and Gow v Leigh* [2011] NZSC 106 at paras 10–11.

25 This necessity test was first articulated in 1999 by the UK Parliament Joint Committee on Parliamentary Privilege when it spoke of rights and immunities 'strictly necessary' for Parliament's functioning in today's conditions. See UK Parliament Joint Committee on Parliamentary Privilege, *Report: Volume I – Report and Proceedings of the Committee*, Session 1998–99, para 4. In *Canada (House of Commons) v Vaid* [2005] 1 SCR 667 at para 4, the Supreme Court of Canada elevated this approach to a 'doctrine of necessity'. Most recently, in 2013, the UK Parliament Joint Committee on Parliamentary Privilege used the 'doctrine of necessity' to define the limits of the exclusive cognisance of parliament. See UK Parliament Joint Committee on Parliamentary Privilege, *Parliamentary Privilege: Report of Session 2013–14*, 18 June 2013, paras 20–28.

26 *R v Chaytor* [2010] UKSC 52, [2011] 1 AC 684. *Chaytor* concerned the prosecution of members of the House of Commons and House of Lords in the UK for submitting false expense claims.

27 *Canada (House of Commons) v Vaid* [2005] 1 SCR 667. *Vaid* concerned the dismissal of a chauffeur of the former Speaker of the Canadian House of Commons, and whether the dismissal was immune from external review by virtue of parliamentary privilege.

28 *Attorney-General and Gow v Leigh* [2011] NZSC 106 at para 12. See also McGee, *Parliamentary Practice in New Zealand*, 3rd edition, 2005, p 606.

29 See notably in recent times the decision in *R* v *Chaytor* [2010] UKSC 52 and the 2013 report of the UK Parliament Joint Committee on Parliamentary Privilege.

being concerned with protecting Parliament's core business, and exclusive cognisance with protecting actions that enable Parliament to discharge its core business'.[30]

Whichever view is taken, the matter has now been put beyond doubt in New Zealand by the *Parliamentary Privileges Act 2014* adopting the Australian approach to defining "proceedings in Parliament". Indeed, the New Zealand Parliament could scarcely have been more pointed in its rounding out of section 10 to ensure a broad reading of "proceedings in Parliament" based on statutory interpretation, without reference to any 'necessity test':

> (4) In determining under subsection (1) whether words are spoken or acts are done for purposes of or incidental to the transacting of the business of the House or of a committee, no necessity test is required or permitted to be used.
>
> (5) Necessity test includes, but is not limited to, a test based on or involving whether the words or acts are or may be (absolutely, or to any lesser degree or standard) necessary for transaction of the business.
>
> (6) …
>
> (7) This section applies despite any contrary law (including, without limitation, every enactment or other law in the decision in Attorney-General v Leigh [2011] NZSC 106, [2012] 2 NZLR 713 (SC)).

Without perhaps going to the extent that the New Zealand Parliament did above, there would be merit in the New South Wales Parliament also finally taking steps to partially codify the freedom of speech of its members under Article 9, based on the model used in the Commonwealth and now New Zealand. As previously indicated, there is no crisis of privilege in New South Wales and no imperative to act, as was the case in New Zealand (and indeed in Australia prior to the adoption of the *Parliamentary Privileges Act 1987*). However, there are strong arguments for a limited codification of the meaning of Article 9, based on the model used by the Commonwealth and New Zealand Parliaments.

First, limited codification of the meaning of Article 9 in New South Wales along the lines adopted in the Commonwealth and now New Zealand Acts would ensure an ongoing consistent interpretation of "proceedings in Parliament" in New South Wales, and would almost certainly head off any possibility of a narrower re-interpretation or chipping away of privilege by the courts in New South Wales in the future, such as occurred in *Buchanan v Jennings* and later *Leigh*. It is notable that the Australian *Parliamentary Privileges Act 1987* was itself enacted by the Commonwealth Parliament to reverse two judgments by Justice Hunt in the Supreme Court of New South Wales in 1985

30 New Zealand Privileges Committee, 'Question of privilege concerning the defamation action *Attorney-General and Gow v Leigh*', June 2013, pp 19–20.

and 1986, which interpreted and applied Article 9 in a manner unacceptable to the Commonwealth Parliament.[31]

Second, the Commonwealth Parliament's partial codification of its immunities has now stood for over 25 years, during which it has seemingly been well accepted, including as mentioned in *Prebble*, in Australia and elsewhere, and has served the Commonwealth Parliament well. It is also notable that Queensland and the two territories now adopt the same basic provisions to those in section 16. While New South Wales is currently an outlier in the extent to which it does not seek to define its privileges, it is interesting to note that both the Hannaford and Torbay privileges bills of 1997 and 2010 adopted a limited codification of the meaning of Article 9 based on section 16 of the Commonwealth Act. The adoption of the provisions of the Commonwealth Act has also been recommended by the privileges committees of both Houses in the past.[32]

Third, section 16 of the Commonwealth Act and in effect the 'reasonable incidentality' test is already used in New South Wales by both the Parliament and the courts as an appropriate guide as to the meaning of Article 9, even though it has not formally been adopted in legislation in New South Wales. The Parliament has routinely used the definition of "proceedings in Parliament" in section 16 in protocols with law enforcement agencies concerning the execution of search warrants on the offices of members of parliament. It has also been used in resolutions of the Houses. The courts have also been guided by it in cases in which matters of privilege have been raised. Of note, in *Opel Networks Pty Ltd*,[33] Justice Austin held that the preparation of briefs by departmental officials for a minister in Question Time is for the purposes of or incidental to the transacting of the business of the House, and that accordingly such documents are protected by privilege, quite contrary to the decision in *Leigh*.

Fourth, limited codification of the meaning of Article 9 in New South Wales could also be used to put beyond doubt aspects of the operation of Article 9. For example, members of the New South Wales Parliament are currently routinely warned of the implications of the decisions in *Buchanan v Jenning*s and the issue of effective repetition. To date, no Australian jurisdiction has adopted a legislative response to this issue, although the Torbay bill tried. The Senate Privileges Committee has suggested that at least at the federal level, the *Parliamentary Privileges Act 1987* would likely prevent a decision

31 It is acknowledged that the views of Justice Hunt have not been followed in subsequent New South Wales cases. See for example the decision in *Opel Networks Pty Ltd* cited later in this paper.

32 As noted earlier, between 1993 and 2009, the Privileges Committees of the two Houses between them recommended the adoption of privileges legislation seven times. However, it was only in the last two reports that the Committees specifically recommended adoption of the provision modelled on the Commonwealth Act. See New South Wales Legislative Council Privileges Committee, *Review of Members' Code of Conduct and draft Constitution (Disclosures by Members) Amendment Regulation 2006*, October 2006, Recommendation 9; New South Wales Legislative Assembly Parliamentary Privileges and Ethics Committee, *Report on a Memorandum of Understanding with the Independent Commission Against Corruption relating to the execution of search warrants on the Parliament House offices of member*s, November 2009, Recommendation 3.

33 *In the matter of OPEL Networks Pty Ltd (in liq)* [2010] NSWSC 142.

of the nature of *Buchanan v Jennings*.[34] Perhaps by extrapolation it may do so in New South Wales as well. It is notable, however, that for the avoidance of doubt, section 3 of the new New Zealand Act makes it clear that the Act is intended to 'abolish and prohibit' "effective repetition" claims of the type exemplified by the decision in *Buchanan v Jennings*. Equally, the historical exceptions doctrine, which permits the courts to establish what was said or done in Parliament as a matter of historical fact, but not to impeach or question the proceedings in Parliament, was established by the Privy Council in *Prebble*, but now usefully finds statutory expression, and importantly constraint,[35] in section 15 of the New Zealand *Parliamentary Privileges Act 2014*.

In advocating limited codification of the immunities of the Houses of the New South Wales Parliament along the Commonwealth lines, it is salient to note the recent warning of the United Kingdom Joint Committee on Parliamentary Privilege in its 2013 report that legislation to confirm the scope and meaning of parliamentary privilege is a 'last resort'. However, the Committee also recognised that legislation should not be ruled out where it is needed to 'resolve uncertainty' and to 'confirm the existence or extent of specific privileges'.[36] This was the reasoning adopted by the New Zealand Privileges Committee when it recommended a legislative response to *Leigh*:

> We do not wish to see a full codification of parliamentary privilege in legislation; we consider this properly remains with the Parliament. We do however wish to set out some general principles to ensure that our parliamentary democracy is safeguarded appropriately and to provide more clarity than the existing 1908 legislation affords.[37]

For similar reasons, limited codification of the meaning of Article 9 in New South Wales, provided that it carefully preserves all existing immunities under the common law, would usefully confirm an ongoing expansive interpretation of "proceedings in Parliament" and bring New South Wales into line with the Commonwealth, New Zealand, Queensland and the Territories at a time of increasing uncertainty internationally as to the precise application of Article 9.

Finally, legislation could also usefully put beyond doubt certain other immunities outside of Article 9 that are currently open to some conjecture in New South Wales. A very limited immunity of members and officers of Parliament from arrest and attendance before the courts is provided in section 14 of the Commonwealth *Parliamentary Privileges Act 1987*, where the scope of the immunity in New South Wales is unclear. Equally, the application of the general law to the Commonwealth Parliament is clarified in section 15 of the Commonwealth *Parliamentary Privileges Act 1987* where

34 Senate Privileges Committee, *Effective Repetition*, 134th Report, June 2008.

35 For further discussion, see D.McGee, 'The scope of parliamentary privilege', *The New Zealand Law Journal*, March 2004, pp 84–88.

36 UK Parliament Joint Committee on Parliamentary Privilege, *Parliamentary Privilege: Report of Session 2013–14*, 18 June 2013, paras 41, 46.

37 New Zealand Privileges Committee, 'Question of privilege concerning the defamation action *Attorney-General and Gow v Leigh*', June 2013, p 33.

in New South Wales there is uncertainty.[38] Should a privileges Act proceed in New South Wales, the protection of absolute privilege in the *Defamation Act 2005* for the publication of records of the proceedings in the Houses, together with the broadcasting of proceedings, could also be consolidated into the new Act.

A CASE FOR FURTHER PARTIAL CODIFICATION OF THE POWERS OF THE HOUSES OF THE NEW SOUTH WALES PARLIAMENT

There is also a case for further partial codification of the powers of the Houses of the New South Wales Parliament, at least in relation to the powers of the Houses to discipline their members and arguably former members.

The six privileges bills that failed in New South Wales between 1856 and 1912 all attempted to codify the powers of the Parliament of New South Wales, for example by connecting them with those of the House of Commons in the Westminster Parliament, or by legislating the power to punish contempts. Indeed, the reason why a number of the bills failed was precisely because of disagreement over the contempt provisions they contained. Ultimately, the only significant area in which the Parliament did legislate was the enactment in 1881 of a parliamentary evidence Act, subsequently repealed and replaced in 1901, to enable the Houses and their committees to compel witnesses to attend and give evidence.[39]

Given the lack of legislation in this area, the majority of the powers of the Houses of the New South Wales Parliament, including the power to control their own affairs, the power to deal with contempts, the power to discipline members, the power to conduct inquiries and the power to order the production of papers, continue to rely on the common law principle of necessity.[40] As Lord Denman CJ observed in *Stockdale and Hansard*:[41]

38 Unless explicitly stated otherwise, or unless there is a direct connection with "proceedings in Parliament", it is assumed the general law in force in the State applies to the Parliament of New South Wales.

39 It should be noted that the *Public Works Act 1912* also provides the Joint Standing Committee on Public Works with the power to compel witness to attend and give evidence, in similar terms to the *Parliamentary Evidence Act 1901*.

40 Necessity as a basis of privilege in colonial legislatures was established in *Kielley v Carson* (1842) 12 ER 225 in 1842, in which the Privy Council held that colonial legislatures deriving their authority from Imperial statutes had only such powers and immunities as were 'necessary for the existence of such a body, and the proper exercise of the functions which it is intended to execute'. This position was reiterated in later 19th century decisions: *Fenton v Hampton* (1858) 14 ER 727; *Doyle v Falconer* (1866) 16 ER 293; *Barton v Taylor* (1886) 11 App Cas 197; and *Fielding v Thomas* [1896] AC 600.

41 (1839) 112 ER 1112 .

> If the necessity can be made out, no more need be said: it is the foundation of every privilege of Parliament, and justifies all that it requires.[42]

Reliance on the common law principle of necessity has on the whole served the Parliament of New South Wales well. In particular, the *Egan*[43] decisions of the late 1990s, which confirmed the power of the New South Wales Legislative Council to order the production of papers from the executive government, were founded on necessity. Its great advantage is its flexibility: it changes with time and with the changing roles and operation of the Houses in New South Wales. 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. As was observed by Justices Gaudron, Gummow and Hayne in the 1998 High Court decision of *Egan v Willis*:

> What is 'reasonably necessary' at any time for the 'proper exercise' of the functions of the Legislative Council is to be understood by reference to what, at the time in question, have come to be conventional practices established and maintained by the Legislative Council.[44]

However, while necessity has the advantage of flexibility, its limitation (but not necessarily disadvantage) is that the powers of the two Houses that derive from it are variously described as 'protective' and 'self-defensive' only and not punitive,[45] although the boundary between them is often difficult to draw. In the absence of legislation, the common punitive powers of other parliaments, the powers to fine or imprison, are almost certainly beyond the reach of the Houses of the New South Wales Parliament, regardless of the manner of their use.

The question then arises whether the Houses of the New South Wales Parliament should have such punitive powers to punish contempts, or at the very least to discipline their members. In 1985, the Joint Select Committee on Parliamentary Privilege in New South Wales recommended that the Houses be given a statutory power to fine (and seemingly only refrained from recommending the provision of other punitive powers on the apparent belief that the Houses already possessed them).[46]

The basic argument for why any parliament should have punitive powers to deal with contempts was encapsulated in the report of the 1984 Commonwealth Parliament

42 (1839) 112 ER 1112 at 1169.

43 See the decision of the New South Wales Court of Appeal in *Egan v Willis and Cahill* (1996) 40 NSWLR 650, the decision of the High Court in *Egan v Willis* (1998) 195 CLR 424 and the decision of the New South Wales Court of Appeal in *Egan v Chadwick* (1999) 46 NSWLR 563.

44 (1998) 195 CLR 424 at 454.

45 In *Willis and Christie v Perry* (1912) 13 CLR 592, the High Court decided that the Speaker of the New South Wales Legislative Assembly had no power to cause a member who had been disorderly in the chamber, and had left it in a disorderly manner, to be arrested outside the chamber and brought back into it. The 'only purpose' of such action, according to the High Court, was to punish the member concerned.

46 New South Wales Joint Select Committee on Parliamentary Privilege, *Parliamentary Privilege in New South Wales*, September 1985, pp 125–126.

Joint Select Committee on Parliamentary Privilege, in many ways the forerunner to the Commonwealth *Parliamentary Privileges Act 1987*:

> Many of the essential safeguards or conditions for the proper operation of the Houses and their committees are provided for in various ways. … But there must, at the end of the day, be a means of enforcing the bedrock safeguards or conditions essential to Parliament's operation. …
>
> The ultimate sanction possessed by Parliament is its penal jurisdiction – the power of the Houses to examine and to punish any breach of their privileges or other contempt.[47]

As previously discussed, the Parliament of New South Wales is singular for not giving its Houses any punitive contempt powers. By comparison, the Houses of the Westminster Parliament have a broad punitive power deriving from the *lex et consuetudo Parliamenti* – the law and custom of Parliament. All the other state parliaments in Australia acted soon after responsible government to acquire contempt powers, either through direct enactment or by reference to those of the House of Commons. The Queensland Parliament has articulated more fully its contempt power in the *Parliament of Queensland Act 2001*. At the Commonwealth level, the Houses have power to impose a fine or imprisonment on any person found guilty of contempt of parliament under section 7 of the *Parliamentary Privileges Act 1987*, although section 8 abolished the power to expel a member. The same arrangements are now replicated in New Zealand under Part 4 of the recently enacted New Zealand *Parliamentary Privileges Act 2014*.

Those that doubt whether punitive powers are appropriate in New South Wales need only look at the *Parliamentary Evidence Act 1901*, which (in strikingly emphatic terms) gives the Houses and their committees the power to compel the attendance of witnesses, other than members, and to obligate answers to 'lawful questions' under oath, at the risk of one month in gaol. Both the 1901 Act and its 1881 predecessor were enacted precisely because committees of the Parliament at the time were encountering considerable difficulty in relation to the calling of witnesses and taking of evidence. While the provisions of the *Parliamentary Evidence Act 1901* have been used sparingly over the years, nevertheless the words of the 1984 Commonwealth joint select committee ring true: the Act has at times been essential in enabling committees of the Parliament to operate effectively.

Once again, the Commonwealth *Parliamentary Privileges Act 1987* would be an appropriate template for the adoption of contempt powers in New South Wales: it sets out a broad indicative definition of contempt, together with specific penal powers. While this approach to contempt powers has been criticized and ultimately rejected in the

47 Commonwealth Joint Select Committee on Parliamentary Privilege, Final Report, October 1984, p 79.

United Kingdom,[48] it was the approach adopted in the Torbay bill of 2010, and to a lesser degree, the Hannaford bill of 1997.[49]

For all these arguments, however, it is hard to see that there is currently a compelling case for the Houses of the New South Wales Parliament to legislate to adopt additional punitive contempt powers for use against non-members. Importantly, contempt powers are generally not necessary to protect the immunities of the Parliament; they are expected to be protected by the courts. Rather they exist to enable the Houses to effectively carry out their functions and to deal with challenges to their authority. In modern times, serious challenges to the operations of the Houses are uncommon outside of the conduct of committee proceedings (which are covered at least in part in New South Wales by the *Parliamentary Evidence Act 1901)*. Moreover, legislating punitive contempt powers against non-members at this time would raise questions as to the circumstances (ideally few) in which the power would be invoked, and whether the penal jurisdiction of the Parliament should be transferred to the courts.

There is, however, a stronger argument that the Parliament of New South Wales should legislate to grant its Houses additional powers, including punitive powers, for the internal discipline of their own members, and also arguably former members.

In New South Wales, the Independent Commission Against Corruption (ICAC) has power to find that a member of the New South Wales Parliament has engaged in 'corrupt conduct', including a substantial breach of the *Code of Conduct for Members*, and to report that finding to the relevant House.[50] However, it is for the individual Houses to discipline members for misconduct or conduct unworthy of the House.

In circumstances where a House becomes aware of misconduct by one of its members, for example on receipt of a report of the ICAC, the House currently has available to it at common law 'protective' and 'self-defensive' disciplinary measures only. They include the power to seek an apology from the member concerned, or to reprimand the member, and in instances of very serious misconduct, there is authority also that

48 UK Parliament Joint Committee on Parliamentary Privilege, *Parliamentary Privilege: Report of Session 2013–14*, 18 June 2013, pp 22–23.

49 It is noted that section 7A of the New South Wales *Constitution Act 1902*, inserted in 1930, provides, amongst other things, that a bill to alter the powers of the Legislative Council, including potentially to define the privileges of the Council, shall not be presented to the Governor for assent unless first passed by both Houses and approved at a referendum by a majority of the electors. On one view, since the insertion of section 7A, any attempt to introduce a parliamentary privileges act in New South Wales that alters the powers of the Council would require the endorsement of the people of New South Wales at a referendum. The more likely view, however, is that section 7A refers specifically to the powers of the Council vis-à-vis the Legislative Assembly, rather than the powers of the Council (and Assembly) in relation to privilege, and that section 7A is only designed to protect the existence and powers of the Council as a constituent part of the Legislature, rather than to prevent any future codification of the powers of the Parliament. In support, see G.Griffith and D.Clune, *'Arena v Nader* and the Waiver of Parliamentary Privilege' in G.Winterton (ed), *State Constitutional Landmark*s, The Federation Press, 2006, pp 351–352.

50 The Houses may also conduct their own investigations.

the Houses have the power to expel a member where it is necessary for the defence of the institution, provided it is not a cloak for punishment.[51] On the same basis, it is also possible that the courts would judge the suspension of a member for serious misconduct as a defensive measure and therefore within power, although unconditional suspension, for an indefinite time would likely be beyond power.[52] However, other punitive measures, such as suspension of a member for an unrestricted period of time, and the imposition of financial penalties such as a fine or the loss of pay, are presumably beyond power.

Arguably the Houses should have available such powers to deal with their members, on the basis that they must be able to safeguard their operations and integrity. Punitive powers against their members are held by all other parliaments in Australia and New Zealand, with the limited exception of Tasmania, although in some jurisdictions the power of expulsion has been removed.[53] Equally, the Houses should arguably be able to take action (generally through a fine) against former members who are otherwise beyond the reach of the Houses for bringing the House into disrepute. The Parliament of Queensland has recently fined former members Mr Gordon Nutall and Mr Scott Driscoll for contempt and misleading the House.

The argument for codification in this area is given further force if the Parliament of New South Wales adopts recent proposals concerning the ethics regime for members of the Parliament.

In October 2013, the New South Wales Independent Commission Against Corruption (ICAC) published a report that included three specific recommendations targeted at improving the accountability and scrutiny of members of the Parliament in New South Wales.[54] The recommendations followed a series of scandals in New South Wales in relation to the conduct of members past and present.[55] Amongst those recommendations was a recommendation that the New South Wales Parliament establish a 'parliamentary investigator position', with reference made by the ICAC in its report to the Parliamentary Commissioner for Standards model adopted by the United Kingdom Parliament. Amongst other things, the Commissioner would be in a position to investigate allegations against a member of a less serious nature than those generally investigated by the ICAC. A commissioner would also be able to investigate matters where issues of privilege arose, where the ICAC cannot act.

51 See the authority of *Barton v Taylor* (1886) 11 AC 197 at 204–205; *Harnett v Crick* [1908] AC 470; *Armstrong v Budd* (1969) 71 SR (NSW) 386 at 396.

52 *Barton v Taylor* (1886) 11 AC 197 at 204–205.

53 For the rationale for removing the power of expulsion, see the discussion in Commonwealth Joint Select Committee on Parliamentary Privilege, Final Report, October 1984, pp 121 – 127.

54 Independent Commission Against Corruption, *Reducing the opportunities and incentives for corruption in the State's management of coal resources*, October 2013.

55 Of note, see the Independent Commission Against Corruption's investigation reports on Operation Jasper, entitled *Investigation into the conduct of Ian Macdonald, Edward Obeid Senior, Moses Obeid and others*, July 2013, and Operation Acacia, entitled *Investigation into the conduct of Ian Macdonald, John Maitland and others*, August 2013.

The matter was subsequently considered by the Privileges Committees of both Houses, both of which made recommendations in support of either an 'Ethics Commissioner' or 'Commissioner for Standards', with the commissioner to have power to receive and review complaints concerning possible breaches by members of the 'Code of Conduct for Members' or the interest disclosure regime, and to report findings in certain circumstances to the respective Houses (or committees of the Houses). It would then be open to the Houses to impose sanctions against the member concerned.[56]

If the commissioner for standards model is introduced in New South Wales, a sensible accompaniment would be privileges legislation giving the Houses of the New South Wales Parliament the full suite of measures that are available in other parliaments in Australia and the New Zealand Parliament to discipline members and former members who undermine their operations and bring the institution into disrepute. Such an approach would have the added benefit of providing an appropriate mechanism for the Houses to deal in full with potential misconduct by members where evidence of the conduct in question is protected by privilege.

If such an approach were to be adopted, once again care would need to be taken to ensure that existing powers of the Houses in New South Wales under the common law remained untouched. The opportunity could also be taken to consolidate and modernise the existing punitive provisions of the *Parliamentary Evidence Act 1901* into the new Act.[57]

THE MEANS BY WHICH A PARLIAMENTARY PRIVILEGES ACT MIGHT BE DEVELOPED

Should the Parliament of New South Wales proceed down the path of limited codification of its privileges in a parliamentary privileges Act, the means by which a bill might be developed and implemented would be of great import.

The Commonwealth *Parliamentary Privileges Act 1987* was unprecedented in being introduced by the President of the Senate.[58] Arguably, it would be appropriate for

56 See New South Wales Legislative Council Privileges Committee, *Recommendations of the ICAC regarding aspects of the Code of Conduct for Members, the interest disclosure regime and a parliamentary investigator*, June 2014; New South Wales Legislative Assembly Parliamentary Privileges and Ethics Committee, *Inquiry into matters arising from the ICAC report entitled "Reducing the opportunities and incentives for corruption in the State's management of coal resources"*, July 2014.

57 For example, the Act currently provides that a witness who refuses to answer a lawful question 'may be forthwith committed for such offence into the custody of the usher of the black rod or sergeant-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'. This provision has never been used, and it is unclear how it would operate in modern times.

58 See *Australian Senate Hansard*, 7 October 1986, p 892. In his second reading speech to the Senate, the President indicated that he was introducing the bill in response to the requests of Senators, and that Senators had indicated that 'it would be appropriate, as it is a parliamentary matter, for the President to introduce such a Bill.'

the President and Speaker of the New South Wales Parliament to jointly sponsor a privileges bill in New South Wales, rather than the bill being introduced by the Government of the day. To ensure cross-party support, the bill could be developed by the Presiding Officers in consultation with a cross-party working group with members drawn from both Houses, along the lines adopted recently in addressing other cross-party issues.[59] The Torbay and Hannaford bills, together with the Commonwealth *Parliamentary Privileges Act 1987* and New Zealand *Parliamentary Privileges Act 2014*, would be appropriate starting points for such a group. It would also be appropriate before the introduction of a privileges bill for an exposure draft of the bill to be tabled by the Presiding Officers in both Houses and referred to the respective privileges committees of the two Houses for inquiry and report to enable all members the opportunity to comment on the bill.

CONCLUSION

Parliamentary privilege has its origins in centuries of struggle by the House of Commons to establish its privileges and to assert its authority over the conduct of its own affairs, free from undue interference from the Crown or the courts. It is the sum of a range of peculiar immunities, rights and powers, some derived from the law and practice of the House of Commons, some from the common law, and some from statute, which despite their longevity, often remain difficult to define fully. This difficulty is complicated by the fact that privilege continues to evolve, seemingly ever more rapidly, to match the needs of parliaments over time.

A prime example of the need for privilege to evolve to match the need of the day is Article 9 of the *Bill of Rights 1689*. Article 9 articulates the final success of the House of Commons in establishing its independence from the Crown, and in modern times has come to be relied upon by the courts as a statutory articulation of the immunities of Westminster parliaments everywhere. Indeed it is fundamental to the existence of Westminster parliaments. However, in many ways, the vagueness of the wording of Article 9 does not match the needs of modern Parliaments, including the Parliament of New South Wales. The *Australian Parliamentary Privileges Act 1987* has led the way in giving meaning to the words of Article 9, an approach recently strongly endorsed by the New Zealand Parliament following controversial decisions in *Buchanan v Jennings* and *Attorney-General and Gow v Leigh*. There are very good arguments, based on consistency, clarity, and indeed safety, for the New South Wales Parliament to adopt the same approach, and to fall into line with other Australian jurisdictions and New Zealand in giving broad and consistent statutory meaning to Article 9. Importantly, the immunity attaching to freedom of debate and other ‘proceedings in Parliament’ in New South Wales is now firmly rooted in statute, namely Article 9, and as such, it should be better defined in statute, without reference to the common law principle of

59 For example, the cross-party marriage equality working group that worked on the Same Sex Marriage Bill 2013.

necessity. In New South Wales, necessity is a basis for the powers of the Houses of the Parliament, not their immunities. The opportunity should also be taken to clarify the meaning of other immunities of the New South Wales Parliament.

The powers of Westminster parliaments exist to enable them to effectively carry out their functions and to deal with challenges to their authority. In New South Wales, those powers are not expressly founded on the powers of the Westminster Parliament, as is the case in many other Australian states, nor on statute, but on the common law principle of necessity. This is despite numerous attempts and recommendations to legislate in the field over more than 150 years. For this failure, the Houses of the New South Wales Parliament can probably be grateful. While it has been argued that the common law test of necessity is not appropriate in interpreting Article 9, in defining the powers of the Houses in New South Wales it has the great advantage that it changes and evolves to suit the circumstances of the time, as demonstrated by the landmark *Egan* decisions of the late 1990s. This is unlike the circumstances of those jurisdictions that base their privileges on those of the House of Commons at a particular date. As such, necessity should remain the basis of the powers of the Houses in New South Wales. There is, however, a very strong argument that the Parliament of New South Wales should legislate to give its Houses additional punitive powers for the disciplining of members and former members, especially if the Parliament adopts recent proposals concerning the ethics regime for members of the Parliament. A case for broader contempt powers generally could also be made, although it is not necessarily compelling at the current time.

Other Australasian parliaments have been more successful than the New South Wales Parliament in legislating in the field of privilege. Admittedly, some have acted only in response to provocation from the courts. Nevertheless, this article has made a case for the Parliament of New South Wales to be more proactive in legislating to protect its privileges in the future, starting with the uncertainty at the edges of Article 9 and the power of the Houses to discipline their members and former members.