PARLIAMENTARY PRIVILEGE

DEVELOPMENTS SINCE 2019 AND CURRENT ISSUES

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Introduction

This paper provides a summary of recent developments and current issues around Australia in relation to parliamentary privilege. It picks up where a previous presentation to the equivalent seminar in 2019 by the Clerk of the New South Wales Legislative Council and Clerk of the Parliaments, Mr David Blunt, left off. It begins with a recap of what parliamentary privilege is and its sources. Subsequently, it discusses a number of interesting developments in relation to privilege in the last three years, including the fascinating decision in *The President of the Legislative Council of Western Australia v Corruption and Crime Commission of Western Australia [No 2]*, recent developments in relation to orders for papers in the Senate and the New South Wales Legislative Council, and slightly more left-field developments such as an issue coming out of Victoria in relation to the use of CCTV footage and the adoption by the New South Wales Legislative Council of new standing orders. Although the paper does its best to capture developments in privilege from around Australia, the slight New South Wales-centric nature of the paper may betray the author's status as a clerk-at-the-table in the New South Wales Legislative Council.

A recap: What is parliamentary privilege?

It has been said that the term 'parliamentary privilege' is an unhelpful one.[1] It connotes some form of special benefit or entitlement for members of parliament. And indeed, during a period of time in English history, that was what parliamentary privilege entailed.

But in modern times, parliamentary privilege is more accurately described as the sum of certain powers, rights and immunities, enjoyed sometimes by the individual houses of parliament, sometimes by their committees and witnesses, and sometimes by individual members, which enable those houses, committees and members to carry out their legislative, representative and scrutiny functions without undue interference from the other arms of government: the courts and the executive. Without these powers, rights and immunities, the independence of parliaments, and indeed the system of responsible and representative government in Australia generally, would likely be fatally undermined.

Texts and case law cite the powers, rights and immunities of parliaments slightly differently, depending for example on the issue at play in a given case or perhaps on the nature of the parliament in question. But fundamentally the powers, rights and immunities of parliaments can be said to entail:

- Powers such as the power to conduct inquiries, generally through committees, and in some cases to summon witnesses and to compel them to answer questions; the power to punish contempts (which are essentially any acts or omissions which significantly impede a house or its committees and members in the conduct of their functions); the power of houses to determine their own membership, subject to constitutional and electoral law, although in modern times this power has largely been referred to the courts; the power of houses to maintain their own internal order, both in respect of their own members but also visitors; and the power to order the executive government to produce papers.

1 UK Government Green Paper, *Parliamentary privilege*, April 2012, p 10.

- Rights such as the right of houses to determine and control their own proceedings, including through the adoption of standing orders and setting their own agendas; and the right to the first call on the attendance and service of their members.

- The immunity attaching to parliamentary action, especially 'speech and debate' in parliament. This is the only immunity of any importance attaching to parliamentary proceedings. It is broad in scope: it prevents parliamentary actions from being the cause of or otherwise being critically examined in any proceedings in a court of law, even where the action may arise from events outside of parliament. It is also absolute: it is not defeated by the presence of malice or even untruth. In modern times, the immunity is often seen through the prism of Article 9 of the *Bill of Rights 1689*, but in fact it is part of the broader compact reached between the legislative and judicial branches of government over several centuries in England, whereby the courts will not allow examination of what is said or done during parliamentary proceedings (subject to certain strict and limited exceptions).

At this point a couple of important distinctions can be made.

First, whilst the powers and rights outlined above generally attach to houses of parliament and their committees as a whole, the immunity attaching to parliamentary action is generally enjoyed by members of parliament (and also witnesses before committees) as individuals. However, it is important to emphasise that the immunity attaching to parliamentary action is not for members' personal benefit: it is strictly limited to parliamentary action and cannot be claimed in respect of wider non-parliamentary duties. Indeed conceivably, parliamentary privilege might act to prevent a member of parliament from bringing court proceedings as much as it may act to protect a member in court proceedings. In addition, parliamentary contributions are still very much subject to control by the relevant house itself.

Second, it is for the courts to uphold the immunity attaching to parliamentary action by preventing the impeaching or questioning of parliamentary proceedings during proceedings before them. It is also for the courts to adjudge the existence of any inherent or common law powers held by parliaments. However, once a power has been established at common law, it is for houses of parliament themselves to adjudge how that power should be exercised.[2] In addition, it is acknowledged by the courts that the jurisdiction of houses of parliament in relation to their internal processes is absolute. Such matters are usually described as falling within the 'exclusive cognisance' of parliament.

As for that unhelpful term 'parliamentary privilege', the consensus appears to be that we are stuck with it! So many people are accustomed to 'parliamentary privilege' or even just 'privilege', both parliamentarians and non-parliamentarians alike, and the term is used so widely in case law, generously proportioned parliamentary tomes and of course parliamentary debate, that to attempt to change it now would likely be futile. And it must be acknowledged that referring to 'powers, rights and immunities' rather than 'privilege' would be a mouthful! Nevertheless, it is to be hoped that when the term 'parliamentary privilege' is used, as it is used in the rest of this paper, it is used with due recognition of its actual meaning and purpose.

2 Parliaments can also pass legislation in order to establish their powers.

Sources of parliamentary privilege

There are many sources of parliamentary privilege in Australia, and they vary from one jurisdiction to the next.

In New South Wales privilege rests on three clear sources:

- The common law doctrine of 'necessity', or 'reasonable necessity' (although nothing much appears to turn on the word 'reasonable'), under which the Parliament of New South Wales has been held by the courts to possess those powers and immunities which are 'necessary' for it to fulfil its functions within the system of representative and responsible government. This test dates back to the seminal decision of the Privy Council in 1842 in *Kielley v Carson*,[3] and was imported into the common law of New South Wales at the achievement of responsible government in 1856, if not earlier at the time of the decision itself.[4] Significantly, and rather helpfully, what is 'necessary' for the operations of the Houses of Parliament in New South Wales has been held to evolve over time to reflect changes in the operations of the government and society more broadly.

- The adoption into law in New South Wales, by virtue of the *Imperial Acts Application Act 1969*, of Article 9 of the English *Bill of Rights 1689*.[5] Using modern language, this now quite famous article 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'. Within that seemingly innocent statement, one can spend an inordinate amount of time analysing the meaning of 'proceedings in Parliament', 'impeached or questioned' and 'place out of Parliament'. Indeed this article will soon spend quite a bit of time doing just that! But in the meantime, one of the most curious aspects of Article 9 is that for 300 odd years it was of absolutely no judicial note whatsoever. Historically, the immunity of parliamentary proceedings from examination before the courts rested not on Article 9 but on constitutional first principles, notably respect by the courts not to interfere in the operations of parliament. One is in fact hard pressed to find any judicial notice of Article 9 whatsoever before the early 1970s. But these days Article 9 is ubiquitous. Perhaps this is because of the opportunity it presents to the legal world for statutory interpretation!

- The enactment of certain statutes, notably the *Parliamentary Evidence Act 1901* (NSW), which gives the Houses of the Parliament in New South Wales the power to send for and examine persons, and punitive powers to punish non-attendance and the giving of false evidence. Other statutes touching on privilege in New South Wales include the *Parliamentary Papers (Supplementary Provisions) Act 1975*, the *Defamation Act 2005*, the *Evidence Act 1995* and the *Interpretation Act 1987*.

The sources of parliamentary privilege in other Australian jurisdictions are very different from those outlined above in New South Wales. Other Australian states and the Commonwealth, with the exception of Tasmania, adopt in their constitution or other relevant legislation 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, the Commonwealth and Queensland as at 1 January 1901 and Western Australia as at 1 January 1989. Practitioners and devotees of parliamentary

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3 (1842) 13 ER 225.

4 There is a good argument that English law, including the law of privilege, was imported into New South Wales and Van Diemen's land at the passage of the *Australian Courts Act 1828 (Imp)*. But it hardly matters now.

5 Or 1688, depending on your calendar.

privilege in these jurisdictions presumably keep handy a copy of the relevant edition of *Erskine May*,[6] the parliamentary handbook of the House of Commons, in order to ascertain the privileges of the House of Commons at the relevant date. Curiously, in 1853 prior to the attainment of responsible government in New South Wales in 1856, the colonial Legislative Council considered but rejected the insertion of an equivalent provision in the soon to be adopted *Constitution Act 1855* (NSW). The failure to do so meant that ultimately the New South Wales Parliament instead fell back on 'necessity' as the source of the majority of its privileges at the attainment of responsible government in 1856. As it has turned out, however, 'necessity' has proven to be quite a flexible and useful basis for privilege in New South Wales; rather more flexible in fact than attaching the privileges of the Parliament of New South Wales to those of the House of Commons quite a long time ago.

Other jurisdictions in Australia have also passed additional legislation to further codify privilege in their jurisdiction more comprehensively, as notably the Commonwealth did with the *Parliamentary Privileges Act 1987* (Cth), and Queensland with the *Parliament of Queensland Act 2001* (Qld). In New South Wales, there were six attempts to introduce more comprehensive privileges legislation between 1856 and 1912, but all failed. Ultimately, the parliament had to settle for the more modest in scope *Parliamentary Evidence Act 1901* (NSW).[7]

So much for the sources of parliamentary privilege in New South Wales and around Australia.

Previous papers on parliamentary privilege presented to the Legalwise seminar

As mentioned in the introduction, this paper is the latest of a series of papers presented by the clerks of the New South Wales Legislative Council to the Legalwise parliamentary law seminar on the topic of parliamentary privilege:

- In 2015, the Clerk of the Legislative Council and Clerk of the Parliaments, Mr David Blunt, presented a paper focused on the history of privilege and the separation of powers between the three arms of government.[8]

- In 2016, Mr Blunt presented a paper on a number of contemporary privilege issues facing the New South Wales Legislative Council and its committees.[9]

- In 2017, the Deputy Clerk of the New South Wales Legislative Council, Mr Steven Reynolds, presented a paper on the interaction between parliamentary privilege and compulsory processes of discovery by the police and investigative agencies.[10]

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6 *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament.*

7 Whilst saying that the *Parliamentary Evidence Act 1901* (NSW) was more modest in scope, on the basis that it concerned only witnesses before the Houses and committees, it is far from modest in its application. It is perhaps one of the most startling and draconian acts on the New South Wales statute book. For further information, see B.Duffy and S.Ohnesorge, 'Out of step? The New South Wales *Parliamentary Evidence Act 1901'*, *Parliamentary Law Review*, (Vol 27, 2006).

8 D Blunt, 'Parliamentary Sovereignty and Parliamentary Privilege', Paper presented at a seminar on the Fundamentals of Law: Politics, Parliament and Immunity conducted by Legalwise Seminars, Sydney, 16 June 2015.

9 D Blunt, 'Parliamentary Privilege: New South Wales still at the cutting edge', Paper presented to a seminar on Parliamentary Law conducted by Legalwise Seminars, Sydney, 10 June 2016.

10 S Reynolds, 'Parliamentary Privilege and Searches by Investigatory Agencies', Paper presented to a seminar on Parliamentary Law conducted by Legalwise Seminars, Sydney, 9 June 2017.

- In 2019, Mr Blunt presented a paper on significant developments in privilege during the 56th Parliament in New South Wales between 2015 and 2019, including in relation to cabinet information and orders for papers by committees.[11]

Taken together, these papers present a wealth of information on developments in privilege in recent years, in New South Wales but also in other Australian jurisdictions, which are recommended in the warmest terms to those interested in parliamentary privilege.

This paper now turns to examine some of the most recent developments in privilege in Australian jurisdictions over the last three years since Mr Blunt presented his paper in 2019. In doing so, the author acknowledges the contributions from clerks from all Australian parliaments to the bi-annual issues of *Parliament Matters*, the bulletin of the Australia and New Zealand Association of Clerks-at-the-Table (ANZACATT). Whilst their contributions are largely anonymous, the author acknowledges extensive use of their material. The author also acknowledges those clerks in parliaments around Australia who kindly took the time when asked to provide comments on the updates listed below.[12]

The President of the Legislative Council of Western Australia v Corruption and Crime Commission of Western Australia [No 2]

Undoubtedly the most significant case concerning parliamentary privilege in an Australian jurisdiction over the last few years has played out in Western Australia, culminating in the 2021 decision of the Supreme Court of Western Australia in *The President of the Legislative Council of Western Australia v Corruption and Crime Commission of Western Australia [No 2]*.[13]

By way of background, in April 2019 the Western Australian Corruption and Crime Commission (CCC) issued the first of a series of notices to produce documents or things to the Director General of the Western Australian Department of Premier and Cabinet (DPC) relating to the parliamentary email accounts of three former members of the Western Australian Legislative Council. The DPC managed these accounts on behalf of the Parliament.

The CCC notices to produce immediately raised the question as to the status and protection of those emails held by DPC but covered by parliamentary privilege.

As cited earlier in this paper, it is universally understood that Article 9 of the *Bill of Rights 1689* prevents the impeaching or questioning of 'speech and debates or proceedings in Parliament'. However, Article 9 is silent as to whether the immunity also applies during investigations by quasi-judicial bodies such as the CCC prior to the bringing of court proceedings.

On one view, it may be argued that compulsory processes of production of parliamentary material, such as discovery under warrant or similar processes, do not attract the protections under Article 9. It is only if the material is subsequently sought to be used in a court or tribunal that the prohibition on impeaching or questioning the material arises. This position has been advanced by Professor Anne Twomey, amongst others.[14]

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11 D Blunt, 'Parliamentary privilege in practice', Paper presented to a seminar on Practice, Procedure and the Law of Parliament', Sydney, 27 March 2019.

12 Peter Banson, Deputy Clerk of the House of Representatives; Ivan Powell, Director, Table Office, Department of the Senate; and Helen Minnican, Clerk of the New South Wales Legislative Assembly.

13 [2021] WASC 223.

14 A Twomey, *The Constitution of New South Wales*, (Federation Press, 2004), pp 502-503.

The alternative view, and the one adopted by the courts and most commentators, is that privilege does act to prevent the production of material constituting 'proceedings in Parliament' where production could subsequently lead to the impermissible questioning or impeaching of that material. The lead authority for this position is a decision of the Queensland Court of Appeal in 1997 in *O'Chee v Rowley*,[15] a case concerning the production of documents in the possession of Senator O'Chee. In that case, McPherson JA observed:

> Proceedings in parliament will inevitably be hindered, impeded or impaired if members realise that the acts of the kind done here for purposes of parliamentary debates or question time are vulnerable to compulsory court process of that kind (the production of documents to the Court for inspection). That is a state of affairs which, I am persuaded, both the Bill of Rights and the [Parliamentary Privileges] Act of 1987 are intended to prevent.[16]

Returning to the events in Western Australia, following the issuing by the CCC of its notices to produce documents and things, the Legislative Council took steps to engage with the CCC through its Procedure and Privileges Committee on the processes to be followed to protect privileged documents. However, as transpired somewhat later, the CCC also continued to deal directly with DPC, contrary to the understanding of the Procedure and Privileges Committee, that an agreement had been reached on the procedure to be followed to protect those documents to which parliamentary privilege applied. The Director General of DPC in turn consulted the Attorney General and the Solicitor General and instructed the State's Solicitor's Office to conduct its own review of the privilege status of approximately 70,000 emails identified as of interest.

The DPC and the State Solicitor's Office then produced the emails deemed by them not to be privileged to the CCC. A subsequent summons issued by the Procedure and Privileges Committee to the Acting Director of DPC to attend before the committee and produce copies of the documents produced to the CCC, together with those documents withheld on the grounds of privilege, was not complied with.

From there things only deteriorated further, if that were possible! When the Legislative Council ordered the Director General of DPC not to hand over any further documents to the CCC in response to any additional notices to produce, the Attorney General commenced proceedings in the Supreme Court against the Legislative Council, challenging the power of the Council to make such an order. In turn, the Legislative Council commenced its own proceedings in the Supreme Court against the CCC, the Director General DPC and the Clerk, challenging the validity of the CCC notices and the actions of DPC and the State Solicitor's Office in making 'determinations' of privilege without the authority of the Legislative Council.

Hall J delivered his decision in *The President of the Legislative Council of Western Australia v Corruption and Crime Commission of Western Australia [No 2]* on 13 July 2021. He found that the CCC notices to produce were valid, but that the CCC's receipt and use of the documents produced to it by the DPC prior to the Legislative Council making a determination of privilege was a breach of Article 9 and was therefore unlawful.

In his reasoning, whilst still upholding the immunity of documents falling into the category of 'proceedings in Parliament', Hall J doubted the varying positions adopted by the justices of the Queensland Court of Appeal in *O'Chee v Rowley*.[17] Rather he presented a new line of argument

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15 (1997) 150 ALR 199.

16 *O'Chee v Rowley* (1997) 150 ALR 199 at 212 per McPherson JA.

17 *The President of the Legislative Council of Western Australia v Corruption and Crime Commission [No 2]* [2021] WASC 223 at [149] per Hall J.

which is surely the clearest articulation to date why the immunity under Article 9 should extend to documents sought to be discovered under compulsory processes of production. His Honour reasoned that in court proceedings documents are only sought to be used if they are tendered in evidence, at which point any claim of privilege can be independently adjudicated by the court judge. By contrast, his Honour observed that in proceedings of the CCC, documents once produced may be used to make determinative findings, without any need for process or pleadings as to the status of the documents, and without the need to take the documents to either public or private hearings. Justice Hall's full reasoning is worthy of reproduction:

> … In the context of court proceedings it is readily understandable that a distinction could be made between production of documents and their use. Documents could be produced under subpoena which would require them to be provided to the court. However, their use to impeach or question the proceedings in Parliament would arguably not occur until such time as they were referred to in the course of proceedings or tendered in evidence. Such a distinction is not meaningful in the case of administrative bodies such as the CCC.
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> Inquiries conducted by the CCC are unlike court proceedings in that there is no decision maker independent of the parties. The CCC is both an investigative body and a determinative one. Furthermore, in a CCC investigation there is no initiating process or pleadings that define the nature of the proceedings and no necessity to hold hearings either private or public. Nor is there an existing forum in which objection to use of privileged material can be taken and ruled upon before any such use occurs. The CCC may conduct an investigation and produce a report entirely upon investigations conducted without hearings. …
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> Since production of documents to the CCC enables those documents to be immediately used in a way that could have adverse consequences for a member of Parliament, it must be accepted that the point at which parliamentary privilege would be breached would be at the point of production.[18]

Hall J went on to observe that it was for the Parliament itself, or if necessary the courts, or some person authorised by the Parliament or the courts, to determine whether immunity from production applies to documents subject to compulsory processes of discovery by the CCC.[19] It is not for agencies subject to such discovery processes themselves, or advisers to such agencies, to make such a determination. Certainly, in this case it was not for the State Solicitor's Office to make such a determination.[20]

The judgment in *The President of the Legislative Council of Western Australia v Corruption and Crime Commission of Western Australia [No 2]* inevitably raises some significant questions to be addressed by parliaments Australia-wide as to how compulsory processes of production, directed not to the parliament itself but to public sector agencies, but which may nevertheless lead to the discovery of documents which are covered by parliamentary privilege, are to be dealt with.[21] Clearly parliaments need to be involved, but if nothing else, the potential for tens of thousands of

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18 *Ibid* at [152]-[154] per Hall J.

19 *Ibid* at [174]-[178] per Hall J.

20 *Ibid* at [179]-[185] per Hall J.

21 In New South Wales, the issue was given initial consideration by the Legislative Assembly Privileges and Ethics Committee. See Standing Committee on Privilege and Ethics, NSW Legislative Assembly, 'Interim Report: Parliamentary Privilege and the use of investigatory and intrusive powers', Report 3/57, June 2022.

documents to be subject to discovery and review raises not insignificant practical difficulties for parliaments with only limited resourcing and staff.

Finally a postscript to this matter. In December 2021, the Presiding Officers of the Parliament of Western Australia and the Commissioner of the CCC signed an historic protocol designed to ensure the Commission can properly undertake investigations relating to parliamentarians, whilst respecting parliamentary privilege.[22]

Other cases concerning the immunity attaching to 'proceedings in Parliament'

Whilst *The President of the Legislative Council of Western Australia v Corruption and Crime Commission of Western Australia [No 2]* is undoubtedly the most significant Australian privilege case in recent times, there has also been a number of other cases worthy of note.

As mentioned earlier, it is universally understood that courts and tribunals in Australia are expected to prevent parliamentary proceedings from being impeached or questioned in proceedings before them. This is part of the constitutional settlement inherited from England dating back to the 'Glorious Revolution' and the enactment of Article 9, preventing the 'impeaching or questioning' of 'proceedings in Parliament'.

However, there is always tension as to where the boundary of 'proceedings in Parliament' lies.

Keen followers of parliamentary privilege would be aware that in 1987, in response to two decisions of the New South Wales Supreme Court in 1985 and 1986 concerning Justice Murphy which appeared to alter the previously understood application of privilege,[23] the Commonwealth Parliament enacted the *Parliamentary Evidence Act 1987* (Cth). The thrust of this Act was simply to reassert what the Commonwealth Parliament saw as the traditional understanding of the meaning of privilege as it was thought to apply prior to the two New South Wales Supreme Court judgments. However, in doing so, the Act adopted in section 16 a broad definition of 'proceedings in Parliament' within the meaning of Article 9 as including all words spoken or acts done in the course of, or incidental to, the transacting of business of a house or committee. This provision has now been replicated by Queensland, New Zealand, the ACT and the Northern Territory. In some quarters, it has become known as the 'reasonable incidentality' test.

Three recent matters in Queensland, the Northern Territory and the Commonwealth have occasioned opportunities to explore the boundaries of this test and the immunity attaching to 'proceedings in Parliament'.

The first is the decision of the Queensland Court of Appeal in 2022 in *Carne v Crime and Corruption Commission*,[24] which visited again the immunity attaching to reports and other documents tabled in parliament.

As a general proposition, it is widely accepted that the protection of absolute privilege applies to reports prepared specifically for tabling in parliament. In 2016 in *Carrigan v Honourable Senator*

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22 See 'Protocol: The execution of search warrants on premises occupied by Members of the Legislative Council and Legislative Assembly and determination of claims of immunity from production by reason of parliamentary privilege between Corruption and Crime Commission of Western Australia and Legislative Council of Western Australia and Legislative Assembly of Western Australia', December 2021.

23 The first decision is unreported; the second is *R v Murphy* (1986) 5 NSWLR 18.

24 [2022] QCA 141.

Michaelia Cash,[25] White J held that a report prepared at the direction of the Commonwealth Minister for Health into the actions of the Vice President of the Fair Work Commission was prepared for the purpose of or incidental to the transacting of the business of a House of the Commonwealth Parliament, based on an analysis of the purpose of the report's author and the legal framework for the removal of the Vice President. As such its contents were covered by privilege.[26]

In 2021, in the Queensland Supreme Court in *Carne v Crime and Corruption Commission No 2*[27] (the decision that preceded the decision in *Carne v Crime and Corruption Commission*), David J essentially came to the same conclusion. At issue was whether a report prepared by the Queensland Crime and Corruption Commission into the former Public Trustee of Queensland, Mr Carne, which contained the outcomes of an investigation into possible corruption by the former Trustee, attracted privilege. Mr Carne had sought declarations on various grounds including that he had not been afforded procedural fairness in the preparation of the report. In response, the Commission had delivered a copy of the report to the Parliamentary Crime and Corruption Committee (PCCC), thereby seeking to attach privilege to it. The Commission had also publicly stated that it was seeking a direction from the PCCC that the report be given to the Speaker of the Queensland Legislative Assembly, to be tabled in the Legislative Assembly. The Speaker, who appeared *amicus curiae*, supported the CCC's position that the report was protected by parliamentary privilege and that Mr Carne's application was therefore non-justiciable.

In his decision, David J found that the Commission's preparation of the report and the resolution of the Commission to seek a direction from the PCCC were proceedings of the Parliament. As such, by reason of section 8 of the *Parliament of Queensland Act 2001* (Qld), it attracted privilege and could not form the basis of the proceedings brought by Mr Carne. Mr Carne appealed to the Court of Appeal.

In the Queensland Court of Appeal in *Carne v Crime and Corruption Commission*, the majority, McMurdo and Mullins JJA, allowed the appeal and held that the Commission, having performed its function of investigating corruption, was not empowered or required by the *Crime and Corruption Act 2001* (Qld) to make a report to the Legislative Assembly. This was because the provision under which the report was purported to be provided to the PCCC had not, in their view, been enlivened. As such, the report was not subject to parliamentary privilege.[28] In dissent, Freeburn J argued that section 8(1) of the *Parliament of Queensland Act 2001* (Qld) extends parliamentary privilege to 'proceedings in the Assembly' which is defined in s 9(1) to 'include all words spoken and acts done in the course of, or for the purposes of or incidental to, transaction business of the Assembly or a committee'. Freeburn J reasoned:

> … nothing in ss 8 or 9 of the PQ Act requires parliament to perform some positive act in connection with the report before the report can be characterised as "proceedings in the Assembly". In fact, the very nature of the report, as a report prepared by the Commission for the purposes of being given to the PCCC, and its submission to the PCCC, justifies the characterisation of the preparation and submission of the report as the business of parliament and therefore as "proceedings in the Assembly".[29]

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25 [2016] FCA 1466.

26 In addition to the decision in *Carrigan v Honourable Senator Michaelia Cash*, see also the decision in *Stewart v Ronalds* [2009] NSWCA 277.

27 [2021] QSC 241.

28 *Carne v Crime and Corruption Commission* [2022] QCA 141 at [15] and [81] per McMurdo and Mullins JJA.

29 *Carne v Crime and Corruption Commission* [2022] QCA 141 at [160] per Freeburn J.

A second, perhaps less controversial recent decision is the 2020 decision of the Supreme Court of the Northern Territory in *Law Society Northern Territory v Legal Practitioners Disciplinary Tribunal (NT) & Anor*.[30] This case considered whether privilege attaches to communications from a legal practitioner to a parliamentarian.

As a general proposition, it is widely held that privilege extends to the preparation of briefs by departmental officials for ministers for the purposes of or incidental to the transacting of business of parliament. The authority for this is the 2000 decision of the NSW Supreme Court in *Re OPEL Networks Pty Ltd*,[31] in which it was held that the preparation of briefs for a minister to use in Question Time attracted privilege. In *ACT v SMEC Australia Pty Ltd*,[32] the privilege was extended to drafts of briefs to a minister.

In the decision in *Law Society Northern Territory v Legal Practitioners Disciplinary Tribunal (NT) & Anor,* although complicated by other events, Mildren AJ essentially found that emails sent by legal counsel in response to a request for advice from the Chief of Staff of the Leader of the Opposition constituted 'proceedings in Parliament' within the meaning of Article 9 and section 6 of the *Legislative Assembly (Powers and Privileges) Act 1992* (NT). The advice had been sought from legal counsel in relation to the tabling of a report by a Commission of Inquiry in the Norther Territory Legislative Assembly critical of the Leader of the Opposition.[33]

A third matter exploring the boundaries of 'proceedings in Parliament' arising in the House of Representatives is currently ongoing. On 15 June 2021, the Member for Clark in the House of Representatives, Mr Andrew Wilkie, raised as a matter of privilege issues related to an interlocutory judgment of the Federal Court of Australia in *Registered Clubs Association of New South Wales v Stolz*,[34] dated 1 June 2021. The judgment concerned an action brought by the Registered Clubs Association of New South Wales (ClubsNSW) against Mr Troy Stolz, a former employee of ClubsNSW. The judgment granted leave to ClubsNSW to obtain correspondence between Mr Stolz and Mr Wilkie's office, including emails, text messages and documents.[35] In his statement to the House, Mr Wilkie asserted that he had relied on the material to speak in the House in February 2021, and that therefore the material was covered by parliamentary privilege. Subsequently, with the permission of the Speaker, Mr Wilkie successfully moved that the matter be referred to the House of Representatives Standing Committee of Privileges and Members' Interests for inquiry and report.[36]

In its report dated October 2021, the committee made extensive reference to the meaning of 'proceedings in Parliament' as defined in section 16(2) of the *Parliamentary Privileges Act 1987* (Cth) and the 1997 decision of the Supreme Court of Queensland in *O'Chee v Rowley*.[37] In that case, the majority (McPherson JA, Moynihan J agreeing, Fitzgerald P dissenting) took the view that

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30 [2020] NTSC 79.

31 [2010] NSWSC 142.

32 *ACT v SMEC Australia Pty Ltd* (2018) ACTSC 252 at [79].

33 *Northern Territory in Law Society Northern Territory v Legal Practitioners Disciplinary Tribunal (NT) & Anor,* [2020] NTSC 79 at [47]-[48] per Mildren AJ.

34 [2021] FCA 576.

35 During the proceedings, Mr Stolz apparently objected to the production of certain documents on the basis of parliamentary privilege, including the emails to Mr Wilkie, but subsequently withdrew the objection.

36 House of Representatives Committee of Privileges and Members' Interests, *Report concerning legal action in the Federal Court of Australia and possible issues of parliamentary privilege*, October 2021, pp 1-7.

37 (1997) 150 ALR 199.

correspondence to Senator O'Chee that had been retained by the Senator for the purposes of carrying out parliamentary business was covered by privilege.[38]

Based on this material, the Committee indicated that it was satisfied that the documents were provided to Mr Wilkie by Mr Stolz, either directly or through his staff member, and were retained by Mr Wilkie for use in the Parliament, and that as such, they likely attracted privilege under section 16(2) of the *Parliamentary Privileges Act 1987* (Cth). The committee acknowledged, however, that ultimately this was a matter for the courts to determine.[39]

On 27 October 2021, the House agreed to a subsequent motion authorising the Speaker to act to ensure that the interests of the House were represented in the matter before the Federal Court.[40] On 22 November 2021, the Speaker informed the House that he had instructed solicitors to write to the parties in the matter about the issues of privilege.

The court proceedings continue, but to date the Speaker has not had cause to report anything further to the House.

Execution of search warrants on the home and Parliament House office of the Hon Shaoquett Moselmane

As the cases above document, in Australia it is the courts and tribunals that are responsible for adjudicating on the parameters of 'proceedings in Parliament' and preventing parliamentary proceedings from being impeached or questioned in proceedings before them. However, as the events in Western Australia reveal, in those specific circumstances where investigative bodies seek to seize document through processes of discovery prior to matters coming before the courts, houses of parliament have themselves got involved in defining the boundaries of 'proceedings in Parliament'.

Just this scenario has been at play again in New South Wales in recent years after officers of the Australian Federal Police (AFP) executed search warrants on the home and Parliament House office of the Hon Shaoquett Moselmane, a member of the New South Wales Legislative Council, as well as other premises related to Mr Moselmane's staffer, Mr Zhang, on 26 June 2020. The search warrants were authorised under various sections of the *Crimes Act 1914* (Cth) to obtain evidence for the possible prosecution of Mr Zhang under the so-called "foreign interference" laws in section 92 of the *Criminal Code 1995* (Cth). Despite media reports on the day and subsequent days identifying Mr Moselmane as the focus of the investigation, the warrants did not allege that Mr Moselmane had committed offences under the Commonwealth legislation.[41]

The search warrants were executed by the AFP in accordance with the *National Guideline for Execution of Search Warrants where Parliamentary Privilege may be involved*, the protocol in place between the Commonwealth Parliament and the AFP for the execution of search warrants on the premises of members of the Commonwealth Parliament.

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38 *O'Chee v Rowley* (1997) 150 ALR 199 at 208 per MacPherson JA, at 215 per Moynihan J, at 203-204 per Fitzgerald P.

39 House of Representatives Committee of Privileges and Members' Interests, *Report concerning legal action in the Federal Court of Australia and possible issues of parliamentary privilege*, October 2021, pp 8-9.

40 House of Representatives, Votes and Proceedings, No 151, 27 October 2021, p 2292.

41 NSW Legislative Council Privileges Committee, *Execution of search warrants by the Australian Federal Police*, Report No 80, October 2020, p 1.

As readers with a long memory may recall, the execution of search warrants at the Parliament of New South Wales in Sydney arose on a previous occasion in 2003, when officers of the NSW Independent Commission Against Corruption (ICAC) executed a search warrant at the Parliament House office of the Hon Peter Breen, also a member of the Council. That occasion was an unhappy event to say the least. During the execution of the warrant, the ICAC officers seized a quantity of documents, as well as two computer hard drives and Mr Breen's laptop computer. It later became evident that at least one document seized was potentially covered by parliamentary privilege.

Thankfully on the occasion concerning Mr Moselmane in June 2020, matters were handled very much better by the AFP. In its subsequent report on the matter, the Legislative Council's Privileges Committee noted several previous reports of the Senate Committee of Privileges criticising the AFP's observance of the protocol.[42] However, in this matter, the processes outlined in the protocol were largely followed as intended. In summary:

- The President and Clerk were notified in advance that a search warrant was to be executed on the parliamentary office of Mr Moselmane (although notice was not given before a search warrant was executed on the home of Mr Moselmane).

- The President granted permission for the execution of the warrant on Mr Moselmane's parliamentary office on the condition that the Clerk or the Deputy Clerk be present at all times during the search and that the member or his legal representative had the opportunity to make claims of parliamentary privilege over any items seized.

- On the completion of the search of the office, all items subject to a claim of privilege by Mr Moselmane's legal representative were taken into the custody of the Clerk.

- After consultation with the Clerk, Mr Moselmane and Mr Zhang's legal representatives and the AFP investigation team attended Parliament to review the evidence subject to a claim of privilege and agreed a list of documents sought by the AFP as relevant to the investigation. Mr Moselmane's legal representatives were then given an opportunity to indicate whether the claim of privilege over those documents was maintained.[43]

Following the execution of the search warrant and the retention of certain documents by the Clerk over which privilege had been claimed, on 5 August 2020, the Legislative Council referred to its Privileges Committee terms of reference to inquire into and report on the status of the documents subject to a claim of privilege.[44]

In its approach to the matter, the Committee adopted a revised "Breen test" based on the original test adopted by the Committee in 2004 following the unhappy events surrounding the ICAC's execution of a search warrant on the office of Mr Breen. The test had itself been further modified by the Senate Committee of Privileges.[45] The revised "Breen test" adopted by the Committee was as follows:

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42 Ibid, pp 2-3.

43 Ibid, pp 6-7.

44 *Minutes*, NSW Legislative Council, 5 August 2020, p 1160.

45 Senate Committee of Privileges, Australian Senate, *Status of material seized under warrant; Preliminary Report*, Report No 163, December 2016, p 8; Senate Committee of Privileges, Australian Senate, *Disposition of material seized under warrant*, Report No 172, November 2018, p 5.

STEP 1: Were the documents ***brought into existence*** *in the course of, or for purposes of or incidental to, the transacting of business of a House or a committee?*

- *YES falls within 'proceedings in Parliament'.*
- *NO move to step 2.*

STEP 2: Have the documents been ***subsequently used*** *in the course of, or for purposes of or incidental to, the transacting of the business of a House or a committee?*

- *YES falls within "proceedings in Parliament".*
- *NO move to step 3.*

STEP 3: Is there any contemporary or contextual evidence that the documents were ***retained or intended for use*** *in the course of, or for purposes of or incidental to, the transacting of the business of a House or a committee?*

- *YES falls within "proceedings in Parliament".*
- *NO report that there are documents which fail all three tests.*

Note: Individual documents may be considered in the context of other documents.[46]

In dealing with the documents over which Mr Moselmane had claimed privilege, the Committee sought a submission from Mr Moselmane, a response to that submission from the AFP, and a response in turn from both Mr Moselmane and the Clerk. In the event, Mr Moselmane maintained a claim of privilege over just 12 documents. That claim was accepted by the AFP and by the Committee on review using the modified "Breen test". The Committee reported this outcome to the House.[47]

On 15 October 2020, the NSW Legislative Council passed a resolution adopting the findings and recommendations of the Privileges Committee.[48] In speaking to the tabling of the Privilege Committee's report on the matter, the Chair of the Privileges Committee observed that the protocol had worked as intended:

> The report shows that the guideline worked the first time it was used—at least so far. That is thanks to the willingness of the member and his legal representative to cooperate with the investigation and with this committee and because of the professionalism of both the AFP investigation team and the Clerks of this Parliament. The AFP investigation officers respected the role of the Clerks as the neutral third party and the Clerks worked to ensure that the investigation was not unnecessarily impeded. This contrasts with instances in the Senate in 2016 and 2017 when the AFP executed warrants on Senator Conroy and a staffer, and with the difficulties our committee experienced in 2003 and 2004 with the Independent Commission Against Corruption during the Breen matter. In both instances the Privileges Committee had

46 Privileges Committee, *Execution of search warrants by the Australian Federal Police*, Report No 80, October 2020, p 11-14.

47 Ibid, pp 15-20.

48 *Minutes*, NSW Legislative Council, 15 October 2020, p 1422.

to consider breaches of privilege and possible contempt. In this case no such considerations were required.[49]

Leyonhjelm v Hanson-Young and the 'historical exceptions' doctrine

Moving away at last from case law and parliamentary inquiry into the meaning of 'proceedings in Parliament', another interesting case decided in the Federal Court in 2021 was *Leyonhjelm v Hanson-Young*.[50]

Newcomers to the world of parliamentary privilege could be forgiven for thinking that the courts will not permit inquiry into what is said in parliament in any circumstances. As was hinted earlier in this paper, this is not the case. There are in fact a number of circumstances in which the courts will inquire into what is said in parliament. One of those is where the courts are called on, perfectly legitimately, to establish what was said in parliament as a matter of historical fact, but without in any way impeaching or questioning those proceedings. This is the so-called 'historical exceptions' doctrine, and it was very much at play in 2021 in *Leyonhjelm v Hanson-Young*.

By way of background, in 2019 in the preceding case of *Hanson-Young v Leyonhjelm (No 4),* Senator Hanson-Young was awarded damages for defamatory statements made by Senator Leyonhelm about her in public on four separate occasions. In his defence, Senator Leyonhelm had sought to rely on the defence of justification under section 25 of the *Defamation Act 2005* (NSW), arguing that Senator Hanson-Young had spoken certain words in the Senate chamber that justified his subsequent statements. After inquiring closely into the actual words Senator Hanson-Young said in the Senate chamber, including taking evidence from a number of other Senators present at the time, White J found that Senator Hanson-Young did not in fact make the statements attributed to her by Senator Leyonhelm in the Senate. Accordingly his defence failed.[51]

On appeal, Senator Leyonhelm asserted that parliamentary privilege and section 16 of the *Parliamentary Privileges Act 1987* (Cth) precluded any judicial consideration of what, in fact, had been said during debate in the Senate. In their subsequent decision in *Leyonhjelm v Hanson-Young*, Rares, Wigney and Abraham JJ disagreed, finding that it was permissible for the primary judge to take evidence to determine whether, as a matter of historical fact, Senator Hanson-Young said, or did not say, the words Senator Leyonhjelm attributed to her during debate in the Senate.[52]

In passing, the case is also authority, if more authority were needed, that responding to comments made during the course of proceedings in parliament, whether established or otherwise, by embarking on a series of statements outside of parliament is, in the words of Justice Rares, 'not a wise thing to do', at least not 'when speaking of the living'.[53]

Orders for papers in the Australian Senate and NSW Legislative Council

Moving on again, this time to the powers of parliaments: as many long-suffering public servants in New South Wales would readily attest, the NSW Legislative Council has long asserted the inherent power under the common law principle of 'necessity' to order the production of State papers from the executive government. This power was confirmed in a series of three cases, the

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49 *Hansard, NSW Legislative Council,* 13 October 2020, p 3691.

50 [2021] FCAFC 22.

51 *Hanson-Young v Leyonhjelm (No 4)* [2019] FCA 1981at [151] to [196] per White J.

52 *Leyonhjelm v Hanson-Young* [2021] FCAFC 22 at [55] per Rares J, at [237]-[238] and [255] per Wigney J at [381] per Abraham J.

53 *Leyonhjelm v Hanson-Young* [2021] FCAFC 22 at [9] per Rares J

so-called *Egan* cases,[54] between 1996 and 1999. Although there are disputes around the margins, which this paper will come to shortly, the government in New South Wales is obliged to conform with orders for papers and routinely does so. In the 57th Parliament (2019-2023) alone, over 400 orders for papers have been passed by the Legislative Council. With a few exceptions, they have all essentially been complied with.

In the Senate the power to order papers, or order returns as they are called in the Senate, rests on very different foundations. Orders are made under standing order 164, but ultimately the power of the Senate to order the production of papers rests on section 49 of the Commonwealth Constitution, which provides that the powers, privileges and immunities of the Senate and the House of Representatives, and their members and committees, are those of the House of Commons at the establishment of the Commonwealth in 1901. In this regard, the 10th edition of *Erskine May*, published in 1893, states at page 507 (referring to the British Parliament):

> Parliament is invested with the power of ordering all documents to be laid before it, which are necessary for its information. Each house enjoys this authority separately, but not in all cases independently of the Crown.

Despite this apparently firm foundation on which the power to order returns rests in the Senate, *Odgers' Australian Senate Practice* notes a high and in recent times increasing degree of resistance by the executive government to providing returns to orders. The government's refusal to comply with orders is usually based on the argument that to produce the documents would not be in the public interest.[55]

All evidence is that this problem has continued in the new, 47th Parliament. Statistics provided by the Senate indicated that to date in the 47th Parliament, 20 orders have been made of which three have been fully complied with, six partially complied with and nine not complied with.[56] As examples of partial or non-compliance:

- On 27 July 2022, the Senate ordered a range of documents relating to the recent foot-and-mouth disease outbreak in Indonesia. Responses tabled on 2 August redacted or withheld information said to reveal deliberative processes of government, subject to legal professional privilege or which may prejudice the investigation of a possible breach of the law.
- Also on 27 July 2022, the Senate ordered documents relating to the proposed abolition of the Australian Building and Construction Commission, and recent changes to its powers. Responses tabled on 3 August redacted or withheld some information on the basis that it would reveal Cabinet deliberations, was subject to legal professional privilege, or related to current court proceedings.

It is notable that some of these claims of privilege – for instance, that documents comprise privileged legal advice or are subject to legal professional privilege – have been explicitly rejected by the Senate as unacceptable, including throughout the previous parliament. But the ball is very much in the Senate's court to take further action in this matter if it wants to enforce more

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54 See the decision of the NSW 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 NSW Court of Appeal in *Egan v Chadwick* (1999) 46 NSWLR 563.

55 R Laing (ed), *Odgers' Australian Senate Practice*, as revised by H Evans, 14th ed, (Department of the Senate, 2016), pp 581, 586.

56 For the other two orders, no documents were found to exist.

transparent government. In the absence of some such action, it seems unlikely that the government of the day will shift its position.

In the New South Wales Legislative Council there are different issues at play in relation to orders for papers. First and foremost, claims of public interest immunity and legal professional privilege are not a basis for refusing to provide documents to the Legislative Council as they are used in the Senate.[57] However, there remains ongoing disagreement between the Council and the government concerning the immunity from production to the Council of cabinet documents.

In the 1999 NSW Court of Appeal decision in *Egan v Chadwick*, Meagher and Priestley JA went their separate ways on the issue of cabinet documents. Meagher JA found that their immunity from production was 'complete'. By contrast, Priestley JA essentially treated cabinet documents as no different from any other document, and therefore liable for production to the Council.[58] This left the judgment of Spigelman CJ as the key deciding judgment.

In his judgment, Spigelman CJ indicated that it was not 'reasonably necessary' for the proper exercise of the functions of the Legislative Council for it to have the power to call for Cabinet documents where their production would conflict with the doctrine of ministerial responsibility, either in its individual or collective dimension. However, he specifically drew a distinction between documents which either directly or indirectly disclose the 'actual deliberations within Cabinet', by which he presumably meant cabinet submissions and minutes, and those which may be described as Cabinet documents, 'but which are in the nature of reports or submissions prepared for the assistance of Cabinet'.[59]

Unsurprisingly, in the years since, the nuances of the Chief Justice's position have not proven easy for either the government or the Legislative Council to navigate. Perhaps also unsurprisingly, governments of the day of whichever political persuasion have seemingly adopted a broader definition of cabinet documents than that of Spigelman CJ, likely that set out in Schedule 1 to the *Government Information (Public Access) Act 2009* (NSW). Needless to say, this is of course somewhat hard to judge, given both the difficulty of applying the test articulated by Spigelman CJ and the fact that 'cabinet documents' are not routinely returned to the Council anyway.

Nevertheless, in recent years, the Legislative Council has increasingly pushed back against the blanket exclusion of 'cabinet documents' from returns to order. On most occasions, the flash point has been orders by the Council for the government to produce various business cases, such as the business cases for the Parramatta Light Rail Project and the Western Harbour Tunnel. In such cases, a pattern has developed whereby the Council has repeatedly ordered the production of the documents, and the government has repeatedly cited the business cases as cabinet documents. After the lapse of several weeks if not months, normally the delay has been sufficient for the matter to lose political currency, after which the documents have been provided to the Legislative Council on a 'voluntary' basis.

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57 The claim of public interest immunity and legal professional privilege can be made over documents returned to the Legislative Council, however it is a claim that the documents be kept confidential to members of the Legislative Council only and not be published. It is not a basis for non-production of the documents *per se*.

58 *Egan v Chadwick* (1999) 46 NSWLR 563 at 597 per Meagher JA, at 595 per Priestley JA.

59 *Egan v Chadwick* (1999) 46 NSWLR 563 at 574 per Spigelman CJ. For a critique by the former Chief Justice of Australia, the Hon Sir Anthony Mason, of the positions adopted by Meagher JA and Spigelman CJ, see A Mason, 'The Parliament, the Executive and the Solicitor-General', in G Appleby, P Keyzer and J Williams (eds), *Public Sentinels: A Comparative Study of Australian Solicitors-General*, (Ashgate, 2014).

A second growing area of contention in relation to orders for papers made by the New South Wales Legislative Council concerns orders for documents not held by the executive government, but instead by statutory corporations and independent oversight bodies such as the ICAC. The view taken by the Legislative Council is that these bodies are amenable to such orders and are required to respond. As stated by Bret Walker SC in an advice tabled in the House, it would be extraordinary if in enacting legislation to establish such bodies that the Parliament had deliberately removed them from scrutiny by the Parliament itself. At the very least, plain language would be needed to reach such a 'startling conclusion'.[60] Nevertheless, agencies beyond core government departments routinely assert some form of immunity from Council orders for papers.

A third and perhaps for now final area of contention in relation to orders for papers in the Legislative Council is just the sheer volume and in some cases size of returns and their physical management. In 2014, the Leader of the Government in the Council tabled an advice from the Solicitor General and Ms Mitchelmore of Counsel in which they stated that it would be reasonable for the government, in their view, to 'query or dispute an order that contained an impractical deadline or … was so broad and unwieldy as to place great practical difficulties upon compliance.'

Partly in response to this issue, the Council in 2020 adopted a sessional order, now incorporated in revised draft standing orders, that permits the agency subject to an order for papers and DPC to seek to vary the scope of the order to ease the compliance burden. Nevertheless, the administrative challenges of dealing with the sheer volume of orders now being made by the Legislative Council remain not insignificant for government departments and agencies, DPC and the Department of the Legislative Council itself.

However, this is not to cast aspersions on the impact of the order for papers process in New South Wales. There is a fascinating paper due to be written on a number of matters that have come to public light in the 57th Parliament in New South Wales as a result of the order for papers process, ranging from the operation of the Transport Asset Holding Entity (TAHE), to the allocation of government grants, to the management of iCare and to the appointment of overseas trade and investment commissioners. You heard it here first!

NSW Legislative Council committees and the publication of cabinet documents

Whilst 'cabinet documents' are often at play in relation to orders for papers by the New South Wales Legislative Council, recently they came up in another surprising context. In June 2021, the Legislative Council Public Accountability Committee commenced an inquiry into the Transport Asset Holding Entity (TAHE), established by the New South Wales Government to manage the State's rail assets including train stations and facilities, rail tracks and other infrastructure.

At the first meeting of the committee, one of the committee members tabled various documents in relation to the establishment and operation of TAHE, including, on the face of it, actual cabinet documents. The committee subsequently resolved to accept and publish the documents on the committee's webpage.

Following the publication of these documents, the Secretary of the Department of Premier and Cabinet wrote to the Committee Chair stating that the disclosure of the documents to the committee 'directly or indirectly, was not authorised by the Premier or the Cabinet'. He therefore requested that the committee remove the documents from the committee's webpage, destroy all

60 B Walker SC, 'Parliament of New South Wales, Legislative Council: Orders for Papers from bodies not subject to direction or control by the Government', p 11.

digital copies, return any hard copies to the Department of Premier and Cabinet and refrain from using or disclosing the documents as part of the inquiry.

Following a more detailed submission from the Department of Premier and Cabinet, the Clerk of the Parliaments briefed the committee on the issues raised and possible options for the committee to consider. The committee resolved to respond to the Secretary of DPC noting the request to remove the documents from the committee's website, and to prepare a special report to the House. It recommended that the matter be referred to the Privileges Committee for inquiry and report as to the publication and use of Cabinet documents by Legislative Council committees. The House adopted the recommendation, and the matter was duly sent to the Privileges Committee.

In February 2022, the Privileges Committee tabled its report, finding that most participants to its inquiry advised that there is no legal or constitutional impediment to a Legislative Council committee using a Cabinet document in an inquiry. The committee recommended that a committee in receipt of cabinet documents should take various steps to adjudge whether it is in the public interest for the documents to be published.[61]

In light of this report, the Public Accountability Committee reconsidered the Cabinet documents published on its webpage and resolved that on balance, it was in the public interest that these documents remain on the website.

Suspension of the member for Kiama by the NSW Legislative Assembly

In March 2022, the New South Wales Legislative Assembly suspended the Member for Kiama after he was charged with a serious criminal offence.

As noted previously, New South Wales is unusual in the extent to which it relies on the common law principal of 'necessity' as the basis of so many of its powers. Two 19th century cases decided by the Privy Council, *Doyle v Falconer* [62] and *Barton v Taylor*,[63] make it clear that local legislatures established in former British colonies such as the Legislative Assembly have the inherent power at common law to suspend a member guilty of disorderly conduct in the House or otherwise obstructing proceedings. Subsequent case law in *Armstrong v Budd*[64] also makes clear that the conduct of a member outside the House may also cause the House to feel compelled, for its own protection, to take action against a member.

In the case of the Member for Kiama, on 23 March 2022, the Acting Premier tabled in the New South Wales Legislative Assembly advice obtained from the Crown Solicitor's Office that the House did not have the power to expel the member simply on the basis that he had been charged with a serious criminal offence. Such a course of action would likely have brought the matter within the notice of the courts. Nor could the House impose additional sanctions on the member, such as the withholding of his salary or other entitlements, without risking constitutional challenge, save in the event that the parliament passed legislation to confer such a punitive power on the Houses. However, the House was entitled to suspend the member as a defence or protection of the House, which it duly did the next day.

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61 Privileges Committee, NSW Legislative Council, 'Examination, publication and use of cabinet documents by Legislative Council committees', Report No 86, February 2022.

62 (1866) 16 ER 293 at 298-299 per Sir James Colvile.

63 (1886) 11 AC 197 at 204-205 per Lord Selborne.

64 *Armstrong v Budd* (1969) 71 SR (NSW) 386 at 393 per Herron CJ.

Members' electorate offices in Victoria and the use of CCTV footage

Those with good memories will remember a controversy from the Australian Senate in 2014 when then Senator Faulkner raised in Senate Estimates concerns that the Department of Parliamentary Services (DPS) had authorised access to CCTV footage at Parliament House in relation to a disciplinary matter against one of the Department's employees, but that in the process DPS had filmed people meeting with him in his office. An angry Senator Faulkner suggested that he had effectively been spied on and labelled it a breach of privilege.

The Commonwealth Parliament has since adopted a 'Closed-circuit television code of practice' which relevantly provides that '[d]ecisions about the application of privilege are matters for the Parliament, not for the parliamentary administration'.[65]

It was therefore a source of some interest when, on 16 November 2021, the Member for Polwarth in the Victorian Legislative Assembly alleged that on 15 October 2021:

- Members of the Victorian police had attended his electorate office seeking to prevent or interfere with constituents seeking to meet with him as a local member;

- Victoria Police subsequently questioned him about the identity of constituents he met with outside the electorate office; and

- that the Department of Parliamentary Services also released CCTV footage to Victoria Police, which was then allegedly used to issue fines of $1,817 to constituents seeking to meet with the member.

The Victorian Legislative Assembly referred the matter to the Legislative Assembly Privileges Committee the same day.

In its report on the matter dated 1 September 2022, the Privileges Committee, having looked at the meaning of privilege, the definition of contempt, and the nature of communications between the constituents and members, concluded that a request by members of Victoria Police on 15 October 2021 for members of the public gathered outside the Member for Polwarth's electorate office to disperse was not a breach of parliamentary privilege, and did not constitute a contempt of the Parliament. In those circumstances, the committee further found that there had been no breach of privilege or contempt by the Department of Parliamentary Services in the release of CCTV footage to Victorian Police.

However, the committee did find that 'procedures to allow third parties to access electronic security data held by the parliament must contemplate, as their starting point, the right of a member to assert privilege over such material, particularly where that material relates directly to the work of a member.' The committee made recommendations to this effect.

Whilst this matter was resolved without an apparent breach of privilege, the case reinforces that any parliamentary department or senior parliamentary officer presented with a request for CCTV footage needs to be very careful in their response to such a request.

65 'APH/AFP Closed-Circuit Television Code of Practice', 2 June 2021, para 5.3

New standing orders for the NSW Legislative Council

And finally a note about the New South Wales Legislative Council's impending adoption at the end of 2022 of new standing orders.

For those who have not come across them before, standing orders are the primary source of authority guiding the operations of any house of parliament and its committees.

Followers of the New South Wales Legislative Council will know that 2024 is the bicentenary of the first meeting of the Council in 1824. In that time, the Council has adopted new standing orders on only six occasions: in 1827, 1843, 1849, 1856, 1895 and 2004. Given that the House updates its standing orders so rarely, the forthcoming adoption by the Council of new standing orders at the end of 2022 is a big thing!

In New South Wales, the authority for either House of the Parliament to adopt new standing orders is found in section 15 of the *Constitution Act 1902* (NSW), which provides that the House shall, 'as there may be occasion', prepare and adopt standing rules and orders 'regulating', among other things, the 'orderly conduct' of business, subject to the standing orders being 'approved' by the Governor.

Keen readers might be wondering at this point how the adoption of new standing orders by the New South Wales Legislative Council, interesting as that may be, intersects with the theme of this paper, parliamentary privilege? The answer lies in the right of the Houses of the Parliament of New South Wales to determine and control their own proceeding, without outside interference, which is a somewhat unremarked upon but nevertheless essential privilege. The adoption of standing orders is obviously a key aspect of that privilege.

It was established by the Privy Council in *Harnett v Crick*[66] in 1908 that the standing orders of a house are beyond the notice of the courts to the extent that they relate to the 'orderly conduct' of the proceedings of the house.[67] Put another way, their adoption is within the exclusive cognisance of the house.

Except that they aren't! Close readers of section 15 above would have noticed the little caveat at the end, that the adoption of standing orders in New South Wales is subject to the approval of the Governor. In New South Wales, the Governor, as the representative of the Sovereign, is a constituent part of the Legislature by section 3 of the *Constitution Act 1902* (NSW). However, the Governor also presides at meetings of the Executive Council by section 35D(1) of the *Constitution Act 1902* (NSW), and is required to act on the advice of ministers on the Executive Council.

All this raises the tantalising, albeit highly unlikely, possibility that the executive government could in some way seek to interfere with the adoption by the Council of new standing orders through advice of ministers on the Executive Council to the Governor. Of course, such an event would be almost inconceivable. Nevertheless, it is for this reason that the former Clerk of the Senate, Dr Rosemary Laing, has suggested that provision for external approval of the standing orders of any house of parliament is an anachronism and an unnecessary fetter on the freedom of a house to determine its own standing rules of procedure.[68]

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66 [1908] AC 470.

67 *Harnett v Crick* [1908] AC 470 at 475-476.

68 R Laing, 'Exclusive Cognisance: Is it a Relevant Concept in the 21st Century?', *Australasian Parliamentary Review*, (Vol 30, No 2, Spring/Summer 2015), p 63.

Conclusion

This paper began by noting that parliamentary privilege sits within the doctrine of the separation of powers, ensuring the independence of parliaments from the other branches of government – the executive and the judiciary – and preventing those other branches of government from interfering in the proceedings of parliaments.

Within that settlement, the cases cited in this paper clearly illustrate that in modern times there really is very limited friction in the relationship between parliaments and the courts. All that is really in contention is how far the meaning of 'proceedings in Parliament' extends. In Australia at least, this largely boils down to the limits of the 'reasonable incidentality' test. But there is no suggestion of a re-evaluation of the relationship between parliaments and the courts of the nature contemplated in the decisions of the New South Wales Supreme Court in 1985 and 1986 concerning Justice Murphy. Of course, this may change, but fundamentally it is what you would expect in a relationship which is many centuries old.

By contrast, the relationship between parliaments and the executive government, and particularly it must be said oversight or watchdog bodies (which might also be called a fourth arm of government), appears more fraught. The decision in *The President of the Legislative Council of Western Australia v Corruption and Crime Commission of Western Australia [No 2]* and its implications is a significant challenge for all Australian parliaments to deal with. Issues relating to compulsory powers of discovery and seizure of documents by watchdog agencies will continue to arise in other jurisdictions as well. Inevitably too orders for papers will remain a constant and significant point of disagreement between certain parliaments and their executive governments. Nor can friction between the executive government and parliamentary committees seeking to hold governments to account be expected to subside anytime soon. It seems inevitable that attempts by certain houses of parliament to assert their powers and rights in relation to executive governments will remain the most likely flashpoint for new issues of privilege in the future.

But this is as it should be! Parliamentary privilege, or more precisely the 'powers, rights and immunities' of parliaments, needs to continue to evolve over the years to come to suit the needs of modern legislatures, especially in their relations with executive governments. For keen practitioners of the law and parliamentary democracy, this evolution will always be fascinating to watch.