



## PARLIAMENTARY SOVEREIGNTY AND PARLIAMENTARY PRIVILEGE

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## Introduction

Francis Fukuyama in his 2014 book *Political Order and Political Decay*<sup>2</sup> tells the story of how states, law and democracy developed after the cataclysmic events of the French and American Revolutions. He highlights how the modern landscape, with its uneasy tension between dictatorships and liberal democracies, evolved, and how in several developed democracies unmistakable signs of decay have emerged. Fukuyama argues that the key to successful government, and specifically to the flourishing of liberal democracy, can be reduced to three key elements: a strong state, the rule of law and institutions of democratic accountability. This is in some ways a variation on the theme of the separation of powers between the executive, judicial and legislative branches of government. It is the thesis of this paper that parliamentary privilege, including its purpose, history and current challenges and developments, is best understood in terms of the practical outworking of the concept of the separation of powers. Furthermore, it is suggested that the emphasis that Fukuyama places on the equal need for each of the three key elements of successful government assists in encouraging comity and mutual respect between the three arms of government that is, in some ways, at the heart of parliamentary privilege and its application.

## Parliamentary privilege: definition and purpose

Parliaments are often viewed as primarily legislative bodies. Whilst the making of legislation is one of the most important functions of a parliament, it is by no means the only role. Legislatures (known as parliaments in those countries where the system of government is modelled on the Westminster system in the United Kingdom) have additional important functions as democratic institutions, including representation and the oversight of executive government. To achieve all three objectives parliaments possess certain privileges, powers and immunities. 'Parliamentary privilege' refers to the powers and immunities from aspects of the general law possessed by individual Houses of Parliament, their members, and other participants in parliamentary proceedings. These rights, powers and immunities serve one essential purpose: to enable the Houses of Parliament and their members to carry out their functions effectively.<sup>3</sup>

It should be noted that privilege in this restricted sense can sometimes be confused with privilege in the colloquial sense of a special benefit or special arrangement which gives some advantage to either House or its members. Privileges in the colloquial sense, however useful or established they may be have no relation to immunities under the law, which are fundamental to parliamentary privilege.<sup>4</sup>

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<sup>2</sup> Francis Fukuyama, *Political Order and Political Decay: From the Glorious Revolution to the Globalization of Democracy*, Farrer, Straus and Giroux, New York, 2014.

<sup>3</sup> Enid Campbell, *Parliamentary Privilege*, The Federation Press, 2003, p 1.

<sup>4</sup> Harry Evans & Rosemary Laing (editors), *Odgers' Australian Senate Practice*, Thirteenth Edition, Department of the Senate, Canberra, 2012, pp 40-41.

While Parliaments are primarily legislative bodies, members' roles in representing their constituents and scrutinising the executive are also cornerstones of parliamentary democracy under the Westminster system, from which colonial legislatures such as those in Australia derive their model of governance. The performance of these key functions is secured by members having immunity from ordinary law to freely raise and debate any matter in the course of exercising legislative, deliberative and scrutiny functions, without fear of legal liability or other reprisal. This immunity is absolute: it applies regardless of the accuracy of statements made during proceedings in Parliament, or the motive with which they were made. However, if a member of the House were to abuse the privilege, the House itself would have the power to take action against the member concerned.<sup>5</sup>

Parliamentary privilege has been described as having the effect of both a sword and a shield – it serves as a sword to enable the Houses and their committees to inquire, scrutinise, criticise, debate and legislate, and as a shield from the authority of the other arms of government (namely the Executive and the courts). It embraces both powers, such as the power to control its own proceedings, conduct inquiries, discipline members and (in some jurisdictions) punish for contempt; and immunities, the principal being freedom of speech.

## **Key stages and events in the development of parliamentary privilege**

The privileges enjoyed in parliaments in Australia, like those throughout the Westminster system, find their origins in privileges recognised of the United Kingdom parliament, particularly those of the House of Commons and its members.<sup>6</sup> Initially these privileges were the result of a significant political struggle between the House of Commons and the Crown which culminated in the glorious revolution and the enactment of the *Bill of Rights 1689*. A series of landmark judicial decisions in the nineteenth century settled the relationship between parliamentary law and the general law, and the relationship between parliament and the courts, at least in most respects for many years. The reception of parliamentary privilege into Australia was, however, not entirely straight forward, with again a series of nineteenth century cases important in distinguishing the privileges enjoyed by colonial legislatures from the “mother parliament.” Most of the colonies responded by enacting legislation adopting the privileges of the House of Commons at a particular date, with New South Wales the only state left without comprehensive privileges legislation. The NSW Parliament is therefore reliant on the common law doctrines derived from the nineteenth century cases (concerning privilege in colonial legislatures) and Article IX of the *Bill of Rights* to define the scope of parliamentary privilege. The final key milestone in the development of parliamentary privilege in Australia was the enactment of the *Commonwealth Parliamentary Privileges Act 1987*. Each of these key stages in the development of parliamentary privilege is outlined below.

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<sup>5</sup> NSW Legislative Council Standing Committee on Parliamentary Privilege & Ethics, Report No. 25, *Parliamentary privilege and the seizure of documents by ICAC*, December 2003, p 6.

<sup>6</sup> Campbell, *Parliamentary Privilege*, p 2.

### ***The glorious revolution: Parliament, the Crown and parliamentary sovereignty***

While the English Parliament historically enjoyed a fairly undefined freedom of speech, there emerged a gradual push for a distinct claim of privilege for the House of Commons during the latter part of the 16<sup>th</sup> century and the beginning of the 17<sup>th</sup> century. Following the War of the Roses in the fifteenth century, the English state (the Crown) was somewhat fragile and the Tudor monarchs were forced as a matter of pragmatism to rely on the parliament for support, including for the raising of taxes to fund military actions. The Tudor monarchs were therefore readier than predecessors to accede to demands (or more accurately requests) from the House of Commons in relation to its privileges.

In contrast the Stuart kings were less enamoured of the growing independence of the House of Commons. Things came to a head in 1629 when King Charles I ordered the arrest of three members of the Commons for speeches made in the House which the King considered dangerous, libellous and seditious. Although the men claimed privilege, they were subsequently imprisoned and fined. In 1641 the House adopted resolutions declaring the proceedings against its members a breach of privilege. The struggle reached its peak on 4 January 1642, when Charles I, attended by an armed escort, entered the Commons Chamber and attempted to arrest five members who had been prominent in a move to transfer control of the armed forces away from the Crown. When the King demanded that the Speaker of the Commons identify the five members to him, the Speaker famously rebuffed the King by responding, 'I have neither eyes to see, nor tongue to speak but as this House is pleased to direct me'. It is reported that as the King left the Chamber cries of 'privilege! privilege!' rose up behind him.<sup>7</sup>

This clash between the House and the Monarch led to a series of key shifts, both for the King and for the future of Parliament. Firstly, the English civil war, in which one in ten adult males were killed, and which led to a period of upheaval in which both monarchy and Parliament were for a time overthrown and military rule imposed. Secondly, the consistent protest by the House of Commons for over 40 years in response to the intervention of the Crown in proceedings in parliament. Thirdly, following the restoration of the monarchy further attempts by the crown to intimidate members of the House of Commons, including the arrest and fine of a former Speaker for authorising the publication of a pamphlet which had criticised the then heir to the throne. Fourthly, the assertion by the House of Commons of its privilege to determine which business would be conducted, and not merely attend to the matters for which parliaments were called together by the Crown. And ultimately, to the "Glorious Revolution," which resolved the struggle between the Monarch and the people with the instalment of William III and Mary II as joint monarchs, on whom were imposed the terms of the *Bill of Rights 1689*. The Bill of Rights in turn provided the first statutory recognition of freedom of speech in Parliament, with Article IX providing:

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.

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<sup>7</sup> For a further detailed account of these matters see Sir Malcolm Jack (editor), *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 24<sup>th</sup> edition, Lexis Nexis, 2011, pp 206–209; Lynn Lovelock & John Evans, *New South Wales Legislative Council Practice*, The Federation Press, 2008, pp 48-50; and Geoffrey Robertson, *The Tyrannicide brief: the Story of the Man who sent Charles I to the Scaffold*, Chatto & Windus, 2005.

The ultimate effect of the conflicts of the 17th century was that Parliament emerged supreme, or sovereign, demonstrated in the terms of the Bill of Rights which curb the Crown prerogative and root the customary or inherent freedom of speech in a statutory basis. Hence the term, reflected in the organisers' topic for this paper of "parliamentary sovereignty and parliamentary privilege."

***The landmark nineteenth century cases in the UK: parliamentary law, the general law, exclusive cognisance and the "settlement" between Parliament and the courts***

The glorious revolution and the enactment of the *Bill of Rights 1689* settled the conflict between parliament and the Crown. In the wake of these events some claims of privilege made by members of the House of Commons went beyond the terms of the *Bill of Rights* (for example claims by members that their servants were free from arrest, and of breach of privilege in instances of trespassing or poaching on their lands). Such claims were in time curtailed by statute as serious obstructions to the ordinary course of justice.<sup>8</sup>

The next key stages in the development of a modern understanding of parliamentary privilege was a series of landmark cases in the nineteenth century concerning the respective roles of parliament and the courts in matters of privilege. Conflicts arose as to the relationship of the *lex parliamenti* and the English common law, and the degree to which matters arising concerning either House of parliament should be examined, discussed and decided in that house alone.

The most famous of these cases is *Stockdale v Hansard*.<sup>9</sup> In 1836 Stockdale (a publisher) sued Hansard (the printer for the House of Commons) for libel in relation to a report by an inspector of prisons that had been tabled in the House of Commons and ordered to be printed. The matter took a number of complex twists and turns with four separate actions taken over a three year period, judgements against Hansard, together with a select committee inquiry, the imprisonment of Stockdale by order of the House and ultimately the passing of legislation to afford statutory protection to the publication of papers by order of the House of Commons or House of Lords.<sup>10</sup> A number of key principles arise from *Stockdale v Hansard*. These include:

- "All persons ought to be very tender in preserving to the Houses all privileges which may be necessary for their exercise... but power, and especially the power of invading the rights of others is a very different thing..."
- That the law of parliament was, indeed, part of the general law.
- That the existence of particular privileges was a matter for determination by the courts.

The second key case concerning the relationship between parliament and the courts was *Bradlaugh v Gosset*.<sup>11</sup> Bradlaugh was a member of the House of Commons and evidently a disturber of the proceedings of the House. The House passed a resolution preventing him from taking the oath of office required for him to participate in proceedings until such time as he provided an assurance not to further disturb proceedings. He sought a declaration from the courts that the order of the House was *ultra vires* and to restrain the Serjeant at Arms from continuing to prevent him from entering the House and administering the oath to himself. The

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<sup>8</sup> Lovelock & Evans, *New South Wales Legislative Council Practice*, p 50.

<sup>9</sup> (1839) 112 ER 1112.

<sup>10</sup> *Erskine May*, 24<sup>th</sup> edition, pp 287-290.

<sup>11</sup> (1884) 12 QBD 271.

court found against Bradlaugh, determining that the order of the House was a matter for the internal management by the House of its proceedings, over which the court had no jurisdiction. In this instance, the court recognised the exclusive jurisdiction of the House and an essential necessary condition for the discharge by the House of its functions, thus recognising the concept of “exclusive cognisance.”<sup>12</sup>

The impact of these cases has been a degree of comity between parliament and the courts. On the one hand the courts do not call into question or inquire into the proceedings of the legislature.<sup>13</sup> On the other hand, the courts arbitrate to ensure that parliament only claims such powers as are necessary to its existence, and to the proper exercise of the functions which it is intended to execute.<sup>14</sup> The mutual respect and understanding of the rights, privileges and constitutional functions of these two arms of responsible government has been achieved by an adherence to the broad rule observed by Dixon J in *R v Richards; Ex parte Fitzgerald and Browne*:

[I]t is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise.<sup>15</sup>

***Nineteenth century cases concerning the limitations of privilege in colonial legislatures: the common law principle of “reasonable necessity”***

At the same time as landmark cases were determining the respective roles of the House of Commons (and House of Lords) and the courts concerning parliamentary privilege, and articulating the concept of the “exclusive cognisance” of the UK Parliament, other nineteenth century cases cast doubt on the application this concept and the extent of the privilege enjoyed by “colonial” legislatures in Australia and elsewhere.

The key case is a decision of the judicial Committee of the Privy Council from 1842, *Kielly v Carson*.<sup>16</sup> Kielly had threatened a member of the Newfoundland House of Assembly because of statements of the member about the hospital in which he, Kielly, worked as a physician. Having been brought before the bar of the house by warrant of the Speaker, Kielly was placed in gaol on the order of the House. When brought before a judge, Kielly was discharged on the grounds that the process by which he had been imprisoned was void. The House then ordered the imprisonment of the judge who had released Kielly. The response of the Governor of Newfoundland was to prorogue the Assembly. Whilst the Supreme Court of Newfoundland later upheld the actions of the Assembly this decision was overturned on appeal to the Privy Council, where it was held that the right to punish for contempt is a power peculiar to the two Houses of the UK Parliament and is not transferrable to colonial legislatures. Rather, colonial legislatures

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<sup>12</sup> *May*, 24<sup>th</sup> edition, p 291.

<sup>13</sup> *Odgers*, 12<sup>th</sup> edition, p 33; *Canada (House of Commons) v Vaid* [2005] 1 SCR 667 at 41; Joint Committee on Parliamentary Privilege, *Report: Volume 1 – Report and Proceedings of the Committee*, UK Parliament, Session 1998-99, HL Paper 43 – 1, HC 214 -1, p.8.

<sup>14</sup> *Egan v Willis* [1998] HCA 71 at 31, citing *Kielly v Carson* [1842] EngR 593; [1842] 4 Moo PC 63 [13 ER 225]; *Stockdale v Hansard* [1839] 9 Ad & E 1 [112 ER 1112] at 1192.

<sup>15</sup> [1955] HCA 36; [1955] 92 CLR 157 per Dixon CJ at 162. See more recently *Egan v Willis and Cabill* [1996] 40 NSWLR 650, per Gleeson CJ at 653; *Egan v Willis* [1998] 195 CLR 424, per McHugh at 69; *Hamilton v Al Fayed* [1999] 3 All ER 317 at 334; *Canada (House of Commons) v Vaid* [2005] 1 SCR 667 at 29.9.

<sup>16</sup> (1842) 12 ER 225.

only possessed those privileges “reasonably necessary for the proper exercise of their functions and duties.”<sup>17</sup>

This principle was upheld in further cases including *Fenton v Hampton*,<sup>18</sup> an 1858 decision concerning the powers of the Tasmanian Legislative Assembly and *Doyle v Falconer*,<sup>19</sup> a decision concerning the Dominican House of Assembly. A subsequent series of cases in NSW applied the same principle in holding that whilst the Legislative Assembly had an inherent power to discipline members, including by their removal from the chamber to protect against obstruction and disturbance, the power did not extend to punitive action such as the indefinite suspension of a member (*Barton v Taylor*<sup>20</sup>). These principles were further enunciated in twentieth century cases concerning the limits on the powers of the NSW Parliament to discipline or expel members: *Willis and Christie v Perry*<sup>21</sup> and *Armstrong v Budd*.<sup>22</sup> As outlined below the ongoing relevance of the principles arising from these nineteenth century cases was confirmed by the High Court in *Egan v Willis*.<sup>23</sup>

### ***Privileges legislation in the colonial legislatures (and its absence in New South Wales)***

Whilst these nineteenth century cases made clear that, at common law, colonial legislatures did not automatically enjoy the privileges of the House of Commons and House of Lords, it was recognised that, by statute, they “could be endowed with privileges co-extensive with those of the Westminster parliament and its members,” including punitive powers.<sup>24</sup>

Some Australian jurisdictions have made statutory claim to the privileges of the House of Commons: for example, the Victorian Constitution claims for its Parliament the power and privileges of the House of Commons as at 1855; South Australia makes its claim as at 1856; and Western Australia makes its claim as at 1989.<sup>25</sup>

Queensland, one of Australia’s three unicameral parliaments, claims the powers and privileges of the House of Commons as at 1901,<sup>26</sup> and has partially codified its privileges under the *Parliament of Queensland Act 2001*. The Northern Territory<sup>27</sup> and the Australian Capital Territory<sup>28</sup>, also unicameral parliaments, draw either directly or indirectly on the terms of the Commonwealth Privileges Act, discussed below. Both territories define the privileges of their Houses as those for the time being of the House of Representatives in Canberra.<sup>29</sup>

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<sup>17</sup> For a detailed discussion of *Kielly v Carson* see John Courage, “Parliamentary privilege in Newfoundland: the strange case of Kielly v Carson” accessed online at [http://www.revparl.ca/4/3/04n3\\_81e\\_Courage.pdf](http://www.revparl.ca/4/3/04n3_81e_Courage.pdf), 11.41 am, 5/6/2015.

<sup>18</sup> (1858) 14 ER 727.

<sup>19</sup> (1866) 16 ER 293.

<sup>20</sup> (1886) 11 AC 197.

<sup>21</sup> (1912) 13 CLR 592.

<sup>22</sup> (1969) 71 SR (NSW) 386.

<sup>23</sup> (1998) 195 CLR 424 at 495 per Kirby J.

<sup>24</sup> Campbell, *Parliamentary Privilege*, p 2.

<sup>25</sup> S 19, *Constitution Act 1975* (Vic); s 38, *Constitution Act 1934* (SA); s 1, *Parliamentary Privileges Act 1891* (WA).

<sup>26</sup> S 9, *Constitution of Queensland 2001* (Qld).

<sup>27</sup> *Legislative Assembly (Powers and Privileges) Act 1992* (NT).

<sup>28</sup> *Australian Capital Territory (Self-Government) Act 1988* (ACT).

<sup>29</sup> Although s 24(4) of the *Australian Capital Territory (Self-Government) Act 1988* (ACT) includes an exception that ‘Nothing in this section empowers the Assembly to imprison or fine a person’.

Tasmania has codified in some detail powers to summon witnesses and require the production of documents, and to provide power to punish certain defined contempts.<sup>30</sup> Other aspects of privilege have not been codified.

New South Wales stands in stark contrast to these other Australian jurisdictions, having not legislated to define any of its powers and privileges, although this is not for any want of trying. Upon the establishment of responsible government in 1856 there was debate about the need for privileges legislation in NSW. Lovelock and Evans describes six attempts to enact privileges legislation since 1856.<sup>31</sup> In recent years there have been recommendations for the enactment of privileges legislation made by the Legislative Council's Privileges Committee and most recently an exposure draft bill was tabled by the former Speaker of the Legislative Assembly on the second last sitting day before the 2011 election.<sup>32</sup>

New South Wales is therefore the only jurisdiction in Australia in which the immunities and powers of Parliament rely primarily on the common law principle of 'reasonable necessity', together with the protections afforded under Article IX, discussed below. While certain other statutes confer additional rights and powers on the Parliament, including the power to compel witnesses to attend and give evidence, in the absence of a comprehensive statutory regime, the NSW Parliament does not possess the right to punish for contempt. In particular, it has been held that in the absence of an express grant, the powers of the NSW Parliament are protective and self-defensive, not punitive in nature. Further, what is 'reasonably necessary' is not fixed, but changes over time.

[T]he critical question is to decide what is 'reasonable' under present-day conditions and modern habits of thought to preserve the existence and proper exercise of the functions of the Legislative Council as it now exists.<sup>33</sup>

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.<sup>34</sup>

Where, as in the case of the Houses of the New South Wales Parliament, no external reference point has been provided to identify and define the limits of the applicable privileges, the inquiry is even more at large than otherwise it would be. It involves identifying the functions of the House in question and then specifying, by reference to the [Commonwealth] Constitution, statute law and the common law of Parliaments, those powers essential to the existence of the House as a chamber of Parliament or at least reasonably necessary to the performance by that House of its functions as such.

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<sup>30</sup> *Parliamentary Privileges Act 1858* (Tas).

<sup>31</sup> Lovelock & Evans, *New South Wales Legislative Council Practice*, pp 53-56.

<sup>32</sup> Exposure draft *Parliamentary Privileges Bill 2010*, Votes and Proceedings (LA), 2/12/2010, p 2562. A learned paper to shortly be published by a colleague argues that, particularly in view of the developments in New Zealand, outlined below, that it is time that the merits of privileges legislation for NSW be considered again.

<sup>33</sup> *Armstrong v Budd* (1969) 71 SR (NSW) 386 at 402.

<sup>34</sup> *Egan v Willis* (195 CLR 424 at 454 per Gaudron, Gummow and Hayne JJ).



The powers which fit those criteria are not frozen in terms of the exposition of the powers of colonial legislatures, whether in Australia or elsewhere.<sup>35</sup>

### ***Parliamentary Privileges Act 1987 (Cwth)***

Federally, section 49 of the *Commonwealth of Australia Constitution Act 1900 (The Constitution)* invested the Commonwealth Parliament with the power to codify its privileges, but until such time, claimed the privileges of the Senate and the House of Representatives to be those of the House of Commons as at 1901, being the date of federation.

The privileges of the Commonwealth Parliament were further codified and clarified with the introduction of the *Parliamentary Privileges Act* in 1987, which was enacted primarily to reverse two judgments in the Supreme Court of New South Wales in 1985 and 1986 (collectively cited as *R v Murphy*)<sup>36</sup> which interpreted and applied Article IX of the *Bill of Rights 1689* in a manner unacceptable to the Parliament. The Parliament utilised the legislative power provided by s 49 of the Constitution to apply the provisions of Article IX, and define what, in its view, was covered by Article IX, particularly by the reference to ‘proceedings in Parliament’ (s 16).<sup>37</sup>

The background to the *Parliamentary Privileges Act 1987* is detailed in *Odgers’ Australian Senate Practice*.<sup>38</sup> The case involved the prosecution of a justice of the High Court, the Hon Lionel Murphy, for attempting to pervert the course of justice. The principal prosecution witness had given evidence before Senate select committees, inquiring into whether Justice Murphy should be removed from office by parliamentary address under section 72 of the Constitution.<sup>39</sup> The question arose as to whether evidence submitted to a Senate committee, including both the evidence of the principal prosecution witness and Justice Murphy’s written submission, could subsequently be used during the course of Justice Murphy’s trial.

Justice Cantor appeared to rule that parliamentary privilege was not absolute and that the question of whether use could be made of evidence of parliamentary proceedings involved a balancing of the privilege of freedom of speech in parliament with the requirements of the court proceedings. In the second, published, judgement, Justice Hunt ruled that Article IX was restricted to preventing parliamentary proceedings being the actual cause of an action, but did not prevent evidence from those proceedings being used to support an action. As a consequence, during the two trials both Justice Murphy and the prosecution witnesses were subjected to severe attacks using their committee evidence to attack the truthfulness and motives for both their court evidence and their earlier committee evidence. Use was also made in the trials of previously unpublished *in camera* evidence to the committees.

The judgment prompted an immediate reaction from the Commonwealth Parliament which deemed the court’s interpretation and application of Article IX as unacceptable, as it would allow

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<sup>35</sup> Ibid at 495-496 per Kirby J.

<sup>36</sup> First judgment unreported; the second is in 64 ALR 498.

<sup>37</sup> See *Parliamentary Privileges Act 1987* (Cwth), s 16.

<sup>38</sup> *Odgers’ Australian Senate Practice*, Thirteenth Edition, pp 45-53.

<sup>39</sup> The Senate select committee inquiries, the criminal proceedings against the judge and a subsequent parliamentary commission of inquiry are further outlined in *ibid*, pp 671-683. Following the winding up of the parliamentary commission the documents of the commission were given into the hands of the Presiding Officers of the Commonwealth parliament, to remain confidential and be released after 30 years, in 2016.

members of Parliament, as well as witnesses, to be called to account in court for their parliamentary speeches and to be attacked for their participation in parliamentary proceedings.

The Commonwealth responded by enacting the *Parliamentary Privileges Act 1987* to explicitly counteract the decision, with s 16(3) of the Act declaring a wide meaning of ‘impeached or questioned’:

- (3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:
- (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
  - (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
  - (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

Section 16(3) prohibits a court or tribunal from questioning the truth or motive of anyone participating in parliamentary proceedings. It also prohibits the use of parliamentary proceedings to question the motives or credibility of a member or witness. So, for example, a judge or jury cannot be invited to infer motives from a member’s speech in Parliament.

Lord Browne-Wilkinson endorsed section 16(3) of the Act in the Privy Council case of *Prebble v Television New Zealand Ltd*,<sup>40</sup> stating that the section ‘contains ... the true principle to be applied’ as to the effect of Article IX and the admissibility of evidence.

Section 16(2) of the *Parliamentary Privileges Act 1987* states that ‘proceedings in parliament’ means ‘all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee’, which includes (but is not limited to):

- (a) the giving of evidence before a House or a committee, and evidence so given;
- (b) the presentation or submission of a document to a House or a committee;
- (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
- (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.<sup>41</sup>

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<sup>40</sup> [1995] 1 AC 321.

<sup>41</sup> *Parliamentary Privileges Act 1987* (Cwth), s 16(2). The Commonwealth definition has been substantially incorporated into s 9 of the *Parliament of Queensland Act 2001*, s 6 of the *Legislative Assembly (Powers and Privileges) Act 1992* (NT), and applies to the ACT Legislative Assembly by virtue of s 24 of the *Australian Capital Territory (Self-Government) Act 1988* (Cwth).

## Article IX of the Bill of Rights 1689

As outlined above the key sources of parliamentary privilege in NSW are the common law principle of reasonable necessity and article IX of the Bill of Rights 1689. The Bill of Rights forms part of the law of NSW by virtue of section 6 and schedule 2 to the *Imperial Acts Application 1969*, which came into effect in NSW from 1 January 1971.<sup>42</sup>

Despite being 325 years old it is only relatively recently that the courts have started to refer to Article IX of the Bill of Rights in cases concerning parliamentary privilege. David McGee, former Clerk of the New Zealand Parliament, has observed that one is hard-pressed to find any judicial citation of Article IX before 1972, when it was cited in the English case of *Church of Scientology v Johnson-Smith* [1972] 1 All ER 387. McGee suggests that the greater focus on Article IX may be part of a tendency to look for an authoritative legislative or judicial expression of law in a form recognisable to the practising lawyer.<sup>43</sup>

In modern language, Article IX reads:

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.

Given the significant protections attaching to proceedings covered by parliamentary privilege, it is accepted that, where the immunity is asserted, there is an onus to demonstrate that the comment, document or other matter in question fulfils the criteria of Article IX – in other words, for the matter to be protected from being “impeached or questioned” “in any court or place out of Parliament,” it must demonstrably be a “proceeding in parliament.”<sup>44</sup> Even after being the subject of considerable judicial interpretation since 1972, there are areas of difficulty in relation to each of these three phrases.

### **“proceedings in parliament”**

There is no definition of ‘proceedings in Parliament’ within the *Bill of Rights 1689*. The interpretation of activities encompassed by the phrase is perhaps the most controversial aspect of Article IX.

*Erskine May* broadly describes ‘proceedings in Parliament’ as:

[S]ome formal action, usually a decision, taken by the House in its collective capacity. While business which involves actions and decisions of the House are clearly proceedings, debate is an intrinsic part of that process which is recognised by its inclusion in the formulation of article IX. An individual Member takes part in a proceeding usually by speech, but also by various recognized forms of formal action, such as voting, giving notice of a motion, or presenting a petition or report from a committee ...<sup>45</sup>

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<sup>42</sup> The Bill of Rights is actually listed in Schedule 2 of this Act as: (1688) *1 William and Mary sess 2 c 2 (The Bill of Rights)*.

<sup>43</sup> D McGee, ‘The scope of parliamentary privilege’, *The New Zealand Law Journal*, March 2004, p 84.

<sup>44</sup> *Canada (House of Commons) v Vaid* [2005] 1 SCR 667 at 29.

<sup>45</sup> *Erskine May, Parliamentary Practice* (24th edition, 2011), pp 235-236.

It is generally accepted that proceedings in parliament include the formal transaction of business in a House or its committees, such as debates, questions and answers, the giving of evidence by witnesses and the tabling of documents. However, ambiguity exists around matters only connected with, or ancillary to, the formal transaction of such business. For example, not all correspondence to members, briefings to ministers or copies of tabled papers may be covered by absolute privilege. Carney states:

[T]he closer the relevant activity is connected to the proceedings of parliament, the easier it is to argue that it should be protected by privilege.<sup>46</sup>

The term ‘proceedings in Parliament’ has never been fully expounded by the courts. As outlined above, the Commonwealth Parliament has attempted to provide a clearer and more comprehensive definition in section 16 (2) of the *Parliamentary Privileges Act 1987* (Cwth).

While the Commonwealth legislation endeavours to clarify the extent of the use of evidence which derives from such proceedings, interpretation issues have nonetheless arisen around certain aspects of s 16(2). In particular, the terms ‘for purposes of or incidental to’ have led to significant debate. Some of these areas of contention are outlined below under the heading of current issues from other jurisdictions.

In NSW in recent years there have been two developments of note in this area. Firstly, the Legislative Council Privileges Committee, having found that the Independent Commission Against Corruption (ICAC) had breached parliamentary privileges in its seizure of documents from the parliamentary office of a member, developed a simple three step test for the determination of whether or not documents fall within the scope of “Proceedings in parliament.” The three tests relate to the creation, use and retention of documents for the purposes of or incidental to the transacting of business in a house or a committee.<sup>47</sup>

Secondly, the impact of the tabling of a document in a house of Parliament has been the subject of some recent *obiter dicta* in the case of *Stewart v Ronalds*.<sup>48</sup> In November 2008, allegations of misconduct were made against the Hon. Tony Stewart MP, a NSW minister and member of the Legislative Assembly. At the request of the Premier, Ms Chris Ronalds SC was retained to investigate the allegations. Her report supported the allegations and resulted in the Premier advising the Lieutenant-Governor to withdraw Mr Stewart’s ministerial commissions. Mr Stewart commenced legal proceedings against Ms Ronalds and the State of NSW, alleging he was denied procedural fairness. He asserted the withdrawal was void and sought damages against Ms Ronalds for her part in the process.

A central question in *Stewart v Ronalds* was to determine whether judicial review of Ms Ronalds’ investigation and report contravened parliamentary privilege under Article IX of the *Bill of Rights 1689*. To this end, the Court of Appeal considered whether the report constituted ‘proceedings in Parliament’, and fell within the definition of ‘the preparation of a document for purposes of or

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<sup>46</sup> Gerard Carney, *Members of Parliament: Law and Ethics* (Prospect Media, 2000), p 211.

<sup>47</sup> Legislative Council, Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC No 2*, report No 28, March 2004, p 8.

<sup>48</sup> *Stewart v Ronalds* [2009] NSWCA 277.

incidental to' the transacting of business of the House or a committee under s 16(2)(c) of the *Parliamentary Privileges Act 1987 (Cwth)*. The Court did not make a conclusive ruling, finding that whilst the preparation of a report directed by Parliament or a committee of Parliament, and produced to Parliament or a committee, would clearly be protected by privilege, it is uncertain whether the privilege extends to an inquiry commissioned by the Executive, with the results to be reported to the Executive, and subsequently tabled in Parliament.<sup>49</sup> The matter was not considered further by the courts as Mr Stewart ultimately discontinued proceedings, having reached an agreement with the Premier.<sup>50</sup>

### ***“ought not to be impeached or questioned”***

Although Article IX places restrictions on the use of parliamentary proceedings as evidence in courts or tribunals there is no definition of “impeached or questioned” in the Bill of Rights. There are nevertheless a number of exceptions and areas of controversy regarding the immunity of parliamentary proceedings in courts or tribunals, some of which will be discussed later in this paper under the heading of current issues in other jurisdictions. Of course, it is this area that was to be so controversial in the Murphy decisions and that led to the enactment of the *Parliamentary Privileges Act 1987*, as outlined above.

The key case in interpreting this aspect of Article IX is *Prebble v Television New Zealand*.<sup>51</sup> The case involved a former Minister who had sued a television program for defamation. The defendant argued that the Minister had made misleading statements in Parliament and that the introduction and passage of a particular piece of legislation facilitating the sale of state assets was evidence of a conspiracy. The defendant sought to rely on parliamentary proceedings to support their case. While the Privy Council struck out much of the evidence the defendant was seeking to rely on, it did find that Hansard could be used to prove what the Minister had said in the House on certain days, and that the legislation in question had been passed by the House and received the Royal Assent. Importantly, though, the Privy Council stated that:

[P]arties to litigation, by whomsoever commenced, cannot bring into question anything said or done in the house by suggestion (whether by direct evidence, cross examination, inference or submission) that action or words were inspired by improper motive or were untrue or misleading.<sup>52</sup>

The distinction (drawn by what is known as the historical exception doctrine) was reduced by Kirby J in *Egan* as ‘the right to prove the occurrence of parliamentary events’ on the one hand, and ‘the prohibition on questioning their propriety’ on the other.<sup>53</sup> The rule against the courts questioning the motives of words said or acts done in the House was reaffirmed in *Kable v State of NSW & Anor*,<sup>54</sup> where the Supreme Court of New South Wales refused to allow Hansard

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<sup>49</sup> *Stewart v Ronalds* [2009] NSWCA 277 at 121.

<sup>50</sup> For a more detailed discussion of *Stewart v Ronalds* see Jenelle Moore, “David, Goliath and the stone of judicial review: the shield of parliamentary privilege in *Stewart v Ronalds*,” *Australasian Parliamentary Review*, Spring 2011, Vol. 26(2), 70–86.

<sup>51</sup> [1995] 1 AC 321.

<sup>52</sup> *Ibid* at p337.

<sup>53</sup> (1998) 195 CLR 424 at 490.

<sup>54</sup> [2000] NSWSC 1173.

extracts to be admitted into evidence to show that a particular piece of legislation had been introduced for ‘an improper purpose’, as to do so would contravene Article IX.

Questions have been raised, however, regarding the point of considering an event as a matter of historical fact, if there is no intention of adducing some purpose or meaning into it. Former Clerk of the New Zealand Parliament, David McGee expressed the view that the historical exception doctrine has ‘become a means for litigants to smuggle into their cases parliamentary material whose admission inevitably impeaches freedom of speech in Parliament and to lead the Courts, rather than the Parliament itself, to adjudge the accuracy and motivation of parliamentary contributions.’<sup>55</sup>

The doctrine came into consideration in 2004 by the Queensland Court of Appeal in *Erglis v Buckley*.<sup>56</sup> There the court held, by a 2:1 majority, that the tabling of a letter in Parliament was admissible as evidence in so far as to prove a matter of history. McPherson JA held that the limited purpose for which the plaintiff was relying on the tabling and reading out of the letter in Parliament did not impeach, question or impair parliamentary freedom of speech and debate.<sup>57</sup>

However, in his dissenting judgement, Jerrard JA held that admitting material tabled in parliament into evidence must inevitably call into question proceedings in parliament. Further, he expressed the view that admitting such material could have a detrimental impact on the willingness of citizens to provide information to members of Parliament, with consequences for proceedings in Parliament.<sup>58</sup>

This was the very point made by the Privy Council in *Prebble*, namely that in balancing the needs of litigants against freedom of speech in parliament, the paramount public interest was in ensuring that parliament can exercise its powers freely in the interests of all electors. Further, the Privy Council warned of the “chilling effect” upon parliamentary proceedings if the courts were to allow evidence of those proceedings to be used to question the motives or truth of statements made, that is to be impeached or questioned.

In contrast, it should be noted that section 34 of the *Interpretation Act 1987* (NSW) specifically provides that amongst other things a court may consider when interpreting legislation:

“any relevant report of a committee of Parliament or of either House of Parliament before the provision was enacted or made

the speech made to a House of Parliament by a Minister or other member of Parliament on the occasion of the moving by that Minister or member of a motion that the Bill for the Act be read a second time in that House” and

any relevant material in the Minutes of Proceedings or the Votes and Proceedings of either House of Parliament or in any official record of debates in Parliament or either House of Parliament.”

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<sup>55</sup> David McGee, ‘The scope of parliamentary privilege’, *The New Zealand Law Journal*, March 2004, pp 74-88.

<sup>56</sup> [2004] QCA 223.

<sup>57</sup> *Ibid* at para 19.

<sup>58</sup> *Ibid* at para 33.

### ***“place out of Parliament”***

Article IX prohibits proceedings in parliament from being impeached or questioned ‘in any court or place out of Parliament.’ Whilst the definition of a court is relatively straightforward, what constitutes a ‘place out of Parliament’ has not been defined. The UK Joint Committee on Parliamentary Privilege stated:

To read the phrase as literally meaning anywhere outside of Parliament would be absurd. It would prevent the public and the media from freely discussing and criticising proceedings in Parliament. That cannot be right, and this meaning has never been suggested.<sup>59</sup>

A broader definition of ‘place out of Parliament’ would include government agencies and statutory bodies that are quasi-judicial in nature with the power to compel evidence, such as commissions of inquiry. This is the approach that has been taken at the Commonwealth level under s 16(3) of the *Parliamentary Privileges Act 1987*, which prohibits the impeachment or questioning of parliamentary proceedings in ‘any court or tribunal’. Section 3(1) of the Act defines ‘court’ as ‘a federal court or a court of State or Territory’, and defines ‘tribunal’ as:

[A]ny person or body (other than a House, a committee or a court) *having power to examine witnesses on oath*, including a Royal Commission or other commission of inquiry of the Commonwealth or of a State or Territory having that power (emphasis added).

However, Fitzgerald P in *O’Chee v Rowley* suggested that s 16(3) does not provide an exhaustive definition of ‘place out of Parliament’, and that as such, the phrase in Article IX may be wider than ‘tribunals’.<sup>60</sup>

This view is supported by Carney, who argues that Article IX should not be confined to persons or bodies with the power to examine witnesses on oath.<sup>61</sup> A similar view is expressed by Campbell, who suggests that places out of Parliament could be held to include bodies which do not have the power to require the giving of evidence under oath, but have the power to impose sanctions.<sup>62</sup>

In New South Wales bodies such as the Independent Commission Against Corruption (ICAC) and Police Integrity Commission would likely be regarded as places out of parliament.<sup>63</sup> As Griffith observed, the freedom of speech in Parliament may otherwise be curtailed if such bodies – which have the power to compel evidence and make findings and recommendations which may result in legal proceedings – are permitted to impeach or question parliamentary proceedings.<sup>64</sup>

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<sup>59</sup> Joint Committee on Parliamentary Privilege, *Report: Volume 1 – Report and Proceedings of the Committee*, UK Parliament, Session 1998-99, HL Paper 43 – 1, HC 214-1, p 29.

<sup>60</sup> (1997) 150 ALR 199 at 201.

<sup>61</sup> Gerard Carney, *Members of Parliament: Law and Ethics*, (Prospect, 2000), p 227.

<sup>62</sup> Campbell, *Parliamentary Privilege*, p 20.

<sup>63</sup> Section 122 of the Independent Commission against Corruption Act 1988 specifically provides that “nothing in this Act shall be taken to affect the rights and privileges of Parliament in relation to the freedom of speech, and debates and proceedings, in Parliament.”

<sup>64</sup> Gareth Griffith, *Parliamentary privilege: Major developments and current issues*, NSW Parliamentary Library Research Service, briefing paper no 1/07, pp 81-82.

## Current issues in NSW: probing the boundaries of parliamentary “superintendence of the executive government”

To restate the thesis of this paper: parliamentary privilege is best understood through the lens of the separation of powers between the executive, judicial and legislative (parliamentary) arms of government. Privilege acts both as a shield and sword. It is in respect of the interaction between the parliament and the executive government that privilege is used as a sword, as the parliament utilises its powers to hold the executive government to account. This process has been described by the High Court of Australia in *Egan v Willis* as “superintendence of the conduct of the executive government.”<sup>65</sup> The Court considered arguments that suggested that the responsibility of executive government to parliament was limited to responsibility to the lower house. The Court rejected that argument:

One aspect of responsible government is that Ministers may be members of either House of a bicameral legislature and liable to the scrutiny of that chamber in respect of the conduct of the executive branch of government. Another aspect of responsible government, perhaps the best known, is that the ministry must command the support of the lower House of a bicameral legislature upon confidence motions. The circumstance that Ministers are not members of a chamber in which the fate of administration is determined in this way does not have the consequence that the first aspect of responsible government mentioned above does not apply to them. Nor is it a determinative consideration that the political party or parties, from members of which the administration has been formed, "controls" the lower but not the upper chamber. Rather, there may be much to be said for the view that it is such a state of affairs which assists the attainment of the object of responsible government of which Mill spoke in 1861.<sup>66</sup>

Given that no government has had a majority in the New South Wales Legislative Council since 1988 it is not surprising that the Council has been assertive in the use of its powers to hold successive NSW governments to account. The former Clerk of the Australian Senate, the late Harry Evans, has described the performance of the NSW Legislative Council in:

... attacking executive prerogatives and dragging reluctant governments to account... The Council has reaped the reward of being more courageous than its federal counterpart and, indeed, than any comparable house. It is a world leader in this area: in some respects ahead even of the United States Congress, which has not found a satisfactory solution to claims of executive privilege, except its power to impose political penalties if it dares.<sup>67</sup>

Set out below is a brief account of two mechanisms which illustrate the approach taken by the NSW Legislative Council in using its privileges to hold the executive government to account:

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<sup>65</sup> (1998) 195 CLR 424 per Gaudron, Gummow and Hayne JJ at par 46.

<sup>66</sup> Ibid at par 45.

<sup>67</sup> Harry Evans, “Lively, analytical history of the NSW Parliament,” *Constitutional Law and Policy Review*, (2006) 9(1) CLPR, pp 17-20.



through orders for the production of state papers, and the use of the inquiry power in the face of claims of statutory secrecy.

### ***Orders for papers***

The power of the Council to order the production of state papers was routinely exercised between 1856 and the early 1900s. However, such orders ceased to be a common feature of the operation of the Council during the second decade of the 20th century, with the occasional exception until 1948. During the 1990s the power of the Council to order papers was revived, precipitating a series of decisions referred to as the *Egan* cases.

The *Egan* cases were generated by the refusal of the former Treasurer and Leader of the Government in the Legislative Council, the Hon Michael Egan, to produce certain state papers ordered by the Council. This occurred on a number of occasions, resulting in inquiries by the Privileges Committee, and the House finding Mr Egan in contempt of the House for his failure to comply with the order of the House. Mr Egan was subsequently suspended from the House and escorted from the chamber by the Usher of the Black Rod to Macquarie Street. Mr Egan used this last point as a means of precipitating legal proceedings in the Supreme Court of NSW. In November 1996, in *Egan v Willis and Cabill*, the New South Wales Court of Appeal unanimously held that ‘a power to order the production of state papers ... is reasonably necessary for the proper exercise by the Legislative Council of its functions’.<sup>68</sup>

Mr Egan was granted leave to appeal to the High Court, where the key issue was the power of the Legislative Council to order the production of documents. The High Court in *Egan v Willis* in November 1998, confirmed that it is reasonably necessary for the Council to have the power to order one of its members to produce certain papers. (Gaudron, Gummow and Hayne JJ):

It has been said of the contemporary position in Australia that, whilst ‘the primary role of Parliament is to pass laws, it also has important functions to question and criticise government on behalf of the people’ and that ‘to secure accountability of government activity is the *very* essence of responsible government’.<sup>69</sup>

However, while the High Court in *Egan v Willis* clearly affirmed the power of the Council to order the production of state papers, it did not consider the production of papers subject to a claim of privilege by the executive such as legal professional privilege, or public interest immunity. This was not resolved until the decision in *Egan v Chadwick* in June 1999, where (following the continued refusal of Mr Egan to produce documents in response to orders of the House, this time on the grounds that they were the subject of claims of public interest immunity and legal professional privilege) the New South Wales Court of Appeal held that the Council’s power to require the production of documents, upheld in *Egan v Willis*, extended to documents in respect of which a claim of legal professional privilege or public interest immunity could be made. However, the majority (Spigelman CJ and Meagher JA) did hold that public interest may be harmed if access were given to documents which would conflict with individual or collective ministerial responsibility, such as records of Cabinet deliberations.

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<sup>68</sup> *Egan v Willis and Cabill* (1996) 40 NSWLR 650, per Gleeson CJ at 667.

<sup>69</sup> *Egan v Willis* (1998) 195 CLR424, per Gaudron, Gummow and HayneJJ at 451.

Accordingly, the executive government in New South Wales is required by law to produce to the Legislative Council documents subject to an order for papers notwithstanding any claim of public interest immunity. Since the *Egan* decisions, orders for the production of documents have become common in the Council, with over 300 orders made since 1999. Successive executive governments in New South Wales have routinely complied with such orders, including the production of documents subject to a claim of public interest immunity.

It is also relevant to note that in 2013, following it becoming evident that a certain return to order may not have been fully complied with, the matter was referred to the Legislative Council's Privileges Committee for inquiry and report. Following a robust inquiry into the matter, the committee produced two reports, the recommendations of which have sent a powerful signal to the public service in New South Wales that orders for papers by the Council are significant and must be complied with.<sup>70</sup>

Whilst the power to order the production of documents has been recognised as part of the common law (based on the principle of reasonable necessity), the procedure by which the power is exercised is now set out in Standing Order 52 of the Legislative Council. Hence the often heard reference to orders for the production of documents as "SO 52's." A key feature of the Standing Order is the provisions for dealing with claims of privilege. Documents returned are tabled and made public excepting those subject to a claim of privilege and which are kept confidential and viewable by members of the Legislative Council only. Any member may dispute a claim of privilege, with the President obliged to appoint an independent legal arbiter to consider and report on the validity of the claim. Notwithstanding the report of the arbiter, it is a matter for the House to determine whether or not to in effect adopt the report, although in the overwhelming majority of cases the recommendations made by the arbiter is indeed adopted (if a claim of privilege is not upheld this usually results in the documents the subject of the dispute being tabled and made public). The role of the arbiter has been the subject of some debate and commentary.<sup>71</sup> The most recently appointed arbiter has adopted a process of calling for submissions from interested parties, including in relation to the exercise of his role, resulting in a fresh examination of the role. His reports have therefore included some very interesting observations about the role and how it will be approached in the foreseeable future.<sup>72</sup>

### ***The committee inquiry power***

Another example of the NSW Legislative Council asserting its powers is in the exercise of the inquiry power by its committees. The Clerk Assistant Committees in the Department of the Legislative Council, Ms Beverly Duffy, delivered an excellent paper in 2014 which discusses recent challenges faced by the Legislative Council in exercising the inquiry power to require the provision of information when mere requests have proven unsatisfactory. The instances

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<sup>70</sup> Legislative Council Privileges Committee, Report No. 68: *Possible non-compliance with the 2009 Mt Penny order for papers*, April 2013; and Report No. 69, *The 2009 Mt Penny return to order*, October 2013.

<sup>71</sup> For a critical account see Anne Twomey, "Executive Accountability to the Senate and the NSW Legislative Council," *Australasian Parliamentary Review*, Autumn 2008, Vol 23(1), pp 257-273; and for a response see Lynn Lovelock, "The Power of the New South Wales Legislative Council to Order the Production of State Papers: Revisiting the *Egan* Decisions Ten Years On," *Australasian Parliamentary Review*, Spring 2009, Vol 24(2), pp 197-218.

<sup>72</sup> See for example The Hon Keith Mason AC QC, *Report under Standing Order 52 on Disputed Claim of Privilege: WestConnex Business Case*, 8/8/2014, tabled in the Legislative Council on 13/8/2014, Minutes of Proceedings (LC), p 2658.

discussed cover: orders for the production of documents by committees, statutory secrecy provisions, and the compulsory attendance of witnesses. The paper is available on the NSW Parliament's website so it is not reproduced here.<sup>73</sup> However, in one of those areas there has been a significant development in the months since the paper was delivered: statutory secrecy provisions. This is an issue on which, up until very recently, the NSW Legislative Council and its committees have adopted different viewpoints from successive NSW governments.

The issue arose during a budget estimates inquiry by one of the Legislative Council's General Purpose Standing Committees in 2000 when witnesses from the Casino Control Authority refused to answer questions on the grounds that the provision of the information requested would breach secrecy provisions in the *Casino Control Act*. The then Clerk, at the request of the committee, sought advice from Bret Walker SC. Mr Walker advised that the secrecy provisions did not prevent disclosure to a parliamentary committee as deprivation of the pre-existing powers of such committees to obtain information would have required express provision in the relevant legislation.<sup>74</sup> However, by the time the advice was received a majority of the committee had decided not to press the relevant questions.

As outlined in Duffy's paper, the issue next arose in another budget estimates hearing, this time in 2012, concerning the Police portfolio. Questions were asked about a police strike force which had investigated the possible illegal phone tapping of many police officers some years before, known as Strike Force Emblems. One of the Deputy Commissioners indicated that she could not answer the questions of the committee because to do so would involve a breach of the secrecy provisions in the *Crime Commission Act*. The Committee Chair having informed the witness of the Legislative Council's position that the committee indeed had the power to ask questions despite statutory secrecy provisions, the committee nevertheless resolved to adjourn the line of questioning until a later date, to enable both the committee and the witness to obtain further advice. Once again, the Clerk obtained written advice on behalf of the committee from Bret Walker SC. The advice confirmed his earlier advice and stated that there was nothing specific to the provisions of the *Crime Commission Act 2012* or other relevant legislation that would mean a person who disclosed information to a Legislative Council committee would be in breach of statutory secrecy provisions.<sup>75</sup> However, as in 2000, by the time the committee reconvened a majority of committee members had decided it was no longer desirable to pursue the line of questioning.

At this stage, this issue appeared to have been resolved in the creative manner described in Duffy's paper as follows:

How should committees respond when their efforts to seek information are contested? Some commentators advise against overreaching. For instance, barrister Bret Walker SC would prefer that both sides exercise 'compromise and civilized restraint' ... with as little assistance from the judges as possible'.<sup>76</sup> He counsels Members of Parliament, both

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<sup>73</sup> *Information is power: challenges for committees in the NSW Legislative Council*, paper presented by Beverly Duffy at the 45<sup>th</sup> Presiding Officers & Clerks Conference, Apia, Samoa 30 June – 4 July 2014.

<sup>74</sup> Further detail of this inquiry and the advice provided to the committee by both Bret Walker SC and the then Clerk is set out in Lovelock & Evans, *NSW Legislative Council Practice*, pp 513-516.

<sup>75</sup> Published in GPSC No 4, NSW Legislative Council, *Budget Estimates 2012-2013*, Report 26, November 2012.

<sup>76</sup> Mr Bret Walker SC, Keynote address. Proceedings of the C25 Seminar Marking 25 years of the committee

individually and collectively, to continue to assert their powers, which in the fullness of time will come to be known as the ‘true state of affairs’. In a similar vein, esteemed former clerks, William McKay and Charles Johnson warn committees faced with an uncooperative executive to avoid ‘crises which may not have satisfactory endings’, but to instead find more ingenious ways around the problem.<sup>77</sup>

Two years later, though, in November 2014 a majority of members of the Legislative Council decided that they did want the issues surrounding Strike Force Emblems to be explored and established a select committee to inquire into and report on the matter, and in particular the conduct and progress of the Ombudsman’s inquiry “Operation Prospect,” which had been established in 2012 to investigate the matter. Given the subject matter of the inquiry it was clear that much of the relevant information would be covered by statutory secrecy provisions. The committee resolved to request that the Clerk obtain advice from Bret Walker SC on a number of issues, including the impact of statutory secrecy provisions in the *Ombudsman Act 1974* (including amendments to that Act and related Acts made in 2012). In his advice, Mr Walker confirmed his view of the relevant parliamentary law and statutory interpretation remains the same as it was in 2000 and 2012 and that there is nothing specific to the *Ombudsman Act 1974* that would suggest otherwise:

It remains the case that there are no words or necessary implication to be seen in these statutory provisions that amount to the abrogation by Parliament of this aspect of parliamentary privilege – meaning, in this case, that aspects of the power of the democratic institution to investigate matters in the discharge of its function in our system of responsible government.<sup>78</sup>

During the course of its inquiry the committee subsequently received a large volume of information in submissions and evidence from witnesses that without the protection of parliamentary privilege would breach statutory secrecy provisions. The Ombudsman initially indicated an intention to claim public interest immunity in relation to some evidence to be given. However, he did not in fact make any such claim in response to any line of questioning, although some evidence was taken in camera at his request. A number of other witnesses made express statements to the committee about the advice the committee had obtained and their preparedness on the basis of that advice to proceed to give evidence and answer questions.

The committee concluded in its report, in relation to statutory secrecy:

[We] note the acceptance by the executive and the Ombudsman of the power of the Legislative Council to seek information that would otherwise be covered by statutory secrecy provisions. This inquiry is one of the most significant in any Australian parliamentary jurisdiction in its use of committee powers to obtain evidence under privilege that is subject to statutory secrecy provisions. The Legislative Council will not accept attempts by future state governments and their agencies to hide behind statutory

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system in the Legislative Council, 20 September 2013, p 9.

<sup>77</sup> William McKay and Charles W. Johnson, *Parliament and Congress, Representation & Scrutiny in the twenty-first century*, (Oxford University Press 2010), p 368.

<sup>78</sup> Published in Select Committee on the on the Conduct and Progress of the Ombudsman’s Inquiry “Operation Prospect”, NSW Legislative Council, *The conduct and progress of the Ombudsman's inquiry "Operation Prospect"* (2015).

secrecy when the Council or its committees are seeking to comply with the key role of scrutiny of the executive.<sup>79</sup>

## **Current issues in other jurisdictions: comity with the courts, exclusive cognisance and incursions into the immunities of parliament**

If the relationship between parliament and the executive government involves the use of parliamentary privilege as a sword, the relationship between parliament and the courts involves its use as a shield.

There is also a long-standing principle of comity between the parliament and the courts. This was articulated by the Privy Council in *Prebble*:

[T]he courts and Parliament are both astute to recognize their respective constitutional roles. So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges.<sup>80</sup>

Whilst the scope of the fundamental of the relationship between parliament and the courts was settled in the late nineteenth century and, as outlined above, reaffirmed in *Prebble* there continue to be tests and challenges at the margins as various cases come before the courts. In recent years there have been significant cases in Canada, the United Kingdom and New Zealand that have involved consideration by the courts of the precise scope of proceedings in parliament and those matters within the exclusive cognisance of parliament. Some of these have produced reasonable outcomes, others have caused considerable concern from a parliamentary perspective.

### ***Recent cases touching on the exclusive cognisance of parliament and the scope of proceedings in parliament***

#### ***Canada (House of Commons) v Vaid***

*Canada (House of Commons) v Vaid*<sup>81</sup> concerned the exclusive cognisance of Parliament over its own ‘internal affairs’, in particular, the exclusive jurisdiction over ‘the management of all employees’. The case involved the Speaker’s chauffeur who claimed he had been discriminated against and wrongfully dismissed. Counsel for the House of Commons argued that the hiring and firing of House employees were ‘internal affairs’ which are not subject to judicial review. However, this ‘fundamentalist’ interpretation of the exclusive cognisance doctrine was rejected by the Supreme Court, which instead favoured the ‘test of necessity’. Under that test, the court held that exclusive and unreviewable jurisdiction over all House employees is not necessary to protect the functioning of the Parliament, and that privilege only attaches to the management of parliamentary employees that are directly connected to the legislative and deliberative functions of the House.

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<sup>79</sup> Select Committee on the on the Conduct and Progress of the Ombudsman’s Inquiry “Operation Prospect”, NSW Legislative Council, *The conduct and progress of the Ombudsman's inquiry "Operation Prospect"* (2015), p 5.

<sup>80</sup> [1995] 1 AC 321 at 332 (Lord Browne-Wilkinson).

<sup>81</sup> [2005] 1 SCR 667.

In practical terms what directly emerges from *Vaid* is a distinction between those parliamentary employees whose work is directly connected with Parliament's constitutional functions and those whose work is too remote to be so classified. The former are subject of immunity from external review and are within the exclusive cognisance of the parliament of Canada, while the latter are able to seek redress in the courts or tribunals (including under the Canadian *Human Rights Act*).<sup>82</sup>

### *R v Chaytor*

*R v Chaytor* concerned false claims made by three United Kingdom MPs for costs incurred in the performance of their parliamentary duties. In the wake of the UK expenses scandal three MPs were charged with false accounting offences under the *Theft Act*. They each argued that the criminal courts did not have jurisdiction to try their cases because they were protected by parliamentary privilege. This argument was rejected but appealed to the Supreme Court, where a bench of nine judges unanimously rejected the submission that parliamentary privilege protected them from prosecution. The MPs were subsequently sent for trial, convicted and sentenced to terms of imprisonment of between 16 and 18 months. The Lord Chief Justice concluded that "parliamentary privilege... has never attached to ordinary activities by members of parliament."<sup>83</sup>

The reasoning adopted by the President of the Supreme Court is noteworthy and involves both the nature of the connection of the conduct in question with the core or essential business of parliament and whether there would be an adverse impact on that business if the matter in question did not enjoy the immunity provided by parliamentary privilege:

... freedom of speech and debate in the Houses of parliament and in parliamentary committees [are the principal matters protected by parliamentary privilege]. In considering whether actions outside the Houses and committees fall within parliamentary proceedings because of their connection to them, it is necessary to consider the nature of that connection and whether, if such actions do not enjoy privileges, this is likely to impact adversely on the core or essential business of Parliament.<sup>84</sup>

The approach of the Canadian Supreme Court in *Vaid* and the UK Supreme Court in *Chaytor* was endorsed by the Joint Committee of the UK Parliament on Parliamentary Privilege in 2013.<sup>85</sup> However, it should be noted that because parliamentary privilege in New South Wales is founded upon the principle of "reasonable necessity" and not on the principle of "exclusive cognisance" the application of these cases and their reasoning in any matters that might arise in NSW is very limited.

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<sup>82</sup> Gareth Griffith, *Parliamentary privilege: first principles and recent applications*, NSW Parliamentary Library Research Service, briefing paper 1/09, p 31.

<sup>83</sup> Yvonne Tew, "No longer a privileged few: expenses claims, prosecution and parliamentary privilege," (2011) 70(2) *The Cambridge Law Journal*, 282 quoted in Gareth Griffith, *Parliamentary privilege: the continuing debate*, NSW Parliamentary Library Research Service, background paper 2/2014, p 15.

<sup>84</sup> [2010] UKSC 52, para 47.

<sup>85</sup> House of Lords and House of Commons, Joint Committee on Parliamentary Privilege, *Parliamentary Privilege*, report of Session 2013-14, HC Paper 30 HC 100, pp 8-10.

### ***Problematic New Zealand cases***

Two recent cases in New Zealand have seen a significant disagreement between the parliament and the courts about the scope of parliamentary privilege, eventually leading the New Zealand parliament to enact the *Parliamentary Privilege Act 2014*.

#### *Buchanan v Jennings*

While it is clear that parliamentary privilege does not extend to protect a member who directly repeats outside parliament defamatory statements made in the course of parliamentary debates, it has been less clear if privilege applies where a member merely implicitly affirms a statement made in parliament.

The issue arose in 1995 in *Buchanan v Jennings*<sup>86</sup> when a member of the New Zealand Parliament, Mr Jennings MP, made defamatory allegations of Mr Buchanan during parliamentary debate. When questioned afterward by a journalist, Mr Jennings did not directly repeat the allegations. However he did indicate that he “did not resile” from what he said in the House. Mr Buchanan commenced proceedings and succeeded, both in the New Zealand High Court and the Court of Appeal. It then went to the Privy Council, which upheld the earlier rulings.

The *Buchanan v Jennings* judgments were highly controversial, and resulted in the Privileges Committee of the New Zealand Parliament immediately commencing an inquiry into the question of privilege arising from the case.<sup>87</sup> The committee recommended that the law be changed to provide that no person may be liable for effectively repeating words written or spoken in proceedings in Parliament. The Parliament agreed, and specifically addressed effective repetition in the *Parliamentary Privileges Act 2014* (NZ) by indicating that it is an occasion of absolute privilege.<sup>88</sup>

At the Commonwealth level in Australia, section 16(3)(b) of the *Parliamentary Privileges Act* would seemingly prevent such an issue arising, as a member’s statements outside Parliament cannot be shown to be motivated by malice by reference to a member’s statements in Parliament.

#### *Attorney General and Gow v Leigh*

*Attorney General and Gow v Leigh*<sup>89</sup> (hereafter referred to as *Gow*) was another action for defamation. In this case a former public servant (Leigh) sued the former Deputy Secretary of the ministry in which she had worked (Gow) for defaming her in an oral briefing and written briefing note prepared for the relevant minister to enable the minister to respond to questions being raised in parliament about the circumstances surrounding her resignation.

The Supreme Court in *Gow* ruled that a briefing given by a civil servant to a Minister for the purposes of replying to a question in the House was not a parliamentary proceeding and that as such, the statements could be considered by the court as they were not protected by absolute

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<sup>86</sup> [2005] 1 AC 115.

<sup>87</sup> Privileges Committee, *Question of privilege referred 21 July 1998 concerning Buchanan v Jennings*, New Zealand House of Representatives, 31 May 2005.

<sup>88</sup> *Parliamentary Privileges Act 2014* (NZ), s 17.

<sup>89</sup> [2011] NZSC 106.

privilege. In reaching its decision, the court rejected the submission of counsel for the Speaker of the New Zealand Parliament that the test of whether the material was privileged was whether it was ‘reasonably incidental’ to the discharge of the business of the House, drawing on s 16(2) of the Commonwealth *Parliamentary Privileges Act*.

The test preferred by the New Zealand Supreme Court was whether it was ‘necessary for the proper and efficient functioning of the House of Representatives that the occasion on which Mr Gow communicated with the Minister be regarded as an occasion of absolute privilege.’<sup>90</sup> The ‘necessary connection’ test was formulated by the UK Joint Committee on Parliamentary Privilege in 1999 for determining matters within the exclusive cognisance of the UK Parliament. It was later elevated to a ‘doctrine of necessity’ by the Supreme Court of Canada in *Canada (House of Commons) v Vaid*.<sup>91</sup> However, the decision in *Gow* to reject ‘reasonable incidentality’ in favour of ‘necessary connection’ was considerably controversial in New Zealand as it ‘appeared to represent a significant shift in the interpretation by the courts of the privileges, powers, and immunities essential to the effective functioning of Parliament.’<sup>92</sup> Concerns were also raised about the potential ‘chilling effect’ of the decision on advice given by public servants to ministers.

#### *New Zealand Privileges Act 2014*

In response to the ruling in *Gow*, in 2014 the New Zealand Parliament enacted its own privileges legislation. ‘Proceedings in Parliament’ is defined in section 10, with subsections (1) and (2) largely mirroring s 16(2) of the Commonwealth legislation:

- (1) Proceedings in Parliament, for the purposes of Article 9 of the Bill of Rights 1688 [sic], and for the purposes of this Act, means 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.
- (2) The definition in subsection (1) must be taken to include the following:
  - (a) the giving of evidence (and the evidence so given) before the House or a committee
  - (b) the presentation or submission of a document to the House or a committee
  - (c) the preparation of a document for purposes of or incidental to the transacting of any business of the House or of a committee
  - (d) the formulation, making, or communication of a document, under the House’s or a committee’s authority (and the document so formulated, made, or communicated)
  - (e) any proceedings deemed by an enactment to be (or a thing said or produced, or information supplied, in an inquiry or proceedings, if an enactment provides the thing or information is privileged in the same way as if the inquiry or proceedings were) for those purposes proceedings in Parliament.
- (3) 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, words spoken or acts done for purposes of or incidental to the transacting

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<sup>90</sup> [2011] NZSC 106 at para 8.

<sup>91</sup> [2005] 1 SCR 667.

<sup>92</sup> Privileges Committee, New Zealand House of Representatives, *Question of privilege concerning the defamation action Attorney-General and Gow v Leigh* (2013), p 7.



of reasonably apprehended business of the House or of a committee must be taken to fall within subsection (1).

Subsection (4) expressly rejects any test based on necessity, and subsection (7) rejects any contrary law – including in particular anything arising from the decision in *Gow*:

(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.

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(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)).

### ***Judicial review of administrative decisions***

Another area of concern has been in relation to judicial review of administrative decisions. This issue arose in *Toussaint v Attorney General of St Vincent and the Grenadines*.<sup>93</sup> Mr Toussaint was a former Police Commissioner in St Vincent. In 1990 he had purchased a parcel of land from a government agency. In 2002, following a change in Government a demand was made that he pay a further, significantly larger sum for the land. There was a suggestion that he had previously obtained the land for below market value due to his relationship with the previous government. Mr Toussaint refused to pay the additional fee. The new Prime Minister announced in parliament, in a televised debate, that the land was to be compulsorily acquired for educational purposes. Mr Toussaint sought judicial review of the government's decision to compulsorily acquire his property and sought to rely on the statement of the Prime Minister in parliament as a statement of the true, and his view "political," reasons for the action.<sup>94</sup>

The Privy Council held that the statement could be relied on as a record of what was said as to the reasons for acquisition, although it would not be permissible to impugn the statement itself. It also upheld that Mr Toussaint's right of access to the courts would be unduly undermined if he could not rely on the statement.

As noted by Griffith, the case 'raised the accountability of the Executive to Parliament, as well as its accountability to the rule of law by means of judicial review.' It appeared to signal a shift away from the primacy of freedom of speech in Parliament to concern for the greater public interest, in the accountability of the executive government, whether it be to parliament or to the courts by way of judicial review.

Lord Mance in *Toussaint* observed that it 'would be an ironic consequence of article 9' if the courts could not examine the legality of executive decisions in Parliament, commenting:

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<sup>93</sup> [2007] 1 WLR 2825.

<sup>94</sup> Gareth Griffith, *Parliamentary privilege: first principles and recent applications*, Briefing paper no 1/09, p 19.

Intended to protect the integrity of the legislature from the executive and the courts, article 9 would become a source of protection of the executive from the courts.<sup>95</sup>

The Privy Council referred to the 1999 First Report of the UK Joint Committee on Parliamentary Privilege, which supported the use of ministerial statements in judicial review. The Joint Committee noted:

The development represents a further respect in which acts of the executive are subject to a proper degree of control. It does not replace or lessen in any way ministerial accountability to Parliament ... Parliament must retain the right to legislate and take political decisions, but only the courts can set aside an unlawful ministerial decision.<sup>96</sup>

However, it is important to note that the evolving case law on the scope of the application of Article IX, such as that in *Tousaint*, have been considered anomalies. Following recent cases in the UK, the Lord Chief Justice asserted that it is vital to recognise such anomalies as mistakes, rather than treating them as a challenge to Parliament.<sup>97</sup> Even so, the 2013 report of the UK Joint Committee noted that there is a risk that, even if such mistakes are acknowledged, and do not establish a precedent, 'their frequency in judicial review cases risks having a chilling effect upon parliamentary free speech'.<sup>98</sup>

## Conclusion and implications for legal practice

Parliamentary privilege is a fascinating and important subject. Any lawyer hoping to make parliamentary privilege a key feature of their practice will, however, find the amount of work available in this area very sparse. That is a consequence of the determination of most key players from the three arms of government, and particularly from the parliamentary perspective, to keep these sorts of matters out of the courts as far as possible. After all, the outcomes when matters do get to the courts are not always predictable and, as the recent New Zealand experience demonstrates, can be unsatisfactory from a parliamentary perspective.

For those occasions when the issue of parliamentary privilege does arise, however, a number of salient points are worth remembering. Firstly, parliamentary privilege is essential for the effective operation of the system of representative and responsible government in a liberal democracy. Without the powers recognised at law as reasonably necessary to enable them to legislate and particularly to hold the executive government to account parliaments would be ineffectual. Judicious use of these important powers enables parliament to shine a light into areas of government administration and to explore difficult public policy issues in a unique and powerful way. Without the immunities recognised in the common law and statutorily recognised in Article IX of the *Bill of Rights*, particularly freedom of speech in debate and other proceedings, parliaments would be no different to any other debating forum. While parliamentary privilege may sometimes seem to have a negative impact upon the ability of a litigant to put their case fully

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<sup>95</sup> [2007] 1 WLR at para 17.

<sup>96</sup> Joint Committee on Parliamentary Privilege, *Report: Volume 1 – Report and Proceedings of the Committee*, UK Parliament, Session 1998-99, HL Paper 43 – 1, HC 214-1, Chapter 2 para 50

<sup>97</sup> 2013 UK Joint Committee Report on Parliamentary Privilege, para 135.

<sup>98</sup> 2013 UK Joint Committee Report on Parliamentary Privilege, para 135.

to the courts, it is itself recognised as part of the rule of law. Parliamentary privilege is to be respected and protected, even when it might be frustrating.

Secondly, parliamentary privilege is best understood in the context of the separation of powers between the executive, the judiciary and the legislative arms of government. As a sword, parliamentary privilege enables the parliament to effectively hold the executive government to account. As a shield, parliamentary privilege prevents unnecessary incursions by the courts into proceedings in parliament. Each of these relationships involves inevitable tensions and scope for occasional great constitutional conflicts. For the most part the relationships are marked by comity and mutual respect, particularly the relationship between parliament and the courts. Any legal practitioner who finds themselves engaged to provide advice or counsel in a matter involving parliamentary privilege is well advised, while vigorously prosecuting the case of their client, to be cognisant of the broad sweep of the history of the development of parliamentary privilege, the key features of the general settlements between the parliament and the courts, and the importance of maintaining comity in the relationship between these two arms of government.

These can be delicate matters. Ultimately what is at stake in cases concerning parliamentary privilege is the relationship between the three arms of government. Returning to Fukuyama's account of the three key elements to a successfully functioning liberal democracy, parliamentary privilege enables parliament to perform its roles. Parliamentary privilege is recognised and embedded in the rule of law and enables the parliament and the courts to perform their respective roles. Furthermore it enables the legislature to hold the executive government to account and, whilst this might not always be appreciated by executive governments, it ultimately assists executive governments to be more effective.