

David, Goliath and the stone of judicial review: the shield of parliamentary privilege in *Stewart v Ronalds*

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Introduction

In November 2008, allegations of misconduct were made against the Hon. Tony Stewart MP, a NSW minister and MLA. 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. In media interviews, Stewart likened the proceedings to 'David versus Goliath'.¹

A central question in *Stewart v Ronalds*² was to determine whether judicial review of Ms Ronalds' investigation and report (herein 'the Ronalds Report') contravened parliamentary privilege under Article 9 of the *Bill of Rights 1688*. 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 incidental to' the transacting of business of the House or a committee under s 16(2)(c) of the *Parliamentary Privileges Act 1987 (Cth)*. Although Mr Stewart ultimately discontinued legal proceedings, having reached an agreement with the Premier, this question is of particular significance as few privilege related issues are litigated and the application of the provisions of Article 9 has been widely contested.³ Whilst the Court did not make a conclusive ruling, it did discuss the matter at some length and the observations made go some way toward providing guidance as to the scope of 'proceedings in Parliament'.

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What is parliamentary privilege?

The term ‘parliamentary privilege’ refers to the powers and immunities possessed by individual houses of parliament, their members, and other participants in parliamentary proceedings, without which they could not perform their functions. Unlike other Australian jurisdictions, there is no principal statute in NSW which defines the powers and privileges of parliament. Instead, the powers and immunities of parliament rely on the common law principle of ‘reasonable necessity’, together with certain statutory provisions⁴, including the adoption of Article 9 of the *Bill of Rights 1688*, which provides:

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

The protections afforded to debates and proceedings in parliament under Article 9 apply by virtue of section 6 and Schedule 2 of the *Imperial Acts Application Act 1969 (NSW)*. It must be noted that the use of the term ‘proceedings in Parliament’ in Article 9 is a widely contested concept, and strikes at the heart of any debate surrounding parliamentary privilege. The scope of this debate, and its relevance to the case of *Stewart v Ronalds*, is dealt with later. The purpose of the immunity provided by Article 9 was highlighted in *Prebble v New Zealand Television Ltd*, in which the Judicial Committee of the Privy Council observed that, in addition to according participants in parliamentary proceedings immunity from liability for statements made by them in the course of those proceedings, the provisions of Article 9 also ensure that:

...parties to litigation, by whomsoever commenced, cannot bring into question anything said or done in the House by suggesting (whether by direct evidence, cross examination, inference or submission) that the action or words were inspired by improper motives or were untrue or misleading.⁵

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).⁶ The immunity provided under Article 9, therefore, operates as a safeguard of the separation of powers and the sovereignty of parliament, in that it prevents the other two branches of government, the executive and the judiciary, calling into question or inquiring into the proceedings of the legislature.⁷ Indeed, the UK Joint Committee on Parliamentary Privilege has described the freedom of speech and debate enshrined in Article 9 as ‘the single most important privilege.’⁸ However, although the immunities provided under Article 9 are fundamental to enabling the parliament to perform its functions, it has been firmly established that the courts must 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.⁹

Despite struggle between the houses of parliaments and the courts in this regard,¹⁰ mutual respect and understanding of the rights, privileges and constitutional functions of the two has been achieved by an adherence to the broad rule observed by Dixon J in *R v Richards; Ex parte Fitzgerald and Browne*:

...it 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.¹¹

To this end, in *Stewart v Ronalds*, it was the role of the court to determine if privilege attached to the Ronalds Report. If so, the report would invoke the protections of Article 9, and render it inadmissible for the purposes of questioning its compilation, contents or accuracy, such matters instead being the prerogative of parliament.

'Proceedings in 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 9 — in other words, for the matter to be protected from being 'impeached or questioned in any court or place out of parliament', it must be demonstrably 'proceedings in parliament'.¹² However, whilst the broad privilege over freedom of speech and debate within the house and its committees has been universally accepted within the westminster system, uncertainty remains as to what, exactly, can be defined as 'proceedings in parliament'.¹³ While interpretation has developed through codification in statute, case law and the practices and conventions of parliament over time, no comprehensive definition has been determined either by a house of parliament or by judicial decision.¹⁴ For this reason, definitions of 'proceedings in parliament' fall within a broad continuum which, simply put, extends from widely accepted 'black' areas to widely contested 'grey' areas.

The following section will seek to situate the various definitions of 'proceedings in parliament' within this continuum, starting first with that established by the Commonwealth *Parliamentary Privileges Act 1987*.

The Commonwealth act

At the commonwealth level, the operation of parliamentary privilege has been codified in the *Parliamentary Privileges Act 1987*, passed under the legislative power of s 49 of the *Australian Constitution* to enact the traditional interpretation of Article 9. Section 16 of the act was expressly enacted to make statutory declaration of the formerly established scope of freedom of speech.¹⁵ In particular, section 16(2) provides a more extensive definition of the scope of the term 'proceedings in parliament':

- (2) For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, *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, and, without limiting the generality of the foregoing, includes:
- (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.

Although opinion has been divided as to whether a statutory definition of ‘proceedings in parliament’ is desirable, the validity of s 16 has withstood challenge in the courts and the definition contained therein has been found to be a direct codification of the provision of Article 9.¹⁶ Identical definitions have since been incorporated substantially into the statute of other states,¹⁷ and the UK Joint Committee on Parliamentary Privilege has also recommended that a similar definition be adopted by the westminster parliament.¹⁸ For this reason, consideration of the commonwealth act, and the manner in which it has been interpreted, has assisted in clarifying the scope of ‘proceedings in Parliament’, however, it is by no means definitive. It is also broad — it not only includes ‘words spoken and acts done in the course of’ transacting business of the House, but also ‘words spoken and acts done *for the purposes of or incidental to*’ such business.

This breadth indicates the scope of the continuum referred to above, much like the diagram below:

Diagram 1: A continuum of definitions of ‘proceedings in Parliament’



Words spoken or acts done in the course of business of the House or its committees

Words spoken or acts done for the purposes of or incidental to business of the House or its committees

At one end of the continuum lies the ‘black’ area, matters that can clearly be identified as falling within the scope of ‘words spoken or acts done in the course of... the transacting of the business of a House or of a committee’ under s 16(2) of the Commonwealth Act. These are matters upon which there is universal and longstanding agreement, from the parliamentary authority of *Erskine May*, through to *Odgers* and modern-day commentators such as Campbell, Carney and the UK Joint Committee on Parliamentary Privilege.¹⁹ These matters include words spoken in debate, motions (notice given and motions moved), questions, answers, votes,

proceedings in parliamentary committees (including evidence given), petitions presented and words spoken and acts done in the tabling of documents in the House. The other end of the continuum, comprising ‘words spoken or acts done... for the purposes of or incidental to the transacting of the business of the House or of a committee’, is grey, and increasingly so, not because these matters are not covered by privilege, but rather because there is great difference in opinion as to which matters exactly fit within this definition. This is arguably the predominant area and the most widely contested, on which there is scant, consistent authority at common law.²⁰ For this reason, the meaning and scope of section 16(2) is a matter that has come before the consideration of the Courts on a number of occasions, and authority in this area relies heavily upon case law and judicial interpretation.

In *Stewart v Ronalds*, the arguments submitted by the defence fell squarely within the broader definition of ‘proceedings in parliament’, being for ‘the purpose of or incidental to’.

Stewart v Ronalds

On 22 October 2008, Tony Stewart, attended a fund raising dinner accompanied by one of his policy advisors, Tina Sanger. (Whilst the reported decision itself does not elaborate as to details, in the week following the dinner, newspapers reported allegations that, at some point during the dinner, Mr Stewart had verbally abused Ms Sanger regarding the quality of the speech she had written for him, and touched her leg, holding her so that she could not move from her seat during the exchange.²¹) On 3 November, Ms Sanger lodged a complaint of misconduct against Mr Stewart with the Department of the Premier and Cabinet (hereafter ‘the Department’), distilled by the court as comprising three elements: allegations of rude and dismissive behaviour; allegations of bullying, in the presence of others; and an allegation of assault — that Mr Stewart had placed his hand on Ms Sanger’s leg and pushed down on it to keep her seated as she tried to stand up.²² The following day the Director General of the Department, on the Premier’s request, retained Ms Chris Ronalds SC to investigate the allegations made against Mr Stewart.²³ In a letter to Ms Ronalds, he expressly stated that:

Your findings will be used for two purposes. First, they will inform the Premier’s decisions as to whether the Minister has told him the truth about relevant events at the charity dinner and therefore as to whether the Minister should remain in the Ministry. Second, they will constitute the findings of fact for the purposes of DPC handling Ms Sanger’s complaint.²⁴

Ms Ronalds was further informed that her report should be ‘in a form suitable for tabling in Parliament’.²⁵ Chris Ronalds provided her report to the Department on 10 November 2008. The report accepted Ms Sanger’s version of events and found that both the conversation Mr Stewart had engaged in with Ms Sanger and the physical touching of her leg were inappropriate, causing distress and humiliation, and restraining her, albeit for a few seconds only, against her will.²⁶ The next day, the

Premier, having accepted the findings, wrote to the Lieutenant-Governor²⁷ to request the immediate withdrawal of Mr Stewart's ministerial commissions and his membership of the Executive Council.²⁸ Later that day the premier provided Mr Stewart with a copy of the report (to read only)²⁹, prior to it being tabled in parliament.³⁰ Shortly after, Mr Stewart made a personal explanation in relation to the complaint against him and the findings of the report, during which he stated that the premier had requested he resign from his position as minister (before he had been forcibly removed), but he had:

refused to do so on the basis that I firmly believe that the report commissioned by the Premier, undertaken by Ms Chris Ronalds, SC, is a denial of natural justice and due process has not been followed.³¹

In early 2009, Mr Stewart commenced proceedings in the Supreme Court alleging denial of procedural fairness in the process that led to the advice of the premier to the Lieutenant-Governor to withdraw his commissions.³² He also sought damages against Ms Ronalds for her part in the process in the withdrawal of his commissions. Ms Ronalds was named as the first defendant and the State of NSW as the second. As both were jointly represented by the same legal counsel, arguments by their counsel are referred to in what follows as submitted 'for the defendants'.

In May, proceedings were transferred to the Court of Appeal to determine the questions of the case, distilled by the court as: (1) whether the decisions of Ms Ronalds, the Premier and the Lieutenant-Governor could be subject to judicial review?; (2) If so, was Mr Stewart owed a duty of natural justice by Ms Ronalds, the Premier or the Lieutenant-Governor?; (3) Did Ms Ronalds owe the plaintiff a duty of care at common law?; and, (4) Do the claims impermissibly seek to call into question the contents of the report of the first defendant in a manner inconsistent with parliamentary privilege and Article 9 of the Bill of Rights 1688?³³ On 4 September 2009, the court answered in the negative to questions (1) and (2) insofar as they related to the premier and the Lieutenant-Governor. The court ruled that the appointment and composition of the executive is a quintessentially political process, made at the pleasure of the Governor (albeit on the advice of the premier).³⁴ Therefore, the decisions of the premier and the Lieutenant-Governor were not subject to judicial review, and no duty of natural justice was owed to Mr Stewart. The court refrained from findings insofar as the questions related to Ms Ronalds.³⁵

The court further answered in the negative with regard to question (3), stating that any duty of care Ms Ronalds might owe to Mr Stewart at common law was precluded by the brevity of the task bestowed on her and the public interest in having the investigation conducted conscientiously, without inhibition from concern about possible repercussions to herself.³⁶ Finally, the Court refrained from making a conclusive ruling as to question (4), having reasoned that Ms Sanger may wish to put submissions on the topic in any subsequent legal action, and that it was 'unnecessary to deal with the matter to dispose of the questions concerning the

Lieutenant-Governor and the Premier and the question of duty of care'.³⁷ Instead, although the Court expressed scepticism as to the arguments put forward by the defendants in support of their claim, it concluded only that it was reluctant to come to a final position as to whether consideration of the report would contravene parliamentary privilege under Article 9, observing 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 result to be reported to the Executive, and subsequently tabled in Parliament.³⁸

However, the observations of Hodgson JA went a step further towards taking a position and refuting the claim of privilege. Though expressing himself tentatively, he stated that:

...it seems arguable to me that this role of Parliament is not itself business of Parliament or a committee of Parliament, and that the tabling of a report prepared at the request of the Executive and provided to the Executive for the purposes of the Executive is not itself Parliamentary business that makes the report itself immune to criticism in the courts.³⁹

Hodgson concluded that

...if s 16(2)(c) were to be otherwise construed, it would not reflect the general law and would be irrelevant to the position in relation to the New South Wales Parliament.⁴⁰

The judgement left Ms Ronalds open to further legal proceedings by Mr Stewart. Following prolonged media speculation as to whether Mr Stewart would indeed continue his case, on 21 October, almost two months after the judgement, Mr Stewart made an announcement that he had discontinued all legal proceedings after reaching an agreement with the then premier, Nathan Rees and the state's legal counsel.⁴¹ Despite the conclusion of legal proceedings, the observations made do add to the case law pertaining to the scope of 'proceedings in Parliament'. For this reason, the case is worthy of further reflection and discussion.

The case put by the defendants

Arguments submitted by counsel for the defendants hinged upon the broader definition of 'proceedings in parliament' found in s16(2)(c) of the commonwealth act, stating that the report of Ms Ronald's investigation constituted 'the preparation of a document for purposes of or incidental to the transacting of' business of the House. The relevant business, it was argued, was

...the Legislative Assembly's role in holding the Executive to account and overseeing its activities and composition, having regard to the need of the Executive to maintain the confidence of the Legislative Assembly.⁴²

This refers to the operation of the doctrine of responsible government that operates in NSW, under which the executive — cabinet and the ministry — is drawn from the parliament and owes its primary responsibility to parliament, and through parliament to the electorate.⁴³ Government is made in the legislative assembly, and it is the role of both houses to, in the words of Mill, ‘watch and control the government: to throw the light of publicity on its acts’.⁴⁴ This also strikes at the heart of the doctrine of the separation of powers — that it is the role of the parliament, not the courts, to hold the executive to account. The defendants were, in essence, arguing that because it is the business of the parliament to hold the executive to account, and the Ronalds Report had been commissioned for the purposes of reporting on the activities and composition of the executive, the report had been prepared for the purposes of transacting the business of the house.

The second component of the argument related to the subject matter of the report. It was submitted for the defendants that the tabling of the report in parliament must constitute a proceeding in parliament ‘because the report related not just to any business of the Executive, but to the constitution of the Executive itself’.⁴⁵ This argument again relates to the accountability of the executive to parliament, but also brings into the argument the issue of the tabling of the document in the legislative assembly.

In essence, then, the arguments submitted for the defendants in support of the claim for privilege over the Ronalds Report hinge upon three substantive issues: the scope of the immunity attaching to a document tabled in the house⁴⁶; the purpose for which, and authority upon which, the Ronalds Report was prepared⁴⁷; and, whether a document, the subject matter of which pertains to the actions and constitution of the Executive, constitutes ‘proceedings in parliament’.⁴⁸

The tabling of the Ronalds Report

As noted, it is widely accepted that matters falling within the formal transaction of debates and proceedings in Parliament fall within the ‘black’ area of parliamentary privilege, being ‘words spoken or acts done in the course of...transacting of the business of the House’ under s 16(2) of the Commonwealth Act. It is clear, then, that when the parliamentary secretary tabled the report in the assembly, his words spoken and actions taken in tabling the report, and in ordering the report to be printed the next day,⁴⁹ arguably fell within the formal transaction of business of the house and are, therefore, protected from questioning or impeachment in the courts. However, the Ronalds Report had been circulated elsewhere prior to it being tabled and had already been used to inform the premier and the lieutenant-governor as to the withdrawal of Mr Stewart’s ministerial commissions earlier that day. The mere act of tabling does not grant immunity to all existing copies of the document or the information within for all intents and purposes. There is good reason for this — as Campbell observes, a regime under which members of parliament have a facility to table documents more or less at will, and by the mere act endow such documents

with a privileged status, is clearly open to abuse.⁵⁰ Campbell cites the example of a case considered by the senate's Committee of Privileges in 1997, in which the committee found that the mere act of a senator tabling documents provided to him by a university lecturer, containing allegedly false accusations against his fellow staff members, attracted absolute privilege to the documents. The committee concluded that when the university took action against the lecturer for publicising the allegations, as a direct consequence of his communication with the senator, it had committed a contempt of the senate.⁵¹ In *Stewart v Ronalds*, although the Court did not discuss this issue at any great length, it did observe that the report did not fall within the parameters of formal proceedings protected by parliamentary privilege.⁵²

For what purpose was the Ronalds Report prepared?

Although very few cases have sought to determine the scope of privilege attaching to documents that have been prepared or used 'for the purposes of or incidental to' business of the house, against which the facts of the *Stewart* case can be weighed, the most illustrative amongst existing case law is that of *O'Chee v Rowley*.⁵³ The case involved an appeal against an order of the Supreme Court of Queensland, requiring a senator who was the subject of defamation proceedings to produce certain documents for inspection. In appealing against the order, the senator claimed that the documents in question were 'created, prepared, brought into existence or came into my possession for the purposes of or incidental to' the transacting of business of the senate, and were therefore immune under the commonwealth act and Article 9.⁵⁴ In his consideration of the case, McPherson JA acknowledged the 'extended' meaning ascribed to Article 9 as a result of the formulation of s 16(2) of the Commonwealth Act, observing that Article 9 is now capable of being reproduced either as:

That [...acts done...for purposes of or incidental to, the transaction of the business of a House] ought not to be impeached or questioned in any court... out of Parliament.

or, having grafted the provisions of s 16(2)(c), as

[the preparation of a document for purposes of or incidental to the transacting of any... business] (of a House) shall not be impeached or questioned in any court... out of Parliament.⁵⁵

The breadth of interpretation this provides goes some way towards explaining the disparity in definitions of the scope of the immunities provided by Article 9.

In his judgement on the appeal, McPherson JA found that documents brought into existence *for the purpose of transacting business of the House* (including collecting, assembling, or coming into possession of them) could be rendered 'proceedings in Parliament'.⁵⁶ It therefore followed that, if the senator were to produce the documents concerned, it would not only hinder or impede the transacting of business of the senate, but also potentially deter the senator and other parliamentarians from

preparing or collecting information for future debates and questions in the house. McPherson JA concluded that ‘that is a state of affairs which, I am persuaded, both the Bill of Rights and the Act of 1987 are intended to prevent’.⁵⁷ Crucially, the court was also of the view that section 16(2)(c), which refers to the ‘preparation of a document for purposes of or incidental to the transacting of business’ — the section also cited in *Stewart v Ronalds* — covered documents supplied to members by non-members, but only where the member had chosen to retain the documents for the purpose of transacting parliamentary business.

This sentiment was similarly supported in the case of *Szwarcbord v Gallop*⁵⁸, which also provided a much clearer application of the extent to which absolute privilege attached to a document that had subsequently been tabled in the House, a factor of particular relevance to *Stewart v Ronalds*. In *Szwarcbord*, the plaintiffs were seeking declaratory relief in relation to findings and recommendations made in a report of a Board of Inquiry (which had been authorised under the *Inquiries Act 1991 (ACT)*). In support of their claim, the plaintiffs sought to tender a copy of the Board’s report. Arguing against this, counsel for the Speaker of the ACT Legislative Assembly, who appeared as *amicus curiae*⁵⁹, submitted that a copy of a report that had been tabled in parliament could not be tendered to the court as evidence in legal proceedings as the report attracted parliamentary privilege, having been originally retained for the purpose of being tabled by a minister in parliament.⁶⁰ However, the plaintiffs countered that the report had been neither commissioned nor prepared for the purpose of tabling in parliament, having been commissioned for the purpose of informing the chief minister and the executive. Such a purpose did not meet the definitions of s 16 (2) of the *Parliamentary Privileges Act 1987 (Cth)*, even if the report was subsequently tabled.⁶¹ Crispin J agreed, ruling that the report had not been *prepared for the purpose of transacting business in Parliament* under s 16(2) of the commonwealth act, having instead been prepared in fulfilment of a statutory duty. The document had therefore come into existence independently of proceedings in parliament, and was not protected by parliamentary privilege. Although privilege may be attracted by the retention of a document for a relevant purpose under s 16(2)(c):

...that is because the retention for such purpose is itself an act forming part of the proceedings. The privilege thereby created does not attach to the document and any copies for all purposes.⁶²

Crispin J was also careful to specify that

privilege may not prevent even documents that have been tabled from being admitted into evidence if they were not prepared for purposes of or incidental to business of the parliament and their subsequent production would not reveal words used or acts done that might fairly be regarded as falling within the concept of ‘proceedings in Parliament’.⁶³

In support of this, the example was given of a member of parliament sued for defamation in respect of the publication of a letter for purposes unrelated to parliamentary business. Crispin J states that the member could not effectively

prevent the maintenance of the proceedings against him by the simple expedient of tabling the only copy of the offending letter. A similar sentiment is echoed in *Odgers*.⁶⁴

Similarly, Carney makes the point that, in cases where the courts have rejected a claim of parliamentary privilege over particular documents under Article 9, the documents in question lacked this necessary connection to proceedings in parliament, or at least to the functions of members in the performance of their parliamentary duties. The cases of *R v Rule* (the subject of which was a letter of complaint to a member of the UK House of Commons which sought representations to be made to a minister about the conduct of a police officer and a justice of the peace) and *Rivlin v Bilainkin* (letters to members defamatory of the correspondent's wife, and demonstrably not connected with proceedings) are cited in support of this.⁶⁵

These decisions, then, provide guidance in the case of *Stewart v Ronalds*. First, the Ronalds Report would be covered by privilege if it could be demonstrated to have been prepared for the specific purpose of tabling in the house. Secondly, the report would be covered by privilege if it could be demonstrated to have been prepared, used or retained for the purposes of (or incidental to) transacting of *other* business of the house. Finally, the mere tabling of the report would not attract privilege over any and all copies of the report and its contents if the first or second test, demonstrating the report's relationship to the business of the House, could not be proven in the positive.

In relation to this first test, it is relevant that in his letter to Ms Ronalds, the head of the Department of Premier and Cabinet stated that he would 'appreciate receiving your report in a form suitable for tabling in Parliament'.⁶⁶ However, Ms Ronalds was specifically informed that:

Your findings will be used for two purposes. First, they will inform the Premier's decisions as to whether the Minister has told him the truth about relevant events at the charity dinner and therefore as to whether the Minister should remain in the Ministry. Second, they will constitute the findings of fact for the purposes of DPC handling Ms Sanger's complaint.⁶⁷

Whilst the tabling of the investigation's findings is certainly a possible, or even *likely* outcome, it does not appear to be its principal purpose. It is also worthwhile to note that Ms Ronalds was explicitly retained on the authority of the head of the department, not a member of parliament, or on the order of the house itself. Whilst the immunity attaching to the preparation or publication of a report pursuant to an order of the house or its committees would have extended to Ms Ronalds if her report had been prepared or published in accordance with an order of the house,⁶⁸ the authority for the report can be clearly demonstrated to have come from the department. The report, therefore, appears to fail this first 'test', as it was not prepared for the purpose of tabling in the house.

This then leaves the second test. In terms of the argument for the defendants, counsel submitted that the relevant business for which the report was prepared was:

...the Legislative Assembly's role in holding the Executive to account and overseeing its activities and composition, having regard to the need of the Executive to maintain the confidence of the Legislative Assembly.⁶⁹

The defendants also stressed that 'the report related not just to any business of the Executive, but to the constitution of the Executive itself'.⁷⁰ In response, the court expressed scepticism as to whether documents used by the executive to regulate its own business could be deemed to be business of the house simply by virtue of the fact that one of the functions of the legislative assembly is to scrutinise the executive. In order to determine whether the report was prepared for the purpose of transacting business of the house, it is necessary to first determine whether the business of the executive in managing its own affairs is itself business of the house.

Is the business of the executive sufficiently connected to the business of the house?

Existing case law has not sought to determine the exact relationship between the business of the executive, particularly the constitution of the executive, and that of parliament. Whilst certain business of the executive, such as ministerial decisions, has certainly come under the scrutiny of the courts, parliamentary proceedings have generally only factored in relation to the use of statements made by ministers in the house about those decisions (for which there is an established practice, the ambit and development of which over the past 30 years has been well documented by the UK Joint Committee on Parliamentary Privilege).⁷¹ Could this be a nod of recognition to the doctrine of the separation of powers?

In view of the absence of pre-existing judicial authority, the comments of the court in *Stewart v Ronalds* provide guidance in clarifying the connection between the business of the executive and business of the house. In its consideration of the facts of the case, the court recognised that ministerial commissions are ultimately made at the royal prerogative, codified in the *Constitution Act 1902*, which specifically states that a minister holds office 'at the Governor's pleasure'. As Allsop P observed,

the phrase reinforces the lack of amenability of the decision to review. Whatever may be the on-going significance of the notion of 'at pleasure' relating to servants of the Crown... the office is terminable for good or bad or no reasons.⁷²

Crucially, Allsop P also noted that any questions as to the substance of advice tendered to the Governor (or in this case Lieutenant-Governor) by the premier, and its fairness or otherwise, are quintessentially political, and therefore not a function of the courts.⁷³ Indeed, it was for this reason that the court dismissed the proceedings insofar as they concerned the premier and the Lieutenant-Governor. It is, therefore, reasonable that a similar approach be taken to determining the nature of the relationship between the business of the executive and that of the parliament.

As noted earlier, the observations made by Hodgson JA (noted by Handley JA with approval) certainly appear to have followed this reasoning. Hodgson JA began by establishing the ‘black’ area of parliamentary privilege — that is, that a report which has been prepared at the direction of parliament or a committee of the parliament, and then produced to the parliament or its committee, is clearly relevant business of the house, and protected by parliamentary privilege.⁷⁴ He then stated he was ‘not able to decide that the same applies’ to an inquiry commissioned by the executive, with the result to be reported to the executive, and only subsequently tabled in parliament. Hodgson JA observed that

it is true that the business of Parliament includes holding the Executive to account, and the maintenance of the confidence of Parliament in relation to the composition of the Executive; but this does not necessarily mean that the tabling in Parliament of a report obtained by the Executive for its purposes makes that report, so obtained by the Executive, a proceeding in Parliament.⁷⁵

By concluding that ‘if s 16(2)(c) were to be otherwise construed, it would not reflect the general law and would be irrelevant to the position in relation to the New South Wales Parliament, his final position seems clear — a connection cannot be established between the business of the executive and the business of the house. The process through which Hodgson JA came to this conclusion certainly reflects the facts of the case. There could be no doubt that the Ronalds Report was prepared for the express purpose of informing the premier as to the alleged misconduct of a member of the executive.⁷⁶ The premier then exercised his constitutional power to tender advice regarding the exercise of the powers and functions of the crown. He did so regardless of any express authority from the parliament to do so, and certainly before the parliament was in the possession of the information contained within the report, on which it could inform such authority, the advice having already been tendered and the ministerial commissions withdrawn before the report was tabled.

Whilst it follows that the decisions made by the premier following receipt of the report necessitated a flow-on effect for parliamentary business — for example, ministerial portfolios changed, bringing with them changes to the carriage of legislation currently under review — this does not situate the composition of the executive or the related report produced by Ms Ronalds within ‘proceedings in Parliament’, and certainly not for the purpose of providing immunity from the scrutiny of the courts. Rather, this merely reinforces the vital role of the parliament in holding the executive to account. Indeed, the parliament went on to exercise this function, with the legislative council subsequently passing two orders for papers concerning Mr Stewart’s removal from office in September 2009 (whilst the case was still before the Court).⁷⁷ The conclusion to be drawn then is that, had legal action against Ms Ronalds continued, it is highly unlikely that that the court would have ruled that the Ronalds Report was sufficiently connected with the transaction of business of the house to render it ‘proceedings in parliament’. Consideration of the report by the court would therefore not be inconsistent the protections afforded

by Article 9 of the *Bill of Rights 1688*. This would then assist in rendering a boundary for current definitions of ‘proceedings in parliament’.

Other considerations arising from Stewart v Ronalds

It is worthwhile to note that, had Mr Stewart not reached an agreement with the premier and chosen to discontinue proceedings against Ms Ronalds, the conclusions drawn above would hold considerable implications for Ms Ronalds, as the likely admissibility of the report would leave her considerably exposed to further legal action in defamation proceedings. The report produced by her, although at the request of the department, was central to informing the advice tendered by the premier to the lieutenant-governor — indeed, as Hodgson JA observed, ‘there is nothing to suggest that the Premier’s decisions about this would be informed by anything else’.⁷⁸ What emerges from the case then, in addition to its commentary on the boundaries of parliamentary privilege, is the vulnerability of third parties retained for the purposes of providing guidance and information to the executive. Although the individual may willingly assume responsibility for informing the executive, it seems unfair at the least to expose third parties such as Ms Ronalds to legal ramifications that those who requested the information, and by whom it has been used, were ultimately protected from. Whilst it is certainly clear that parliamentary privilege would not and should not extend to a third party in this instance, the case does highlight the possible lack of other protections and the potential for injustice. It therefore highlights issues for further consideration and redress.

Griffith observes that ‘case law is rarely compact or tidy, a process of reasoning all pointing in the one direction’.⁷⁹ Certainly the questions posed by *Stewart v Ronalds* serve to highlight the breadth of available interpretations of the provisions of Article 9, and the resultant complexities of questions of parliamentary privilege in general. However, although the court refrained from making a conclusive ruling in this regard, the observations of the court go some way to rendering a boundary for definitions of ‘proceedings in parliament’ insofar as they concern matters pertaining to the business of the executive in managing its internal affairs. The case was also an interesting and rare example of the executive seeking to position itself within the parliamentary domain. This runs contrary to a general reluctance on the part of the executive to submit to scrutiny of its actions, examples of which can be seen in resistance to the power of various houses to order the production of state papers,⁸⁰ and opposition to freedom of information requests.⁸¹

Although in the past there has been tension between the Houses of Parliament and the courts regarding the role of the latter in the administration and enforcement of the immunities afforded by both Article 9 and their more recent codification in the commonwealth act, *Stewart v Ronalds* highlighted the vital role of the courts in arbitrating the scope of parliamentary privilege, and policing the legality of claims of immunity. Nevertheless, debate will continue as to the scope of the immunity afforded by Article 9, and the vigour with which the courts approach their task of determining the limits of such immunities. ▲

Notes

- ¹ ABC News, ‘Stewart confident of winning “David v Goliath” case’, 8 April 2009 at <http://www.abc.net.au/news/stories/2009/04/08/2538063.htm>.
- ² *Stewart v Ronalds* [2009] NSWCA 277.
- ³ Griffith, G. (2009) *Parliamentary privilege: first principles and recent applications*, NSW Parliamentary Library Research Service Background Paper No. 1/09, p 1.
- ⁴ These statutory provisions include the *Defamation Act 2005*, *Jury Act 1977*, *Parliamentary Evidence Act 1901*, *Evidence Act 1995*, *Parliamentary Precincts Act 1997*, and *Parliamentary Papers (Supplementary Provisions) Act 1975*.
- ⁵ *Prebble v New Zealand Television Ltd* [1995] 1 AC 321 at 337.
- ⁶ 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.
- ⁷ *Odgers*, 12th edn, 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.
- ⁸ Joint Committee on Parliamentary Privilege, op. cit., para 36.
- ⁹ *Egan v Willis* [1998] HCA 71 at 31, citing *Kielley 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.
- ¹⁰ See, for example, *Erskine May’s Parliamentary Practice*, 23rd edn, Ch. 11.
- ¹¹ [1955] HCA 36; [1955] 92 CLR 157 per Dixon CJ at 162. See more recently *Egan v Willis and Cahill* [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.
- ¹² *Canada (House of Commons) v Vaid* [2005] 1 SCR 667 at 29.
- ¹³ Joint Committee on Parliamentary Privilege, op. cit., para 37.
- ¹⁴ Joint Committee on Parliamentary Privilege, op. cit., para 37; Hungerford J in *New South Wales Branch of the Australian Medical Association v Minister for Health and Community Services* [1992] 26 NSWLR 114 at 123.
- ¹⁵ *Odgers*, op. cit., p 38.
- ¹⁶ *Prebble v Television NZ Limited* [1995] 1 AC 321; *Amann Aviation v Commonwealth* [1988] 19 FCR 223; *Rann v Olsen* [2000] 172 ALR 395.
- ¹⁷ See discussion in Campell, E. (2003) *Parliamentary Privilege*, p 14, citing legislation enacted in Queensland, the Northern Territory, and the Australian Capital Territory.
- ¹⁸ Joint Committee on Parliamentary Privilege, op. cit., para 129.
- ¹⁹ *Erskine May’s Parliamentary Practice*, 22nd edn (1997), London, p 95; *Odgers*, op. cit., pp 38–55; Campbell, op. cit., p 12 and 61; Carney, G. (2003) ‘Lifting the Veil of Mystery: Freedom of Speech under Parliamentary Privilege’, in Jones and McMillan (eds) *Public Law Intersections*, Centre for International and Public Law, pp 145–68; Joint Committee on Parliamentary Privilege, op. cit., para 100.
- ²⁰ Standing Committee on Parliamentary Privilege & Ethics, op. cit., p 8.
- ²¹ See, for example, Clennell, A. ‘Bombshell call backs abuse claim’, *Sydney Morning Herald*, 30/10/2008, p. 1; Ong, T. ‘No complaint, no probe, says Rees’, *Australian Financial Review*, 30/10/2008, p 10; Carty, L. ‘Not good enough, Mr Premier’, *Sun Herald*, 2/11/2008, p 4.
- ²² *Stewart v Ronalds* [2009] NSWCA 277 at 11.
- ²³ *Ibid*, at 12.
- ²⁴ *Ibid*.
- ²⁵ *Ibid*.

- ²⁶ Ronalds, C. *Report of an investigation into a complaint against the Hon A. P. Stewart MP*, 10 November 2008, pp. 8–9. (Paper received in return to an order for papers by the Legislative Council, reported *Legislative Council Minutes of Proceedings*, 22/9/2009, p 1379).
- ²⁷ Under s 9C (1) (b) of the *Constitution Act 1902*, the Lieutenant-Governor shall assume the administration of the government of the State if the Governor is unavailable.
- ²⁸ *Stewart v Ronalds*, op cit at 16. See also *NSW Legislative Assembly Votes and Proceedings*, 12 November 2008, p 1024.
- ²⁹ *Ibid* at 17. Mr Stewart was provided with a hard copy of the report from the Parliamentary Procedural Office later that day, subsequent to it being tabled.
- ³⁰ *NSW Legislative Assembly Votes and Proceedings*, 11 November 2008, p 1017. Note that the report was ordered to be printed the following day — *NSW Legislative Assembly Votes and Proceedings*, 12 November 2008, p 1023. Under NSW Legislative Assembly SO 266 (1), a minister may table papers at any time by leave of the House. SO 266 (2) dictates that the document may not be ordered to be printed until a subsequent sitting day. Under SO 366, Mr Aquilina, in his capacity as Parliamentary Secretary, could act as a minister for the purpose of tabling papers.
- ³¹ *NSW Legislative Assembly Debates*, 11 November 2008, p 11140.
- ³² *Stewart v Ronalds & Anor* [2009] NSWSC 455.
- ³³ *Stewart v Ronalds* [2009] NSWCA 277 at 3, per Allsop J.
- ³⁴ *Ibid* at 45–46.
- ³⁵ *Ibid*, at 75 and 114. The Court refrained from expressing a final view on the existence of a duty on the part of Ms Ronalds to afford natural justice because Ms Sanger, who had not made submissions, may be a proper or necessary party to proceedings by Mr Stewart against Ms Ronalds.
- ³⁶ *Ibid*, at 98 and 105.
- ³⁷ *Ibid*, at 77.
- ³⁸ *Ibid* at xiii.
- ³⁹ *Ibid* at 124.
- ⁴⁰ *Ibid*.
- ⁴¹ *NSW Legislative Assembly Debates*, 21 October 2009, p 18477. Under the terms of the agreement, as relayed by Mr Stewart, the defendant's costs would be paid by Mr Stewart, and the Premier had publicly accepted that Mr Stewart holds the view (note that the Premier had not acceded to holding the view) that information not available at the time of writing the Ronalds Report may have affected the report's findings had it been known to Ms Ronalds.
- ⁴² *Stewart v Ronalds*, op. cit., at 124.
- ⁴³ *Egan v Chadwick* (1999) 46 NSWLR 563 at 571–572 per Spigelman CJ.
- ⁴⁴ *Egan v Willis* (1998) 195 CLR 424 at 451 per Gaudron, Gummow and Hayne JJ.
- ⁴⁵ *Stewart v Ronalds* op. cit., at 121.
- ⁴⁶ *Ibid*, at 121.
- ⁴⁷ *Ibid*, at 120, 121 and 124.
- ⁴⁸ *Ibid*, at 121 and 124.
- ⁴⁹ Note that in New South Wales the publication of papers presented to Parliament is also subject to the protection of absolute privilege under s 27 of the *Defamation Act 2005* and the *Parliamentary Papers (Supplementary Provisions) Act 1975*.
- ⁵⁰ Campbell, E. (2000) 'Reporting of parliamentary proceedings', *Media & Arts Law Review*, Vol. 5, No. 2, p 84.

- ⁵¹ See Senate Committee of Privileges, 72nd Report, *Possible improper actions against a person: Dr William De Maria*, June 1998.
- ⁵² *Stewart v Ronalds*, op. cit. at 124.
- ⁵³ (1997) 150 ALR 199
- ⁵⁴ *Ibid*, at 206.
- ⁵⁵ *Ibid*, at 208.
- ⁵⁶ *Ibid*, at 215.
- ⁵⁷ *Ibid*.
- ⁵⁸ [2002] 167 FLR 262.
- ⁵⁹ A ‘friend of the Court’.
- ⁶⁰ *Ibid*, at 2 and 9.
- ⁶¹ *Ibid*, at 12.
- ⁶² *Ibid*, at 21 and 22.
- ⁶³ *Ibid*, at 23.
- ⁶⁴ *Odgers*, op. cit, p 33.
- ⁶⁵ *Carney*, op. cit, p 148.
- ⁶⁶ *Ibid*, at 12.
- ⁶⁷ *Ibid*, at 12.
- ⁶⁸ *Odgers*, op. cit, p 55. This reflects s 16(2)(d) of the Commonwealth Act. This was also tested and verified in the case of *Hamilton v Al Fayed*⁶⁸, in which the English Court of Appeal ruled that an inquiry and report by a commissioner appointed pursuant to the House of Commons’ standing orders was protected by privilege.
- ⁶⁹ *Stewart v Ronalds*, op. cit. at 124.
- ⁷⁰ *Ibid*, at 121.
- ⁷¹ Joint Committee on Parliamentary Privilege, op. cit, ch. 2 at paras 42–50. See also *Toussaint v Attorney General of St Vincent and the Grenadines*, (2007) 1 WLR 2825.
- ⁷² *Stewart v Ronalds*, op. cit. at 46.
- ⁷³ *Ibid* at 45
- ⁷⁴ *Ibid* at 120.
- ⁷⁵ *Ibid* at 121.
- ⁷⁶ *Ibid* at 12.
- ⁷⁷ *NSW Legislative Council Minutes of Proceedings No. 111*, 2/9/2009, p. 1312–13.
- ⁷⁸ *Stewart v Ronalds*, op. cit. at 91.
- ⁷⁹ Griffith, G. (2009) op. cit. p 35.
- ⁸⁰ See, for example, *Egan v Willis & Cahill* (1996) 40 NSWLR 650; *Egan v Chadwick and Others* (1999) NSWCA 176 and discussion of recent controversy regarding orders for papers in Victoria in Evans, H. (2009) *Recent Developments in Parliamentary Privilege*, ANZACATT Professional Development Seminar at [http://www.anzacatt.org.au/prod/anzacatt/anzacatt.nsf/ca3cb73640e4b7d4ca2567ee0016638b/91f59d2b4e186f1bca25755a0073673d/\\$FILE/Harry%20Evans%20Senate.pdf](http://www.anzacatt.org.au/prod/anzacatt/anzacatt.nsf/ca3cb73640e4b7d4ca2567ee0016638b/91f59d2b4e186f1bca25755a0073673d/$FILE/Harry%20Evans%20Senate.pdf).
- ⁸¹ See, for example, Griffith, G. (2007) *Freedom of Information — Issues and recent developments in NSW*, NSW Parliamentary Library Research Service Briefing Paper No. 6/07; Snell, R. (2006) ‘Freedom of Information and parliament’, *Agenda*, 291–307.