

CHAPTER 3

PARLIAMENTARY PRIVILEGE: IMMUNITIES AND POWERS OF THE HOUSE

The term parliamentary privilege refers to two aspects of the law as it relates to parliament: the immunities of the Houses of Parliament, and the powers of the Houses of Parliament to protect their processes. Both the immunities and powers of Parliament are fundamental to enable it to perform its functions of representing the people, scrutinising the actions of the executive and reviewing and passing legislation. Of particular significance to the Legislative Council are those immunities and powers directly relevant to its scrutiny and legislative review functions, such as the right of free speech, the power to conduct inquiries and call witnesses, and the power to order the production of documents.

There is no statute in New South Wales which defines the powers and privileges of Parliament. In all other Australian jurisdictions, with the limited exception of Tasmania, the privileges of Parliament are determined either by reference to the British House of Commons or by specific statute, as in the case of the *Parliamentary Privileges Act 1987* (Cth). By contrast, in New South Wales, the immunities and powers of Parliament rely on the common law principle of 'reasonable necessity', together with certain statutory provisions, including the adoption of Article 9 of the *Bill of Rights 1689*.¹ This famous article declares:

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

Importantly, parliamentary privilege belongs to the House itself, and is not the privilege of any individual member. In *Prebble v Television New Zealand Ltd* the Judicial Committee of the Privy Council stated that:

1 The full title of the Act is 'An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown'. The familiar title of the '*Bill of Rights 1689*' comes from the *Short Titles Act 1896*. The Act is also sometimes called the *Bill of Rights 1688*. Parliament proposed the Declaration of Rights and presented it to William III and Mary II as joint monarchs on 13 February 1689. However, at that time, years were held to begin at Easter under the Julian Calendar. From this derives the use of *Bill of Rights 1688*. In 1752, Britain adopted the New Style Gregorian calendar and the beginning of the year was set as 1 January.

The privilege protected by Article 9 is the privilege of Parliament itself. The actions of any individual member, even if he has an individual privilege of his own, cannot determine whether or not the privilege of parliament is to apply ... The decision of an individual member cannot override the collective privilege of the House to be the sole judge of such matters.²

Individual members of Parliament can claim privilege only to the extent that some action, proposed or otherwise, would impede them in carrying out their responsibilities and duties as a member of the House, or adversely affect the proper functioning of the House or a committee.

While parliamentary privilege gives members of Parliament immunities which exceed those possessed by other bodies or individuals, it was never intended to set them above the ordinary law. Members are subject to the criminal law, except in relation to freedom of speech and debates in the context of parliamentary proceedings.

It is for the courts to determine the existence, validity and extent of the powers and immunities of Parliament. However, it is for the Parliament to determine the occasion and manner of the exercise of those powers.³

THE HISTORY OF PARLIAMENTARY PRIVILEGE IN THE UNITED KINGDOM

The privilege of freedom of speech in Parliament and other privileges arose to a large extent out of the historical struggle in England between the Monarch and the Parliament, especially during the Tudor and Stuart periods.⁴

The first reasoned plea for the right of members to speak freely to matters before them was delivered by Speaker Sir Thomas More in his address for privileges in 1523⁵ in which he requested that King Henry VIII (1509-47) accept what members said in good part and in good faith for the prosperity of the realm. Later petitions, in addition to freedom of speech, also requested that members be granted freedom from arrest, freedom from molestation for members and their servants, and admittance to the royal presence.⁶ By 1541 the request for freedom of speech appeared routinely in the Speaker's petition to the King at the opening of Parliament.

Throughout the reign of Queen Elizabeth I (1558-1603), the Parliament continued to claim the privilege of freedom of speech, and by 1563 it was claiming it as an

2 [1995] 1 AC 321 at 335.

3 *Egan v Willis* (1998) 195 CLR 424 at 446; *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 162.

4 It was common practice at this time for the Monarch to have spies within the Parliament who would report to the King before the House had made a decision. For this reason it was considered necessary to entreat the Monarch to construe its deliberations favourably.

5 Elton GR, *Reform and Reformation: England 1509-1558*, Edward Arnold, London, 1977, p 89.

6 McKay W (ed), *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 23rd edn, LexisNexis, UK, 2004, pp 79-80.

ancient right which was simply to be confirmed by the Monarch. However, the freedom was seen by many at that time as limited to debate on legislation, rather than granting members freedom to say whatever they willed. In 1593 Lord Keeper Sir Edward Coke reminded the Speaker that the Queen had granted liberal but not licentious speech.⁷

Under King James I (1603-25) the struggle for freedom of speech for members of Parliament intensified. The Parliament insisted that its freedom of speech was an 'inheritance' of an ancient right, while the King viewed it as a royal prerogative, granted by his 'toleration' and 'derived from the grace and permission of our ancestors and us'.⁸ The Commons responded with the Protestation of 1621, in which it claimed:

[T]hat every Member of the House of Commons hath and of right ought to have freedom of speech ... and ... like freedom from all impeachment, imprisonment and molestation (other than by censure by the House itself) for or concerning any speaking, reasoning or declaring of any matter or matters touching the Parliament or parliamentary business.⁹

James I dissolved the Parliament shortly thereafter. Reluctantly summoning the Parliament again in 1624, the parliamentary session was characterised by great division. James I died soon after the conclusion of the Parliament in 1625.¹⁰

However, it was during the reign of James' son, King Charles I (1625-49), that the struggle between the Parliament and the Monarch reached its zenith. In 1629 Charles I ordered the arrest of three members of the Commons, Sir John Eliot, Denzil Holles and Benjamin Valentine, for speeches made in the House which the King considered dangerous, libellous and seditious. Following the dissolution of the Parliament the men were prosecuted in the Court of King's Bench, on charges of conspiring to resist the King's lawful command that the House adjourn, of calumniating his ministers, of creating discord between King and people, and of assaulting the Speaker. Although the men claimed privilege, arguing that as their alleged offences had been committed in Parliament they were not punishable in any other place, the royal court found against them, and they were subsequently imprisoned and fined.

The decision was extremely unpopular and contributed to the growing opposition to Charles I. In 1641 the Commons adopted resolutions declaring the entire proceedings against its members a breach of privilege.

The climax of this struggle was reached on 4 January 1642 when Charles I, attended by an armed escort, entered the Commons chamber and attempted to arrest five members who were most prominent in Parliament's attempt to transfer

7 *Ibid*, p 80.

8 *Ibid*, pp 80-81.

9 Marshall G, 'Impugning parliamentary impunity', *Public Law*, Vol 509, Winter 1994; see also *Erskine May*, 23rd edn, p 81.

10 Kishlansky M, *A Monarchy Transformed: Britain 1603-1714*, Allen Lane, London, 1996, pp 105-107.

control of the armed forces away from the Crown.¹¹ This dramatic moment in parliamentary history has been described in these words:

No king of England had ever interrupted a session of the House of Commons, and at first the members sat stunned when Charles swept down the centre aisle. Then they remembered their duty and stood bareheaded as the King demanded that the Speaker, William Lenthall point out the five members he had come to arrest. Lenthall answered, 'I have neither eyes to see, nor tongue to speak but as this House is pleased to direct me'. Rebuffed, the King gazed along the serried rows of members. 'Well', he concluded, 'I see all the birds are flown. I cannot do what I came for'. With that Charles strode out of the House as the cry of 'privilege, privilege' rose up behind him.¹²

The relationship between Charles I and the Parliament was fatally undermined by his attempt to arrest the five members. Had he succeeded he might have defused the political crisis by removing the opposition party leaders from the House. His failure ignited it,¹³ and both the King and the Parliament began to gather their forces. The following year, when Charles I raised the royal standard at Nottingham he was met by the Parliament's forces under the leadership of Sir Thomas Fairfax and Oliver Cromwell. The ensuing civil war was a devastating experience for the country. Although the Parliamentary forces were victorious, the war unleashed political and religious radicalism and a period of civil upheaval in which both monarchy and parliament were for a time overthrown and military rule imposed.

The monarchy was restored in 1660 under King Charles II (1661-85). However, it was not until the 'Glorious Revolution' of 1689 that the long struggle between the Stuart kings and the English people and Parliament was finally resolved with the effective 'election' of William III and Mary II as joint Monarchs on whom were imposed the terms of the *Bill of Rights 1689*, including the provisions of Article 9.

The *Bill of Rights 1689* provided statutory recognition once and for all of the basic privilege of parliament – freedom of speech.

In the late 17th and early 18th centuries, some claims of privilege went beyond those in the *Bill of Rights 1689*, including claims that the freedom from arrest in civil matters applied not only to members but also to their servants. In addition, members sought to extend privilege to cover claims of trespassing and poaching on their lands. Such claims were ultimately curtailed as a serious obstruction to the ordinary course of justice, and privilege came to be recognised as only that which is absolutely necessary for Parliament to function effectively and for members to carry out their responsibilities.¹⁴

11 The five members were John Pym, John Hampden, Denzil Holles, Sir Arthur Haselrig and William Strode. Lord Mandeville in the House of Lords (the future Earl of Manchester) was also to be arrested.

12 Kishlansky, above n 10, p 135.

13 *Ibid*, p 149.

14 Marleau R and Montpetit C (eds), *House of Commons Procedure and Practice* (Canada), Cheneliere/McGraw-Hill, Montreal, 2000, p 55.

THE ADOPTION OF PARLIAMENTARY PRIVILEGE IN NEW SOUTH WALES

1823 to 1856

New South Wales was originally established as a penal colony in 1788. It was not until 1823 that New South Wales became a full colony under the Imperial statute known as the *New South Wales Act 1823*.¹⁵ In 1828, the 1823 Act was replaced by an Imperial Act now known as the *Australian Courts Act 1828*.¹⁶

It remains open to interpretation whether British law applied in New South Wales from 1788, 1823 or 1828. According to Richard Lumb, both the statute and the common law of England were in force in New South Wales from 1788, although only 'so far as they were applicable to local circumstances'.¹⁷ A contrary view maintains that it was only with the passing of the *Australian Courts Act 1828*, which provided for the application in New South Wales and Van Diemen's Land of 'all Laws and Statutes in force within the Realm of England at the Time of the passing of this Act ... so far as the same can be applied', that it is clear that British law applied in the colony.

However, in cases that came before the Supreme Court of New South Wales, it is clear that the judges certainly assumed at common law that, at the date of the establishment of the colony, English statute law was received as part of the law of the colony, so far as applicable to local circumstances and conditions. For example, in *R v Farrell, Dingle and Woodward* in 1831, Forbes CJ in the Supreme Court found:

Before, however, I proceed to examining the law of necessity, as applied to this case, I will dispose of an argument raised under the provisions of 9 Geo 4, c 84, which is supposed to give the Supreme Court of this Colony discretion to adopt only so much of the England law as it can apply. Before the passing of this statute, it was laid down in all the authorities, and confirmed by the rulings of the King, in Council, that wherever a new Colony is settled by British subjects, the laws of the parent country become the laws of the place, as far as they are, or may be made applicable to its circumstances and conditions. The New South Wales Act does not introduce a new principle.¹⁸

It also remains open to interpretation whether the adoption of British law in New South Wales included the privileges conveyed by Article 9 of the *Bill of Rights 1689*, and the extent to which the Council inherited the powers and privileges of the British Parliament.

15 *New South Wales Act 1823* 4 Geo IV, c 96 (Imp).

16 *Australian Courts Act 1828* 9 Geo IV, c 83 (Imp).

17 Lumb RD, *The Constitutions of the Australian States*, 5th edn, University of Queensland Press, Brisbane, 1991, p 6.

18 (1831) 1 Legge 5.

Nevertheless, it is clear that from the outset in 1824 the colonial Council certainly assumed that it had the powers and privileges of the British Parliament, given its record of ordering the production of documents, appointing committee inquiries into the administration of the colony and summoning witnesses to the House.

19th century case law

During the 19th century, a series of cases decided by the Judicial Committee of the Privy Council held that the powers and privileges of the Houses of colonial legislatures were more limited in scope and content than those enjoyed by the Houses of the Westminster Parliament.

The leading case was *Kielley v Carson*¹⁹ decided in 1842, which concerned the powers of the Newfoundland House of Assembly in Canada to arrest a person for a breach of privilege committed out of the House. In this case, a distinction was made between the House of Commons and the ‘local’ legislatures of what were then British colonies. The Privy Council decided that these local legislatures could not be said to possess at common law the same inherent punitive powers – of fine or arrest and imprisonment for breach of privilege or contempt – as those of the Houses of the Westminster Parliament, but only those powers of self-protection as were ‘reasonably necessary for the proper exercise of their functions and duties’.²⁰ These local legislatures therefore attracted the common law principle ‘that things necessary pass as incident’ – *Quando lex aliquid concedit, concedere videtur et illud, sine quo res ipsa esse non potest* (when the law gives anything to anyone, it gives also all those things without which the thing itself could not exist).

The ‘exclusive privileges’ belonging to the House of Commons were held not to flow, by analogy, to the legislatures of the colonies. Such exclusive privileges, it was said, were annexed to the House of Parliament by ‘the ancient Law of England’ – the *lex et consuetudo parliamenti* – founded on precedent and immemorial usage. In essence, a subordinate legislative body has only those powers, privileges and immunities as were ‘reasonably necessary for the existence of such a body and for the proper exercise of the functions which it is intended to execute’.²¹

The principles established in *Kielley v Carson* were upheld and followed in *Fenton v Hampton*²² in 1858 concerning the powers of the Tasmanian Legislative Assembly and again in *Doyle v Falconer*²³ in 1866 concerning the Dominican House of Assembly.

In *Barton v Taylor* in 1886, a case concerning a member of the Legislative Assembly of New South Wales, it was found that the Assembly had the power to remove a

19 (1842) 12 ER 225.

20 *Ibid* at 236.

21 *Ibid* at 234; see also *Barton v Taylor* (1886) 11 AC 197; see also *Willis and Christie v Perry* (1912) 13 CLR 592. The test of reasonable necessity dates back to *Kielley v Carson*.

22 (1858) 14 ER 727.

23 (1866) 16 ER 293.

member from the chamber to protect it against obstruction and disturbance of its proceedings; however, the power did not extend to justify punitive action, such as the unconditional suspension of a member for an indefinite time.²⁴

Attempts to codify parliamentary privilege in statute

In the first months after the establishment of responsible government in New South Wales in 1856, there was considerable debate in the Parliament about the scope and nature of the powers and privileges of Parliament. In an editorial on 9 June 1856, the *Sydney Morning Herald* said it agreed with William Forster MLA, a future Premier, that:

[O]ur Parliament possesses no rights and privileges as a legislature which are not derived from the law under which it is constituted, and that appeals to the practice or privileges of the House of Commons ... are irrelevant and useless.²⁵

Since 1856, there have been six attempts to enact privileges legislation in New South Wales. All have failed.

On 12 August 1856, the first attempt to enact privileges legislation in New South Wales was made with the introduction of the Privileges of Parliament Declaration Bill in the Assembly. The bill sought to declare and define the privileges of the two Houses by providing that they 'shall have the same privileges as the House of Commons at Westminster now has or is entitled to'. While not attempting any finite list, the bill enumerated certain contempts and breaches of privilege, as follows:

- (1) assaulting, insulting, or menacing of any member in his coming to, or going from the House, or on account of his behaviour in Parliament.
- (2) sending a challenge to fight any member.
- (3) offering a bribe to, or attempting to bribe, any member.
- (4) obstructing any member in going to or returning from the House, or endeavouring to compel any member by force to declare himself in favor of, or against any proposition then depending or expected to be brought before the House.
- (5) writing or publishing, or causing to be written or published any scandalous or libellous reflection on the character or conduct of the House, of any committee thereof, or of any member.
- (6) misrepresenting the proceedings of the House.
- (7) joining in or creating any disturbance in the House or in the immediate vicinity of the House.
- (8) arresting of any member during any session, or within forty days before the commencement, or forty days after the termination of any session, except for felony, treason, or breach of the peace.

24 (1886) 11 AC 197.

25 *Sydney Morning Herald*, 9 June 1856, p 4.

Clause 3 of the bill provided a power to punish by imprisonment contempt or breaches of privilege while clause 7 placed beyond judicial review the propriety of any warrant of commitment issued by either House. Clause 9 was a re-enactment of Article 9 of the *Bill of Rights 1689*.

On 2 September 1856, another editorial in the *Sydney Morning Herald*, the third in four months on the subject of parliamentary privilege, was critical of the bill, stating that '[s]uch a compound of folly, assurance, and oppression was probably never offered to a legislative body'. In an era when the proceedings of the Houses were only reported in the press,²⁶ the proposal to make the misrepresentation of any such proceedings a ground for contempt was contentious. The bill's main aim, according to the editorial, was 'to destroy the liberty of the press'.²⁷ After a change in the ministry, in which the Attorney General, who sponsored the bill, was relieved of his portfolio, the second reading of the bill was discharged in the Assembly on 16 September 1856.²⁸

Two further attempts to enact privileges legislation occurred in 1878 and 1879, with the introduction of two bills, both entitled the Parliamentary Powers and Privileges Bill. The first bill passed the Assembly but was defeated at the second reading stage in the Council on 16 May 1878.²⁹ The second bill was dropped after ongoing disagreement between the Assembly and Council.³⁰ The Council disagreed with the bills because they would have provided both Houses with the capacity to deal with contempt and breaches of privilege committed outside Parliament. It was held that 'no necessity has been shown for the existence of any powers in excess of those which the Council has already sanctioned for securing the orderly and efficient conduct of public business'; and 'the ordinary judicial tribunals of the country are open to any member of either House of Parliament who may feel himself aggrieved by any act done or word spoken, written, or published to his injury by any person outside the precincts of Parliament'. Exception was also taken to related clauses of the bill which conferred on either House the power to direct, by resolution, the Attorney General to prosecute any contempt or breaches of privilege committed by strangers within or outside the parliamentary precincts.³¹

26 It was not until October 1879, at the start of the third session of the 9th Parliament, that the debates of the New South Wales Parliament were reported by Hansard.

27 *Sydney Morning Herald*, 2 September 1856, p 2.

28 *LA Votes and Proceedings* (16/9/1856) 106.

29 *LC Minutes* (16/5/1878) 100.

30 A free conference on the bill failed to resolve the dispute. On 29 April 1879 the Assembly, by message, requested to be informed of steps taken by the Council on the report of its managers at the free conference. The House appointed a select committee to report on the practice of sending messages from one House to the other requesting such information. The order of the day for consideration of the managers' report in committee of the whole was restored to the business paper, but, following the tabling of the report of the select committee, was discharged and the matter not further proceeded with, *LC Minutes* (17/4/1879) 174.

31 *Sydney Morning Herald*, 17 May 1878, p 3.

On 31 October 1901, in a fourth attempt to introduce privileges legislation, Richard Meagher introduced a private member's Parliamentary Privileges Bill in the Assembly containing many of those provisions which the Council had objected to in 1878. It was read a first time but was interrupted by prorogation.

Another two attempts to pass privileges legislation were made in 1912. Both bills were introduced in the Assembly by the Minister for Justice, the Hon William Holman. The first did not proceed beyond its first reading. The second bill, the Parliamentary Powers and Privileges Bill,³² reached the second reading stage, during which Holman explained that its purpose was to confer on the Houses of Parliament the same powers as the British House of Commons, including the power to punish for contempt and breach of privilege. This bill, like the 1901 bill, did not proceed beyond the second reading before it was interrupted by prorogation.

The Council's express claim of privilege

It was only in 1934, on reconstitution of the Council as an indirectly elected body with an elected President, that an express claim of privilege was made on behalf of the Council. It was made by Sir John Peden, ostensibly to ensure continuity of parliamentary privilege. On his return from Government House, the President informed the Council that he had, on its behalf, 'claimed the usual rights and privileges'.³³

The actual text of the President's petition in recent years states:

I have now, Your Excellency, in the name and on behalf of the House, to lay claim to all their undoubted rights and privileges, particularly to freedom of speech in debate, to free access to Your Excellency when occasion requires, and pray that the most favourable construction will, on all occasions, be put upon their language and proceedings.³⁴

The 1985 recommendation of the Joint Select Committee on Parliamentary Privilege

In 1985, the report of the Joint Select Committee on Parliamentary Privilege, tabled on 26 September 1985, included a recommendation that the *Constitution Act 1902* be amended to place beyond doubt that the powers, privileges and immunities of the Houses of the New South Wales Parliament are those of the British House of Commons as at the establishment of responsible government in 1856. The recommendation was not adopted.

32 It was originally titled the Parliamentary Privileges Bill.

33 *LC Debates* (24/4/1934) 6.

34 The petition for the right of members to speak freely to matters before them was first delivered by Speaker Sir Thomas More in his address for privileges before King Henry VIII in 1523.

A further recommendation of the Joint Select Committee on Parliamentary Privilege was for the passing of legislation physically defining the precincts of the New South Wales Parliament and vesting their control in the Presiding Officers. This recommendation was subsequently implemented under the *Parliamentary Precincts Act 1997*, as discussed later in this chapter.

The Australia Acts and the authority of 19th century case law

Section 11 of the *Australia Act 1986* put an end to the possibility of appeals to the Privy Council from any State court concerning parliamentary privilege, or any other matter. The only remaining avenue of appeal is the theoretical possibility of the High Court granting a certificate on an *inter se* matter pursuant to section 74 of the Commonwealth Constitution.

However, while New South Wales and Australian courts are no longer bound by rulings of the Privy Council, the relevant rulings from the 19th century case law have been adopted by the High Court. Furthermore, in *Egan v Willis* the High Court confirmed the continuing relevance and authority of 19th century case law.³⁵

SOURCES OF PARLIAMENTARY PRIVILEGE IN NEW SOUTH WALES

As indicated above, there is no statute in New South Wales defining the powers and privileges of the Houses of Parliament. By contrast, in all other Australian jurisdictions, with the limited exception of Tasmania, the privileges of Parliament are determined either by reference to the powers and immunities of the British House of Commons or by specific statute, as in the case of the *Parliamentary Privileges Act 1987* (Cth).

In New South Wales, the powers and immunities of Parliament are:

- derived from the common law, as implied by the common law principle of ‘reasonable necessity’;
- imported by the adoption of the *Bill of Rights 1689*;
- conferred by other legislation.³⁶

The common law principle of ‘reasonable necessity’

As already noted, during the 19th century, a series of cases decided by the Privy Council held that colonial parliaments were only entitled to such privileges as were reasonably necessary for them to carry out their functions.

³⁵ (1998) 195 CLR 424 at 495 per Kirby J.

³⁶ See the Joint Select Committee upon Parliamentary Privilege, *Parliamentary Privilege in New South Wales*, 1985, p 16.

However, what is reasonably necessary for the proper exercise of those functions changes over time. As Wallace P observed in the New South Wales Supreme Court in *Armstrong v Budd*, the word ‘reasonable’ must be given an ambulatory meaning ‘to enable it to have sense and sensibility when applied’ to contemporary conditions:

[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.³⁷

This was reaffirmed by the High Court in *Egan v Willis* when Gaudron, Gummow and Hayne JJ observed:

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.³⁸

Kirby J amplified this somewhat:

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. 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.³⁹

In essence, the common law test is whether any particular power or immunity is reasonably necessary today, in its present form, for the effective functioning of the House.⁴⁰

Importation of the *Bill of Rights 1689*

The *Bill of Rights 1689* applies in New South Wales under the *Imperial Acts Application Act 1969*. Section 6 of the Act declares, among other things, that the *Bill of Rights*, so far as it was in force in England on 25 July 1828, was and remains in force in New South Wales on and from that day.

37 (1969) 71 SR (NSW) 386 at 402, approved in *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 664.

38 (1998) 195 CLR 424 at 454.

39 *Ibid* at 495-496.

40 Joint Committee on Parliamentary Privilege, *Report: Volume 1 – Report and proceedings of the Committee*, United Kingdom Parliament, Session 1998-99, p 8. This is the test the Committee recommends should apply to the privileges of the Houses of the United Kingdom Parliament.

As confirmed by the joint judgment in *Egan v Willis*, there is no suggestion that Article 9 of the *Bill of Rights* has been affected by any Imperial or State Act.⁴¹ Article 9 provides a statutory guarantee of absolute protection for parliamentary freedom of speech and debate in New South Wales.

Other statutory sources of parliamentary privilege

Other statutory provisions that define the powers and privileges of the Parliament include the *Parliamentary Evidence Act 1901*, the *Constitution Act 1902*, the *Parliamentary Papers (Supplementary Provisions) Act 1975*, the *Jury Act 1977*, the *Evidence Act 1995*, the *Parliamentary Precincts Act 1997* and the *Defamation Act 2005*.

All of these statutes are examined in context later in this chapter. However, none of these statutes, alone or in combination, gives the Houses of the New South Wales Parliament the full range of powers and privileges enjoyed by the Houses of the British Parliament.

It is a fundamental principle that the law of parliamentary privilege is not affected by a statutory provision unless the provision alters that law by express words.

THE IMMUNITIES OF THE HOUSE

The immunities of the House fall into two broad categories. The first is the immunity of members and other persons taking part in ‘proceedings in Parliament’, usually referred to as freedom of speech. This immunity means that members and persons participating in ‘proceedings in Parliament’ cannot be sued or impeached in the courts for anything they may say there. The second is the immunity that attaches to the ‘proceedings in Parliament’ as such, including decisions of the Houses and the publication of debates and proceedings.

The freedom of speech in Parliament

By far the most important immunity accorded to members of the Council is the exercise of freedom of speech in parliamentary proceedings.

Freedom of speech permits members to speak freely during proceedings in the House or in a committee meeting while enjoying complete immunity from prosecution for any comments they may make. This allows members to make statements or allegations that they may otherwise hesitate to make. Lord Cockburn CJ in the case of *Ex parte Wason* put it in these terms:

It is clear that statements made by Members of either House of Parliament in their places in the House, though they might be untrue to their knowledge, could not be made the foundation of civil or criminal proceedings, however injurious they might be to the interest of a third party.⁴²

41 (1998) 195 CLR 424 at 445.

42 (1869) LR 4 QB 573 at 576.

Before 1969, absolute privilege for freedom of speech in Parliament applied in New South Wales under the common law doctrine of reasonable necessity. In *Gipps v McElhone* in 1881, a defamation case concerning a member of the Assembly, Manning J said:

There may have been questions how far privilege extended to newspapers afterwards publishing reports of proceedings in Parliament; but the public interests require that what is said in the Legislature should be absolutely privileged. Doubtless there may be members of strong energy, easy credulity, and impulsive temperament, who, in discussing a question of public interest, may injure an individual by reckless and injudicious statements. But it is of greater importance to the community that its legislators should not speak in fear of actions for defamation. It is most important that there should be perfect liberty of speech in Parliament, even though sometimes it may degenerate into license.⁴³

However, since 1969, it has been the statutory adoption of the *Bill of Rights 1689* under the *Imperial Acts Application Act 1969* that is the most important guarantee of the freedom of speech in Parliament.

The legal immunity granted by Article 9 of the *Bill of Rights 1689* is both wide and absolute. It applies not only to members, but also to officers of the House, witnesses before committees and other participants in 'proceedings in Parliament'. The United Kingdom Joint Committee on Parliamentary Privilege commented in 1999:

Article 9 applies to officers of Parliament and non-members who participate in proceedings in Parliament, such as witnesses giving evidence to a committee of one of the Houses. In more precise legal language, it protects a person from legal liability for words spoken or things done in the course of, or for the purpose of or incidental to, any proceedings in Parliament.⁴⁴

The effect of Article 9 is not to prevent or restrict the disclosure of things said in the course of parliamentary proceedings in the courts,⁴⁵ but to preclude the impeachment or questioning of such matters.

At the Commonwealth level, the *Parliamentary Privileges Act 1987* (Cth) was enacted primarily to codify the scope of freedom of speech in the Commonwealth Parliament as provided by Article 9, following disagreement as to the scope of that freedom following rulings in two trials in the Supreme Court of New South Wales concerning Justice Murphy in 1985 and 1986.⁴⁶ In a ruling in the second trial, Hunt J found that Article 9 did not prevent parliamentary material being used to support a prosecution provided only that the proceedings or material referred to were not the formal cause of action.⁴⁷ Section 16(3) of the Act provides:

43 (1881) 2 LR (NSW) 18 at 24.

44 Joint Committee on Parliamentary Privilege, above n 40, p 17.

45 See *Munday v Askin* [1982] 2 NSWLR 369 at 369D-G; see also *Henning v Australian Consolidated Press Limited* [1982] 2 NSWLR 374 at 375B-C.

46 The first ruling not reported; the second at (1986) 5 NSWLR 18.

47 Evans H (ed), *Odgers' Australian Senate Practice*, 11th edn, Department of the Senate, Canberra, 2004, pp 35-37.

(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.

Although the Commonwealth Act does not have application in New South Wales, it might be argued that it clarifies the provisions of Article 9.

The scope of Article 9 extends to protection against impeachment or questioning in 'any court or place out of Parliament'.

The meaning of 'place out of Parliament' has not been defined. However, it would be reasonable to suggest that the definition of 'place out of Parliament' would include any agencies of government and statutory bodies that are quasi-judicial in nature, including commissions of inquiry purporting to examine the participation of a member in parliamentary proceedings.

This broad and less restrictive approach was adopted in section 16(3) of the *Parliamentary Privileges Act 1987* (Cth) which defines proceedings in 'any court or tribunal' to mean:

[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.

It would not be reasonable to suggest, however, that Article 9 prevents any comment in the media or elsewhere on what is said in parliament. To take the view that 'place out of Parliament' includes places other than courts, tribunals, quasi-judicial government agencies and their like, would seem too literal a view of the purpose of Article 9, and would ultimately stifle the freedom to comment on what is said or done in parliament. As the United Kingdom Parliament's Joint Committee on Parliamentary Privilege commented: 'That cannot be right, and this meaning has never been suggested'.⁴⁸

When it is desired that an executive commission of inquiry examine 'proceedings in Parliament' then any abrogation of Article 9 can only be done by express words in a statute.⁴⁹ For example, the *Special Commissions of Inquiry Amendment Act 1997* authorised either House to waive privilege in connection with a Special Commission of Inquiry. This is examined later in this chapter under the heading 'Express statutory abrogation of parliamentary privilege'.

48 Joint Committee on Parliamentary Privilege, above n 40, p 29.

49 *Duke of Newcastle v Morris* (1870) LR 4 HL 661.

The sub judice convention

While members of Parliament have an absolute privilege of freedom of speech in parliament, the *sub judice* convention has been applied to avoid or limit discussion in parliament of matters that could prejudice proceedings before the courts. A more detailed discussion of this convention is provided in Chapter 11 (Rules of Debate).

Misuse of the freedom of speech

Misuse of the freedom of speech has been defined as the use by members of their freedom of speech in 'a way which ... may do [harm] to other important rights or freedoms and [result in] disproportionate damage ... to individuals who could otherwise seek protection of the law'.⁵⁰ While there are undoubtedly occasions where it may be appropriate for members to use the privilege of freedom of speech in a way that seriously affects the reputation of another person, there are equally circumstances where that may not be the case. While freedom of speech is necessary to the operation of Parliament, the downside of absolute freedom may arise where members fail to consider the basis, cogency and responsibility of statements they may make.⁵¹

On 25 February 1988, the Australian Senate adopted a resolution setting out the manner in which senators are to exercise their freedom of speech. Specifically the Senate resolved:

9. Exercise of Freedom of Speech

(1) That the Senate considers that, in speaking in the Senate or in a committee, Senators should take the following matters into account:

- (a) the need to exercise their valuable right of freedom of speech in a responsible manner;
- (b) the damage that may be done by allegations made in Parliament to those who are the subject of such allegations and to the standing of Parliament;
- (c) the limited opportunities for persons other than members of Parliament to respond to allegations made in Parliament;
- (d) the need for Senators, while fearlessly performing their duties, to have regard to the rights of others; and
- (e) the desirability of ensuring that statements reflecting adversely on persons are soundly based.

(2) That the President, whenever the President considers that it is desirable to do so, may draw the attention of the Senate to the spirit and the letter of this resolution.⁵²

50 Committee of Privileges, Second Report, United Kingdom Parliament, Session 1978-1979, p v.

51 Lynch A, "Coward's Castle" and persons' right of redress - Senate Privilege Resolution No 5', Department of the Senate, 1989.

52 *Odgers*, 11th edn, p 603.

Although the Council has not adopted similar guidelines⁵³ it nevertheless has power to restrain and discipline members who, by their conduct, offend the House. As Carney notes, the absolute privilege afforded to statements made by members in Parliament implies that ‘members remain accountable to their own House and hence to the electorate for what they say and do within the protection of this privilege’.⁵⁴

The freedom of speech that is enjoyed by members is balanced by rules that are designed to prevent an abuse of this privilege. In particular, standing order 95 provides in part:

- (2) A member may draw attention at any time to a point of order or a matter of privilege arising during the proceedings then before the House.
- (3) The President may intervene at any time when, in the President’s opinion, the speaker is in contravention of the rules and orders of the House.
- (4) On a question of order or a matter of privilege being raised, the business under consideration is suspended until the question of order or matter of privilege is determined.

In addition, the Privileges Committee can be requested to examine and report on matters that are raised by members in debate or in committees.⁵⁵

Citizens’ right of reply

The issue of freedom of speech and the right of a citizen to respond to references made about them during the course of proceedings in Parliament arose in the Council on 31 October 1996, when the Hon Franca Arena made allegations about a former member of Parliament and a former judge in connection with the Royal Commission into the New South Wales Police Service.⁵⁶ This incident was subsequently the subject of considerable media attention concerning the use by Mrs Arena of the privilege of freedom of speech.

On 14 November 1996, in response to the statement made by Mrs Arena, the Council resolved that the Standing Orders Committee inquire into and report on procedures for a person to respond to allegations made about them in the House.⁵⁷

53 On 11 May 2006, the Hon Peter Breen gave notice of a motion pertaining to the need to exercise the right of freedom of speech in a responsible manner, with a view to the damage that may be done by allegations made in Parliament to those who are the subject of such allegations. However, the notice was never brought on for discussion, *LC Notice Paper* (11/5/2006) 9765.

54 Carney G, *Members of Parliament: Law and Ethics*, Prospect Media, Sydney, 2000, p 207.

55 See Standing Committee on Parliamentary Privilege and Ethics, *Report on Inquiry into Statements made by Mr Gallacher and Mr Hannaford*, Report 11, November 1999; and Standing Committee on Parliamentary Privilege and Ethics, *Report on Inquiry into the Conduct of the Honourable Franca Arena MLC*, Report 6, June 1998.

56 *LC Debates* (31/10/1996) 5621-5625.

57 *LC Minutes* (14/11/1996) 447.

In its report dated November 1997, the Standing Orders Committee found that ‘there is a need for a clear and uncomplicated method for persons claiming to have been adversely referred to in debate in the House to have a right of reply to those allegations’. The Committee recommended that the Council adopt similar provisions for citizens’ right of reply as those adopted by the Senate on 25 February 1988.⁵⁸

In response to this recommendation, the Council on 13 November 1997 adopted procedures for a citizens’ right of reply in a resolution of continuing effect.⁵⁹ These procedures were subsequently incorporated in standing orders 202 and 203 adopted on 5 May 2004. The resolution of 13 November 1997 was consequently rescinded on 1 June 2004.⁶⁰

Standing order 202 provides that any person referred to in the House by name, or in such a way as to be readily identified, may make a submission in writing to the President for a citizen’s right of reply on any of the following grounds:

- that they have been adversely affected in reputation or in respect of dealings or associations with others;
- that they have been injured in occupation, trade, office or financial credit;
- that their privacy has been unreasonably invaded.

The submission should also include a request that an appropriate response be incorporated in the parliamentary record. In turn, the President must, as soon as possible, consider the submission and decide whether it is appropriate for the matter to be referred to the Privileges Committee for inquiry and report.

Standing order 203 outlines the procedures to be undertaken by the Privileges Committee when considering a submission for a citizen’s right of reply referred to it by the President. The Committee may meet with the person making the request or the member concerned, but is specifically prohibited from considering the truth of the statements made by the citizen in the response, or of the statements made by the member to which the citizen’s response pertains. The Committee then reports back to the House and recommends whether or not a response should be published. The published response must be succinct and strictly relevant to the questions at issue and not contain anything offensive or unreasonably affecting a person in an adverse way or invading their privacy. The response, if agreed to by the House and published in the records, attracts parliamentary privilege.

Repetition outside of Parliament of statements made in the House

The privilege of freedom of speech does not protect a member who repeats or publishes outside the Council statements made inside the chamber. Members

58 Standing Orders Committee, *Report on a Citizen’s Right of Reply*, Report No 26, November 1997, p 4.

59 *LC Minutes* (13/11/1997) 176-178.

60 *LC Minutes* (1/6/2004) 810.

must take the utmost care in responding to any question outside of the House, including from the media, about what they have said in the House.

Defamatory statements made in the House and then repeated outside the House leave a member open to libel action, even if the actual defamatory statement was not repeated.⁶¹ Generally, statements to the effect that ‘I stand by what I said in the House’ or ‘I do not resile from what I said in the House’ have been interpreted by the courts in other jurisdictions as endorsing outside the House words said in the House.⁶²

This position is based in part on three recent prominent New Zealand defamation cases which have considered the effective repetition outside the House of statements made in the House.⁶³ In these cases, statements by a member confirming that they ‘stand by’⁶⁴ what they said in Parliament or, as in *Buchanan v Jennings*,⁶⁵ that they ‘do not resile’ from what they said in the House have been found to amount to affirmation or ‘effective repetition’ of statements made in the Parliament. In effect, the courts have perversely found that they may use protected statements made in Parliament when deciding defamation cases.

The most recent decision in the Privy Council concerning Buchanan has been controversial.⁶⁶ The Privileges Committee of the New Zealand House of Representatives recommended that the *Legislature Act 1908* (NZ) be amended to provide that no person may incur criminal or civil liability for making any statement that affirms, adopts or endorses words written or spoken in proceedings in Parliament where the statement would not, but for the proceedings in Parliament, give rise to criminal or civil liability.⁶⁷

The Procedure and Privileges Committee of the Western Australian Legislative Assembly has endorsed this position and recommended that:

- the *Parliamentary Privilege Act 1891* (WA) be amended to include a provision which ensures that parliamentary proceedings cannot be used to establish what was ‘effectively’ but not actually said outside Parliament;
- that a uniform national approach be adopted through the auspices of the Standing Committee of Attorneys General.⁶⁸

61 See *Beitzel v Crabb* [1992] 2 VR 121 at 128; see also *Buchanan v Jennings* [2001] 3 NZLR 71.

62 See, for example, *Australian Broadcasting Corporation v Chatterton* (1986) 46 SASR 1.

63 See *Prebble v Television New Zealand* [1995] 1 AC 321; see also *Peters v Cushing* [1999] NZAR 241; see also *Buchanan v Jennings* [2005] 1 AC 115.

64 *Beitzel v Crabb* [1992] 2 VR 121.

65 [2001] 3 NZLR 71.

66 *Jennings v Buchanan* [2005] 2 NZLR 577 (PC).

67 Privileges Committee, Final Report on the question of privilege referred 21 July 1998 concerning *Buchanan v Jennings*, 1.17G, May 2005, p 9.

68 Procedure and Privileges Committee, ‘Western Australia Legislative Assembly Effective Repetition: Decision in *Buchanan v Jennings*’, Report No 3, 2006.

Odgers states simply that 'in other jurisdictions courts have held, wrongly, that ... reference to protected statements may be made'.⁶⁹

There are no decided cases in New South Wales on the issue of effective repetition. However, in *Della Bosca v Arena*,⁷⁰ settled out of court, the settlement ordered by the Supreme Court apparently confirmed the rule that parliamentary privilege does not extend to protect a member who effectively repeats outside Parliament allegations made about a named person in the course of parliamentary debates. The case concerned allegations made by the Hon Franca Arena during a Labor Party caucus meeting and in radio and television interviews of claims first made in the Council of a 'high level paedophile cover up'. At a preliminary stage, in *Della Bosca v Arena* the plaintiff alleged that during a caucus meeting, Mrs Arena said 'I stand by the comments that I made over this matter ...'. The relevant issues were considered, though not decided on, by Levine J in the Supreme Court who was not persuaded to stay the proceedings on the ground that the cause of action would 'canvass Hansard'.⁷¹

Freedom of speech in State parliaments under the federal system

The Commonwealth Constitution does not refer to the privileges of State parliaments. For many years this did not raise any conflicts or uncertainties. However, in 1983 this changed when concerns arose over the interpretation of section 109 of the Commonwealth Constitution and its impact on the privileges of a State parliament. Section 109 provides:

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

The matter arose following a speech in the South Australian Legislative Assembly by Peter Duncan MP on the Royal Commission on the Australian Security Intelligence Organisation. The Commonwealth Solicitor-General and the Attorney General subsequently advised that, while the member was protected from prosecution in respect of the information he gave in his speech, the media reports of the speech were not themselves protected by parliamentary privilege and those who published them would be liable for contempt under the *Royal Commissions Act 1902* (Cth), if the contempt was wilful.

The advice was contentious. In 1985, a majority report of the Senate Standing Committee on Constitutional and Legal Affairs found that the advice was incorrect, concluding that:

[T]he Commonwealth's legislative power in this area is restrained not only because s 106 of the Commonwealth Constitution guarantees the inviolabi-

⁶⁹ *Odgers*, 11th edn, p 44.

⁷⁰ [1999] NSWSC 1057.

⁷¹ See 'Arena to pay Della Bosca \$25,000', *Sydney Morning Herald*, 7 February 2001. See also [1999] NSWSC 1057 at [31].

lity of State Constitutions but also because there is an implied limitation on Commonwealth power in respect of the privilege of freedom of speech in State parliaments ... Any fetter placed on this freedom is a diminution of a State's capacity to govern. The functioning of Parliament is an 'essential State function' which could not exist without that freedom of speech.⁷²

The matter was debated extensively in the New South Wales Parliament, and the 1985 Joint Select Committee Report on Parliamentary Privilege, in discussing the issue, recommended that in the unlikely event of such a conflict being forced to litigation the Parliament seek to intervene to advance the views that no Commonwealth power exists to override the parliamentary privilege of the State parliaments.⁷³

The immunity of other 'proceedings in Parliament' from impeachment or questioning in the courts

As previously noted, members, witnesses and other participants in proceedings in parliament enjoy the privilege of freedom of speech in parliamentary proceedings. As such, they are immune from impeachment or questioning before the courts or in places 'outside of parliament', including being sued or prosecuted, in relation to their contribution to the 'proceedings in Parliament'.

However, this immunity under Article 9 of the *Bill of Rights 1689* also extends to other 'proceedings in Parliament', such as the giving of evidence before the House or a committee and preparation of documents and communications for members. This gives rise to perhaps the most controversial aspect of Article 9: what constitutes 'proceedings in Parliament' and what activities are covered by parliamentary privilege. No definition of 'proceedings in Parliament' is provided in the *Bill of Rights 1689*.

In *Erskine May*, 'proceedings in Parliament' is broadly described as:

[S]ome formal action, usually a decision, taken by the House in its collective capacity. This is naturally extended to the forms of business in which the House takes action, and the whole process, the principal part of which is debate, by which it reaches a decision. An individual member takes part in a proceeding usually by a speech, but also by various recognised forms of formal action, such as voting, giving notice of a motion, or presenting a petition or report from a committee ... Officers of the House take part in its proceedings principally by carrying out its orders, general or particular. Strangers also may take part in the proceedings of a House, for example

72 Senate Standing Committee on Constitutional and Legal Affairs, *Commonwealth Law Making Power and the Privilege of Freedom of Speech in State Parliaments*, Parliamentary Paper No 235/1985, p xix. For the most recent High Court jurisprudence on the 'federal' implications arising under the Commonwealth Constitution, see *Austin v Commonwealth* (2003) 77 ALJR 491 at 496, where Gleeson CJ commented that 'the federal nature of the Commonwealth has been held to limit the capacity of the Federal Parliament to legislate in a manner inconsistent with the constitutional role of the States'.

73 Joint Select Committee upon Parliamentary Privilege, above n 36, pp 23-60.

by giving evidence before it or one of its committees, or by securing presentation of a petition.⁷⁴

At the Commonwealth level, the *Parliamentary Privileges Act 1987* (Cth) has attempted to provide a clearer and more comprehensive definition of ‘proceedings in Parliament’ as well as to clarify the extent of the use of evidence which derives from such proceedings. Section 16(2) provides:

(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.

Odgers notes, however, that the 1987 Act did not explicitly extend the immunities of freedom of speech to activities of members not related to their participation in proceedings of the Houses and committees.⁷⁵ The same principle would apply in New South Wales.

In New South Wales, in the absence of similar legislation, it is open to the courts to determine what constitutes ‘proceedings in Parliament’. Carney argues that ‘proceedings in Parliament’ covers:

[T]he speeches and debates, as well as the passage of legislation. Also included are the tabling of motions and amendments to motions or bills and the tabling, asking and answering of questions to Ministers and other members. A register of members’ pecuniary interests might also attract privilege. The proceedings of parliamentary committees including the evidence given by any person to those committees are also covered as are those who present petitions to parliament. ...

It is clear that members are not protected by the privilege in respect of all their parliamentary duties when performed outside parliamentary proceedings. However, the closer the relevant activity is connected to the proceedings of parliament, the easier it is to argue that it should be protected by privilege.⁷⁶

74 *Erskine May*, 23rd edn, p 110.

75 *Odgers*, 11th edn, p 44.

76 Carney, above n 54, pp 210-211.

Clearly, the term ‘proceedings in Parliament’ denotes the formal transaction of business in either House or in committees, such as the giving of evidence before the House or a committee or the making of a submission to a committee. However, matters only connected with, or ancillary to, the ‘proceedings in Parliament’ become less clear-cut. The particular circumstances of an action are likely to determine whether privilege is attached. However, some guidance is available, as discussed below.

Members’ documents and communications

In the course of their duties, members receive an array of correspondence, memoranda, briefing notes and so forth. Some of these documents may attract privilege. However, not all correspondence between members and ministers, agencies of the executive, or the public, attract privilege. Actions taken in relation to constituents or other persons, or which constituents or other persons take in relation to the member, are usually not ‘proceedings in Parliament’. As David McGee, Clerk of the New Zealand House of Representatives, pointed out:

A person sending information to an individual member is not engaging in a parliamentary proceeding. Such a communication is not a proceeding in Parliament, unless the communication is directly connected with some specific business to be transacted in the House, such as the delivery of a petition to the member for presentation to the House, or was solicited by the member for the express purpose of using it in a parliamentary proceeding.

Other than in these circumstances, no parliamentary privilege applies to a communication to a member of Parliament.

A communication’s status after it has been received by the member depends upon the use made of it by the member. If the member takes some action in respect of it for the purpose of transacting parliamentary business, it may, at that point, become part of a proceeding (whether it is referable to a particular debate or not). But, even so, that will not have any retrospective effect so as to afford protection in respect of the original communication to the member.

Where a member communicates with another member, such as a Minister, regarding parliamentary business (for example, forwarding an amendment to a bill before the House or a question that the member is contemplating lodging) this will be regarded as a proceeding in Parliament.⁷⁷

In 2004 during an inquiry concerning the seizure of a member’s documents by the Independent Commission Against Corruption, the Privileges Committee developed the following test to determine whether or not documents fall within the scope of ‘proceedings in parliament’:

⁷⁷ McGee D, *Parliamentary Practice in New Zealand*, 3rd edn, Dunmore Publishing, Wellington, 2005, p 622.

(1) Were the documents brought into existence for the purposes of or incidental to the transacting of business in a House or a committee?⁷⁸

- YES → falls within 'proceedings in Parliament'.
- NO → move to question 2.

(2) Have the documents been **subsequently used** for the purposes of or incidental to the transacting of business in a House or a committee?

- YES → falls within 'proceedings in Parliament'.
- NO → move to question 3.

(3) Have the documents been **retained** for the purposes of or incidental to the transacting of business in a House or a committee?

- YES → falls within 'proceedings in Parliament'.
- NO → does not fall within 'proceedings in Parliament'.⁷⁹

In advice tendered to the Deputy Premier on 16 December 2002, the Commissioner of the Independent Commission Against Corruption stated:

It is the Commission's view that considering the content of what a member of Parliament has said in Parliament or indeed considering anything that a member has done in preparation for what is said in Parliament falls within the ambit of parliamentary privilege.⁸⁰

At the Commonwealth level under section 16(2) of the *Parliamentary Privileges Act 1987* (Cth), 'proceedings in Parliament' not only covers debates in parliament, including motions, parliamentary questions and answers, committee proceedings, tabling of documents, and petitions once they are presented, but can also include words and acts 'for purposes of or incidental to' such proceedings. For example, various correspondence, such as correspondence with ministers, correspondence with other agents of the executive government, correspondence with members of the public, and research and briefing notes in relation to matters which it is or was intended to bring before parliament, may fall within the ambit of parliamentary privilege. The same may hold true for diary notes or file notes of attendances or conversations relating to the 'business of Parliament'.

The provision of information and protected disclosures to members

An issue that arises often is whether other persons, in providing information to members outside of formal proceedings of parliament, are covered by parliamentary privilege. Particular concern has been expressed about communications made by whistleblowers to members, and whether the protection afforded by

78 In this test, the expression 'for the purposes of' includes 'or predominantly for the purposes of'.

79 Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC No 2*, Report No 28, March 2004, p 8.

80 Advice dated 16 December 2002, ref E02/1706.

parliamentary privilege extends to such communication, and whether the House may treat as a contempt any interference with such communication.⁸¹

Once again, the answers to these questions depend on the extent to which the communication can be linked to a 'proceeding in parliament'.

This issue arose in November 1996 following the serving of notices on the Hon Franca Arena by the Royal Commissioner into the New South Wales Police Service, calling for documents concerning allegations of paedophilia made by Mrs Arena in the Council. Some of the documents covered by the notice were used by Mrs Arena in her speech in the Council on 31 October 1996, when she made allegations about a former member of Parliament and a former judge in connection with the Royal Commission into the New South Wales Police Service.⁸² However, other documents were provided to her after the speech. In advice tendered to the Council by Paul Lakatos and Bret Walker SC, they contended that parliamentary privilege may extend to information received by Mrs Arena which she referred to in her speech, but expressed reservations as to whether privilege would extend to material received subsequent to her speech.⁸³

However, while absolute privilege may not extend to material provided to members but incidental to 'proceedings in Parliament', it is possible that public interest immunity may attach to material provided to a member for the purpose of being raised in parliament. In relation to the case of Mrs Arena, Stephen Gageler SC, acting for Mrs Arena, argued that:

The application of the principles of public interest immunity to information provided in confidence to a member of Parliament relating to a matter of public interest is, in my opinion, particularly strong.

Public interest immunity, however, is not absolute. It involves in all circumstances a balancing of considerations. What is required (ultimately of a court) is that there be a balancing of public interest to determine which predominates: that is, whether the public interest which requires that the information not be produced outweighs the public interest in the body requiring its production to have access to such information.⁸⁴

Oggers also notes that public interest immunity may be held to attach to the provision of information to members of Parliament.⁸⁵

A limited protection of information provided to members of parliament is found in section 19 of the *Protected Disclosures Act 1994* which provides that a disclosure

81 Evans H, 'Members' informants: any protection?', *The Table*, 1997, p 19; see also Attwood J, 'Parliamentary privilege and members' sources of information', Australasian Study of Parliament Group Annual Conference - Parliamentary Privilege, Melbourne, 2002.

82 *LC Debate* (31/10/1996) 5621-5625.

83 Lakatos P and Walker B, 'In the matter of advice as to claim of parliamentary privilege before Royal Commission into NSW Police Service', 6 December 1996.

84 Gageler S SC, 'Matter of the Royal Commission into the New South Wales Police Service - Opinion', 22 November 1996, p 18.

85 *Oggers*, 11th edn, p 42.

by a public official to a member is protected in specified circumstances: the public official must, without success, have already made substantially the same disclosure to an investigating authority, public authority or officer of a public authority; the public official must have reasonable grounds for believing that the disclosure is substantially true; and the disclosure must be substantially true. Informants who are not public officials remain outside the protection offered by the Act.

Tabled papers

A document tabled in the House by a member is protected by absolute privilege. However, the act of tabling the document does not necessarily grant immunity to all existing copies of the document in all circumstances. The extent to which absolute privilege attaches to copies of the document and their subsequent use depends on the purpose for which the document was created.

In *Szwarcbord v Gallop*,⁸⁶ Crispin J held that whilst the copy of a document tabled in parliament would be protected as ‘proceedings in Parliament’, this protection did not extend to other copies of the document if it had not been prepared for the purposes of transacting the business of the Parliament. As stated by Crispin J:

Privilege may be attracted by the retention of a document for a relevant purpose, but 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. It applies only to the words used and acts done in the course of, or for purposes of or incidental to, the transaction of business of the Assembly including the retention of a document for a purpose of that kind.⁸⁷

As a corollary, his Honour also noted that a member, sued for defamation with respect to a document unrelated to parliamentary business, could not thwart the proceedings against them by tabling the document in the House.⁸⁸

It would be a nonsense to suggest that an article in a newspaper, tabled in the House, would prevent other copies of that article in circulation from being used in judicial proceedings against the author for defamation.

Caucus proceedings

The traditional view is that party caucus meetings are not regarded as ‘proceedings in Parliament’ even though they occur within its precincts. In 1958 in *R v Turnbull* in the Tasmanian Supreme Court, Gibson J concluded:

The Caucus, or private meeting of members of a party, to determine joint action in Parliament, is essentially a body which operates outside Parlia-

86 (2002) 167 FLR 262.

87 *Szwarcbord v Gallop* (2002) 167 FLR 262 at [22].

88 *Ibid* at [22]-[23].

ment, whatever effect it intends to produce in Parliament, and cannot, in my opinion, claim parliamentary privilege.⁸⁹

However, in 1997 in the New Zealand High Court in *Rata v Attorney General*, Master Thompson held that, caucus being integral to the parliamentary system, what is said there must be absolutely privileged in the interest of ‘robust debate’. He concluded:

- (a) As a matter of principle the caucus system as it has developed in New Zealand is an integral part of the parliamentary process and that all matters transacted in caucus are inextricably linked to Parliament ...
- (b) If that general proposition is wrong then any discussion and related papers will be privileged when they relate to the passage of legislation (present or future) or any matter which is before the House ...⁹⁰

The decision in *Rata* has been criticised, notably by David McGee, Clerk of the New Zealand House of Representatives, who called it a ‘perverse interpretation’. According to McGee:

The Master’s conclusion that caucus is now legally an integral part of Parliament in New Zealand is a radical one indeed. As he acknowledges, this is not the view of textbook writers in New Zealand who have commented on the meaning of proceedings in Parliament.⁹¹

According to Joseph the decision in *Rata* was ‘without precedent or support’:

Caucus meetings do not qualify as ‘proceedings in Parliament’. Caucus does not transact the business of the House but is a party-political meeting for coordinating strategies that may or may not relate to proceedings in Parliament ... The correct view is that political meetings are not proceedings in Parliament and lack protection of parliamentary privilege.⁹²

In the only case in New South Wales touching on this issue, *Della Bosca v Arena*, Levine J concluded that ‘the question of whether or not proceedings of “Caucus” are embraced by the doctrine of absolute privilege in relation to the proceedings of Parliament is clearly an arguable one’.⁹³

Subpoenas to produce documents

While as a general rule there is no immunity for members of parliament from the processes associated with subpoenas or orders for the discovery of documents, an immunity does arise where documents in the possession of a member form part of ‘proceedings in Parliament’. In such circumstances any attempt to obtain such documents would amount to a contempt of Parliament.

89 [1958] Tas SR 80 at 84.

90 (1997) 10 PRNZ 304 at 313.

91 McGee D, ‘Parliament and Caucus’, *New Zealand Law Journal*, Vol 137, April 1997, p 138.

92 Joseph PA, *Constitutional and Administrative Law in New Zealand*, 2nd edn, Brookers, Wellington, 2001, pp 402-403.

93 [1999] NSWSC 1057 at [24].

In *Crane v Gething*, French J confirmed in this respect that subpoenas are part of the coercive armoury of the courts and they have jurisdiction to determine questions concerned with 'the interaction between parliamentary and judicial proceedings'.⁹⁴

Similar considerations apply with respect to the disclosure and production of documents at the discovery stage of the litigation process. The majority opinion in *O'Chee v Rowley* was that, where a document is a 'proceeding in Parliament', it is to have immunity from the compulsory court processes of discovery or disclosure.⁹⁵ This is because that process would itself amount to impeaching or questioning the proceedings at issue. Conversely, no such protection is afforded to members' documents that do not constitute 'proceedings in Parliament', although, as noted previously, public interest immunity may apply.

The execution of search warrants

A different, yet related, issue is the statutory power of law enforcement and investigative agencies to conduct searches of members' offices at Parliament House. Generally, the execution of a search warrant by enforcement and investigative agencies within the precincts of Parliament only occurs with the consent of the relevant Presiding Officer.

On 3 October 2003 officers of the Independent Commission Against Corruption executed a search warrant at the Parliament House office of the Hon Peter Breen, a member of the Council. During the execution of the warrant, the officers seized a quantity of documents, as well as two computer hard drives and Mr Breen's laptop computer. It became evident later that, despite section 122 of the *Independent Commission Against Corruption Act 1988* which expressly preserves parliamentary privilege, and assurances from the officers themselves that they would respect that privilege, some of the material seized was outside the authorisation of the warrant and some was immune from seizure by virtue of parliamentary privilege. This included at least one document, as well as Mr Breen's laptop and desktop computer hard drives, which it later transpired had been 'imaged' by the Independent Commission Against Corruption.⁹⁶

Following recommendations of the Standing Committee on Parliamentary Privilege and Ethics which inquired into the incident,⁹⁷ the House adopted a resolution to resolve the matter to the following effect:

94 (2000) 97 FCR 9 at 45.

95 (1997) 150 ALR 199 at 215.

96 The laptop and desktop hard drives were returned to the President when it was pointed out to the ICAC that they had been seized outside the authorisation of the warrant.

97 Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC*, Report No 25, December 2003; see also Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC No 2*, Report No 28, March 2004.

- The seized material was to be returned to the President of the House, and retained in the possession of the Clerk, until the issue of parliamentary privilege had been determined.
- The member, the Clerk of the House, and a representative of the Commission were to 'jointly be present at' the examination of the material.
- The member and the Clerk were to identify any items claimed to be within the scope of 'proceedings in Parliament', according to a definition of that expression which was stated in the resolution, in the same terms as the definition contained in the *Parliamentary Privileges Act 1987* (Cth).⁹⁸
- The Commission was to have the right to dispute any such claims, and to provide reasons; the member was to have the right to provide reasons in support of any disputed claim.
- Any items that the House determined as within the scope of 'proceedings in Parliament' were to remain in the custody of the Clerk until the House otherwise decided, with a copy to be made available to the member.
- Any items that the House determined were not privileged, or in respect of which a claim of privilege was not made, were to be returned to the Commission.⁹⁹

This episode highlighted the difficulty of an investigating body such as the Independent Commission Against Corruption, with extensive statutory powers of entry, inspection and subsequent seizure of documents, in dealing with parliamentary privilege.

The procedure followed in the Breen case differs from the procedure followed in similar cases in the Australian Senate, where an independent 'legal arbiter' has been appointed to review material seized under warrant, and make an assessment as to whether any of the material was immune from seizure. In particular, the procedure in the Breen case included steps to enable the particular documents in dispute to be identified, allowing undisputed documents to be returned to the Commission at an early stage, and provided for the question of immunity from seizure to be determined by the House itself rather than an agent.¹⁰⁰

The question of the protection afforded by parliamentary privilege to documents seized under the authority of a search warrant has not been clearly established at law. In *Crane v Gething* in 2000, the question of the application of parliamentary privilege was not ultimately decided, although French J was of the view that the

98 See s 16(2) of the *Parliamentary Privileges Act 1987* (Cth). There is no equivalent legislative provision in New South Wales.

99 *LC Minutes* (4/12/2004) 493-495.

100 Another difference between the Senate procedure and the Council's procedure was that the Council's procedure only provided a mechanism for determining whether documents were immune from seizure on the ground of parliamentary privilege, and did not provide for any determination to be made as to whether the seizure of particular documents may have been unlawful on other grounds.

issuing of a search warrant, authorising a search of Senator Crane's home, parliamentary and electoral offices, was an administrative or executive act in aid of an executive investigation, not a judicial one (as in the case of a subpoena). From this he concluded that it 'is not, in the ordinary course, for the courts to decide questions of privilege as between the executive and the parliament in litigation between the subject and the executive'.¹⁰¹

In another incident in 2002, the Queensland Police executed a search of Senator Harris's electoral office, impounding documents, but providing the Senator with an opportunity to identify those documents he claimed were immune from seizure by virtue of parliamentary privilege. The Senator declined the offer, leaving the matter to be resolved, following the precedent in *Crane v Gething*, by the Senate itself.¹⁰²

There is no settled law in the case of the seizure of members' documents under search warrant. However, as the procedure followed in the Breen case suggests, material cannot be seized if it is covered by parliamentary privilege, although not every document or item in a member's office is necessarily covered by parliamentary privilege.

The publication of documents, proceedings and records of the Parliament

While the publication of documents, proceedings and records of the Parliament clearly falls within the scope of 'proceedings in Parliament' under Article 9 of the *Bill of Rights 1689*, absolute privilege also applies to the publication of documents, proceedings and records of the Parliament under section 27 of the *Defamation Act 2005*, which provides:

- (1) It is a defence to the publication of defamatory matter if the defendant proves that it was published on an occasion of absolute privilege.
- (2) Without limiting subsection (1), matter is published on an occasion of absolute privilege if:
 - (a) the matter is published in the course of the proceedings of a parliamentary body, including (but not limited to):
 - (i) the publication of a document by order, or under the authority, of the body, and
 - (ii) the publication of the debates and proceedings of the body by or under the authority of the body or any law, and

101 (2000) 97 FCR 9 at 30. However, in evidence before the Privileges Committee, Mr Bret Walker SC advised that the decision in that case appears to have been influenced by the unusual nature of the proceedings, and the way in which the case was pleaded, and that the outcome may well have been different if a different kind of claim had been brought before the Court, *Evidence*, 10 November 2003, p 43.

102 The Senate Committee of Privileges, *Execution of Search Warrants in Senators' Offices – Search Warrants*, 105th Report, June 2002; see also *Parliament Matters*, Issue No 9, February 2003, p 4; see also House of Representatives Standing Committee on Privileges, *Report of the Inquiry into the Status of the records and correspondence of Members*, 2000, pp 19-21.

- (iii) the publication of matter while giving evidence before the body, and
- (iv) the publication of matter while presenting or submitting a document to the body, or ...

Section 4 of the *Defamation Act* defines 'matter' to include, among other things, a program, report, advertisement or other thing communicated by means of television, radio, the internet or any other form of electronic communication. A 'document' is defined to include, among other things, anything on which there is writing, and anything from which sounds, images or writings can be reproduced with or without the aid of anything else.¹⁰³

Absolute privilege applies under section 27 to proceedings and records of the House and its committees, and includes all reports, committee reports, as well as the debates and Minutes of Proceedings of either House and committees, the Notice Paper, the Questions and Answers Paper and the Statutory Rules Paper.

Absolute privilege also applies under section 27 to the official publication of Hansard, including 'galley proofs' and bound volumes. The Clerk is authorised to publish a Hansard record under standing order 51.

Section 27 also provides absolute privilege to documents published under the authority of the House and its committees. When read in conjunction with standing order 54, this provides absolute privilege to documents tabled in the House.

There is some debate in other jurisdictions as to whether documents tabled in the House but not ordered to be printed are subject to absolute privilege. For example, it was observed by the Legislative Assembly of Queensland Select Committee of Privileges in 1991 that, in general, documents must be tabled and adopted by the House to become parliamentary papers, 'although there is doubt as to whether papers which are tabled but not ordered to be published or printed become privileged as parliamentary papers'.¹⁰⁴

However, in New South Wales, under the *Defamation Act 2005*, there is no doubt that absolute privilege extends to all documents that have been formally tabled. For the purposes of the Council this would entail the tabling of papers either by leave of the House or pursuant to a legislative requirement, as in the case of annual reports of government departments and statutory authorities.

Section 27 also provides absolute privilege to the broadcasting of 'proceedings in Parliament'. As noted, under section 4, 'matter' is defined to include a program, report, advertisement or other thing communicated by means of television, radio, the internet or any other form of electronic communication, such as data, text, images or sound. The broadcasting of proceedings is authorised by the House under a resolution of continuing effect, originally passed on 11 October 1994.¹⁰⁵

103 *Defamation Act 2005*, s 4.

104 Legislative Assembly of Queensland Select Committee of Privilege, *Report on Privilege Attaching to Parliamentary Papers*, 1991, p 12.

105 *LC Minutes* (11/10/1994) 279-281.

The *Parliamentary Papers (Supplementary Provisions) Act 1975* extends immunity from civil and criminal proceedings, other than proceedings for defamation, for the publication of parliamentary papers under the authority of the House or a Committee. Section 8 stipulates that the Act does not derogate from any power or privilege of either House, its members or its committees.

Section 14A(7) of the *Constitution Act 1902*, read in combination with the *Defamation Act 2005* and the *Parliamentary Papers (Supplementary Provisions) Act 1975*, provides absolute privilege to the publication of the Register of Disclosures by Members of the Legislative Council.

Qualified privilege

A defence of qualified privilege may apply to any publication of public documents, such as Hansard, under section 28(1) of the *Defamation Act 2005*, which provides:

- (1) It is a defence to the publication of defamatory matter if the defendant proves that the matter was contained in:
- (a) a public document or a fair copy of a public document, or
 - (b) a fair summary of, or a fair extract from, a public document.

Qualified privilege may be available to a publisher as a defence in circumstances where it is considered important that the facts be known in the public interest. Because the defence is one of qualified privilege, it may be defeated if it is shown that publication was not in good faith for public information.

The issue of qualified privilege and the republication of ‘proceedings in Parliament’ arose in 1996 when a member made a statement in the Assembly which detailed a long-running dispute between Mr Malouf and the Commonwealth Bank and contained allegations of fraud and misconduct against the bank and a former officer of the bank. In *Commonwealth Bank v Malouf* the bank sought an order preventing Mr Malouf from carrying out his intention to republish, in whole or in part, the relevant Hansard extract.

Levine J of the New South Wales Supreme Court subsequently issued an interlocutory injunction suppressing the distribution of the relevant Hansard extract. In doing so, his Honour emphasised the distinction to be drawn between the absolute privilege that attached to the Private Member’s Statement in the Assembly and the qualified privilege available to a publisher of the Member’s Statement under common law and the former *Defamation Act 1974*:¹⁰⁶

It is trite to observe that a Member of Parliament is protected by absolute privilege in relation to what he says in Parliament. That privilege does not extend to a person who reports or repeats outside of Parliament that which is said in Parliament. The privilege available to a publisher of a report of the proceedings of Parliament is qualified. It has been so at

106 The forerunner to the *Defamation Act 2005*.

common law and in my view clearly is in the light of the provisions of the *Defamation Act 1974*.¹⁰⁷

Qualified privilege may also protect members where they re-publish proceedings in Parliament in separate correspondence or reports. Importantly, however, members are only protected by qualified privilege in such circumstances where it can be proved that the republication or repetition was justified and fair and was made without malicious intent.

Issues also arise in relation to the republication of 'intermediate stages' of Hansard such as the daily 'proofs'. In recent years the proofs of Hansard have been available online and can be accessed via the internet, thereby adding to the scope for uncertainty so far as extraction and copying is concerned. Uncorrected or proof copies of Hansard should not be used where a corrected copy is available. However, it would appear that republication of uncorrected copies is now protected by section 27 of the *Defamation Act 2005*.

Minor immunities

There are a number of minor immunities of members of the Houses of Parliament, both at common law and under statute. These include the limited exemption from civil arrest, the exemption from the service of legal process in Parliament, the limited exemption from attendance as a witness in a court or tribunal and the exemption from jury duty.

Limited exemption from civil arrest

Members of Parliament have limited exemption from arrest in civil matters.¹⁰⁸ This immunity flows from the paramount right of the Houses to the attendance and service of their members.¹⁰⁹

According to *Odgers*, the immunity from arrest in a civil case is now of little significance, as the potential for a person to be arrested and imprisoned by a civil, as distinct from a criminal, process is now extremely small. This is due to changes in the law, and the narrow compass which the courts have given to purely civil cases by interpretation.¹¹⁰

There is no immunity from arrest in criminal matters.

107 *Commonwealth Bank v Malouf* (unreported, NSWSC, 10 December 1996). As for the defendant, his Honour said that his motive, purpose and intent are 'founded upon no perceptible public interest but rather an intent to influence, compromise, embarrass and pressure improperly the conduct of the plaintiff as a litigant'.

108 This immunity was tested in 1894 in *Norton v Crick* (1894) 15 LR (NSW) 172 and was not upheld.

109 See the discussion later in this chapter on 'The power to maintain the attendance and service of its members' at p 84.

110 *Odgers*, 11th edn, p 55.

Exemption from the service of legal process

Erskine May notes that in Westminster, '[t]he service of the subpoena to attend as a witness has in the past been treated as a breach of privilege by the House and the parties responsible for service have on occasion been submitted to the Serjeant for contempt'. However, in modern practice, it would be doubtful whether the actual service would be regarded as a breach of privilege, unless it was effected within the precincts of Parliament while the House was sitting.¹¹¹

The matter arose in the Council in 1988 in connection with the serving of process on the Hon Richard Jones. The President submitted his view to the House that the 'established privileges of every member would be affected if members were impeded in the pursuit of their parliamentary business within the precincts of the House'. The President stated:

I feel that members could be placed in an intolerable situation by being subjected to the service of process on these premises and that such an action constitutes a serious contempt of the rights and privileges of members of the House.¹¹²

The House subsequently adopted the following resolution, which was conveyed by the President to the solicitors concerned:

- (1) This House re-asserts that any attempt to serve legal process upon a Member of the Legislative Council within the precincts of the Parliament constitutes a serious contempt of the House.
- (2) In the opinion of this House, the service of process upon the Honourable RSL Jones at Parliament House on 31 May 1988 was an invasion of Members' privileges and a serious contempt of this House.
- (3) It would be regarded as an acceptable apology to the Member and to this House if the Solicitors for the Petitioners in this matter forthwith withdrew the process as presently served and, if so desired, effect service upon the Member in the conventional manner outside the precincts of Parliament House.¹¹³

The solicitors subsequently withdrew the process and sent a written apology to the House.¹¹⁴ In accepting the apology, the House re-affirmed its position that the service of process, without the consent of the House, on one of its members within the precincts of the Parliament constitutes a serious contempt of the privileges of the House.¹¹⁵

111 *Erskine May*, 23rd edn, p 125.

112 *LC Minutes* (1/6/1988) 109, *LC Debates* (1/6/1988) 953.

113 *Ibid.*

114 *LC Minutes* (14/6/1988) 200-201.

115 *LC Minutes* (16/6/1988) 227.

Limited exemption from attendance as a witness

Section 15(2) of the *Evidence Act 1995* provides:

15(2) A member of a House of an Australian Parliament is not compellable to give evidence if the member would, if compelled to give evidence, be prevented from attending:

- (a) a sitting of that House, or a joint sitting of that Parliament, or
- (b) a meeting of a committee of that House or that Parliament, being a committee of which he or she is a member.

The rationale behind this limited exemption derives from the paramount right of Parliament to the attendance and service of its members. That right was confirmed in the Council on 13 September 1994 when the President, in response to the service of a subpoena on a member, the Hon Stephen Mutch, to attend the Local Court on a given date, and thereafter as required, to give evidence on behalf of the Crown in the case of *Police v Dyers*, informed the House that:

[A]s the member had not been granted leave of absence from the House to attend the Court he had written to the Chief Magistrate advising that, as the Parliament has paramount right of attendance and service of its members, the Legislative Council claims privilege of exemption of Mr Mutch from attendance as a witness, if required, whenever the House is sitting.¹¹⁶

The claim of the Parliament to the service of its members has also been extended to officers of the Council. In September 1998, the President had occasion to write to the Registrar of the District Court of New South Wales to indicate that the Clerk of the Parliaments would be unable to attend before the Court to give evidence on the basis that 'Members and Officers are exempt from attending as a witness while the House is sitting'.¹¹⁷

Exemption from jury duty

Under section 6 and Schedule 2 of the *Jury Act 1977*, members, as well as officers and other staff of the Houses, are exempt from jury service.

In the United Kingdom, section 9 and Schedule 1, Part III of the *Juries Act 1974* previously excused from jury service certain categories of persons including members and officers of the House of Lords and House of Commons. However, the *Criminal Justice Act 2003* repealed these provisions.

Parliamentary privilege and statutory secrecy provisions

In general terms, statutory secrecy provisions in New South Wales have no effect on parliamentary privilege, although that is not to say that members of parliament should not consider seriously claims by witnesses that they cannot answer a

116 *LC Minutes* (13/9/1994) 227.

117 *LC Minutes* (8/9/1998) 663.

question due to statutory secrecy provisions which prohibit the disclosure of particular information. This issue is examined in greater detail in Chapter 18 (The Inquiry Power).

Parliamentary privilege and the criminal law

Parliamentary privilege is part of the general law. Accordingly, there is no question of any immunity for members from criminal prosecution. In *Bradlaugh v Gossett* in 1884, Stephens J said he could find no authority 'for the proposition that an ordinary crime committed in the House of Commons would be withdrawn from the ordinary course of criminal justice'.¹¹⁸ In *Criminal Justice Commission v Nationwide News Pty Ltd* in 1996, Pincus JA said: 'If an assault causing grievous injury were committed by one member on another during the course of a debate, it is clear enough that the injured member could sue, under the general law'.¹¹⁹

THE POWERS OF THE HOUSE

The key powers of the Houses of Parliament are:

- the power of the Houses to regulate their own affairs;
- the power to maintain the attendance and service of their members;
- the power to discipline members;
- the power to deal with contempt;
- the power to exclude and remove strangers;
- the power to conduct inquiries and call witnesses;
- the power to order the production of documents.

The power of the House to regulate its own affairs

The Council has the power to regulate its own internal affairs. *Barton v Taylor*¹²⁰ provides authority for the proposition that a legislative body 'has the right of protecting itself from all impediments to the due course of its proceedings'. It is clear that reasonable measures to prevent disorderly conduct in the chamber are within its power.¹²¹

118 (1884) 12 QBD 271 at 283.

119 [1996] 2 Qd R 444 at 456; considered by Pincus JA was *Attorney General v Macpherson* (1870) LR 3 PC 268 where a member of the New South Wales Legislative Assembly was charged with assaulting another member in an ante-chamber adjoining the chamber, while Parliament was sitting.

120 (1886) 11 AC 197.

121 *Kielley v Carson* (1842) 12 ER 225 at 234.

Standing rules and orders and sessional orders

The *Constitution Act 1902* confers on both Houses power to make standing rules and orders ‘regulating’, among other things, the ‘orderly conduct’ of business,¹²² subject to the approval of the Governor.¹²³

There are few authorities on the scope of the expression ‘orderly conduct’. However, in *Fenton v Hampton*, Fleming CJ defined the power of the Houses to make standing orders for their ‘orderly conduct’ as extending ‘no farther than providing for and regulating the mode of conducting business and forms of procedure, so as to secure method and good order within the House’.¹²⁴

It has been established by case law that the power of the House to pass a relevant standing order is subject to judicial review, while the implementation and practice of a standing order is for the House to determine. In *Harnett v Crick*, a case concerning the Legislative Assembly, the Privy Council observed:

Two things seem clear: (1) that the House itself is the sole judge whether an ‘occasion’ has arisen for the preparation and adoption of a Standing Order regulating the orderly conduct of the Assembly, and (2) that no Court of law can question the validity of a Standing Order duly passed and approved, which, in the opinion of the House, was required by the exigency of the occasion, unless, upon a fair view of all circumstances, it is apparent that it does not relate to the orderly conduct of the Assembly.¹²⁵

The current standing rules and orders of the Council were adopted by the House on 5 May 2004 and approved by the Governor, in accordance with the provisions of section 15(2) of the *Constitution Act 1902*, on 31 May 2004. The previous standing orders were originally adopted in 1895.

Sessional orders are rules adopted each session that govern the way certain aspects of the Council operate during that session of Parliament. Sessional orders have traditionally been used as a means to try out new procedures before they are adopted as standing orders. At the end of the parliamentary session for which they were adopted, sessional orders lapse. Where there is a conflict between the standing orders and sessional orders, the sessional orders take precedence if they are expressed to apply notwithstanding anything in the standing orders.

The Parliamentary Precincts Act 1997

Before the enactment of the *Parliamentary Precincts Act 1997*, there was no statutory definition of the precincts of the Parliament of New South Wales. In addition, the title of the land was fragmented, and there was no horizontal or vertical survey of the property. The result of this lack of definition was that the

122 *Constitution Act 1902*, s 15(1)(a).

123 *Ibid*, s 15(2).

124 (1858) 14 ER 727.

125 [1908] AC 470 at 475-476.

extent of the Presiding Officers' management and control of the precincts was open to doubt and there was confusion as to which organisations had responsibility for certain areas.¹²⁶

In 1985 the Joint Select Committee upon Parliamentary Privilege, chaired by a member of the Assembly the Hon Rodney Cavalier, recommended that a statute be enacted to physically define Parliament House and its precincts. This was supported, and in 1991 Cabinet approved a draft discussion paper on parliamentary privilege, which recommended that control of the precincts be vested in the Presiding Officers. Following extensive consultation with all concerned bodies, including the Police, Sydney Hospital and the State Library (neighbouring institutions) and the Department of Public Works and Services, the *Parliamentary Precincts Act 1997* was finally enacted.

The *Parliamentary Precincts Act 1997* defines the parliamentary precincts, vests control and management of the parliamentary precincts in the Presiding Officers, and provides for the management and security of the parliamentary precincts and certain adjoining areas known as the parliamentary zone. The premises defined to be included in the parliamentary zone and the parliamentary precincts may be amended by resolution of both Houses.¹²⁷

The control and management of the parliamentary precincts is vested in the Presiding Officers.¹²⁸ The Presiding Officers and 'authorised officers' (either parliamentary officers or police officers authorised by the Presiding Officers) may direct a stranger 'to leave or not enter the Parliamentary precincts', and may arrest a person who refuses or fails to leave the parliamentary precincts when lawfully directed to do so. They may also prevent a person from entering the parliamentary precincts.¹²⁹

The Act also provides that the Presiding Officers may enter into a Memorandum of Understanding with the Commissioner of Police to regulate the exercise of police functions in the parliamentary precincts and parliamentary zone.¹³⁰ A police officer acting in conformity with a Memorandum of Understanding or acting in conformity with a specific authorisation given by a Presiding Office is an 'authorised officer' for the purposes of the Act.¹³¹

The Presiding Officers and the Commissioner of Police entered into a Memorandum of Understanding for police access to the parliamentary precinct on 23 June 1998. A revised memorandum was signed on 3 December 2004. Under this

126 In 1984 a new building was completed for Parliament House which included a car park for the adjourning State Library within the building.

127 *Parliamentary Precincts Act 1997*, ss 12 and 17.

128 *Ibid.* The Presiding Officers are the President of the Council and the Speaker of the Assembly.

129 *Ibid.*, ss 18, 19 and 20.

130 *Ibid.*, s 27.

131 *Ibid.*, s 5.

memorandum, police may only act within the parliamentary precincts under the specific authorisation of the Presiding Officers, unless in pursuit of a person to effect an arrest, or in cases of utmost urgency in which there is a clear and unmistakable threat to the lives of persons within the parliamentary precincts and only when it is absolutely necessary to do so.

It should be noted that the *Parliamentary Precincts Act 1997* explicitly states that nothing in the Act derogates from the powers, privileges and immunities of Parliament.¹³² The Act also does not provide the Presiding Officers with power to issue directions to members within the parliamentary precincts or parliamentary zone.¹³³

The power of the House to maintain the attendance and service of its members

The Council has the right to maintain the attendance and service of its members. Section 15(2) of the *Evidence Act 1995* provides that no member of any House of an Australian Parliament can be compelled to give evidence if they would be prevented from attending a parliamentary sitting or a meeting of a committee of which they are a member.¹³⁴

On 13 September 1994, the President reiterated the right of the Council to maintain the attendance and service of its members in response to the service of a subpoena on a member, the Hon Stephen Mutch.

The power to discipline members

The House has a common law power to discipline members adjudged guilty of misconduct or conduct unworthy of the House. However, this common law power is 'protective' and 'self-defensive' only and cannot be used punitively, for example as a disciplinary or coercive measure.¹³⁵ The power of suspension and expulsion is available to the Houses of the New South Wales Parliament under the common law for the purpose of self-protection only.¹³⁶

This line of authority was adopted in the first High Court case of its kind, *Willis and Christie v Perry* in 1912, in which it was decided that the Speaker of the

132 *Ibid*, s 26(1).

133 *Ibid*, ss 25 and 26(2).

134 Similarly, officers of the House are also exempt from being compelled to give evidence. On 8 September 1998, the President informed the House that, in response to a subpoena requiring the Clerk of the Parliaments to give evidence before the District Court of New South Wales, she had written to the solicitors and the Registrar of the District Court advising that, according to the established privileges of the House, members and officers are exempt from attending as a witness while the House is sitting. See *LC Minutes* (8/9/1998) 663.

135 It is within the power of the New South Wales Parliament to acquire punitive powers by statutory enactment.

136 See the authority in *Armstrong v Budd* (1969) 71 SR (NSW) 386 (expulsion) and *Egan v Willis* (1998) 195 CLR 424 at 455 (suspension).

Legislative Assembly had no power to cause a member who had been disorderly in the chamber, and had left it in a disorderly manner, to be arrested outside the chamber and brought back into it. The ‘only purpose’ of such action, according to the High Court, was to punish the member concerned.¹³⁷

By contrast, the Houses of the Westminster Parliament have an unrestricted punitive power, including the power of expulsion. This is also true of the Parliaments of Queensland, South Australia, Victoria and Western Australia, all of which define their power and privileges by reference to the House of Commons, although the date of reference varies – as at 1901 for Queensland, 1856 for South Australia, 1855 for Victoria and 1989 for Western Australia. At the Commonwealth level, the Houses have power to impose a fine or imprisonment on any person found guilty of contempt of parliament under section 7 of the *Parliamentary Privileges Act 1987* (Cth). The power of the Houses to expel a member was expressly abolished by section 8.

There are difficulties in establishing a boundary between the ‘necessary’ and ‘self-defensive’ application of the disciplinary power of the New South Wales Parliament and its ‘punitive’ application.¹³⁸ What is punitive, and therefore beyond the power of the Houses of the New South Wales Parliament, depends on both the nature of the action taken and its purpose or objective, in particular whether the action is for the defence of the institution itself. For example, exclusion of a member from parliamentary accommodation, as well as the withdrawal of financial benefits, has been found by the courts to be punitive.¹³⁹ To fine or imprison a member might also be judged punitive, regardless of the purpose motivating the House.

In this regard, it is notable that before 1856 the Council adopted standing orders to fine members for non-attendance in the House. This is discussed further in Appendix 3. This power to fine remained in the standing orders in force between 1856 and 1895, which provided:

Any Member, not attending in compliance with an Order for a Call of the House, or who shall absent himself for more than three consecutive weeks, without leave of the House, or having no reasonable excuse for such non-compliance or absence, shall be held guilty of contempt.¹⁴⁰

In turn, a member judged guilty of contempt was liable to be fined an amount not exceeding £20 or committed to the custody of Black Rod for a period not exceeding 14 days. This is discussed later in the section on ‘Dealing with contempt’.

It is debatable, however, whether these standing orders were consistent with the common law power of the House. As indicated previously, in 1842 in *Kielley v*

137 (1912) 13 CLR 592 at 598.

138 *Egan v Willis and Cahill* (1996) 40 NSWLR 650 at 667.

139 Campbell E, ‘Expulsion of members of parliament’, *University of Toronto Law Journal*, Vol 21, 1971, p 24.

140 Former standing order 167, adopted 4 December 1856 and approved 6 December 1856.

*Carson*¹⁴¹ it was found that, unlike the British Parliament, the Newfoundland House of Assembly in Canada did not possess punitive powers to fine or arrest and imprison a member for a breach of privilege or contempt at common law.

Notwithstanding the limitations on its disciplinary power, the Council has a number of sanctions available to discipline its members. These include:

- reprimand and admonishment;
- apology by the member (and withdrawal of the words spoken);
- censure;
- suspension;
- expulsion.

In some instances, these powers are regulated through the standing orders.

Reprimand and admonishment

The House has the power to order a member to be reprimanded or admonished by the President in the name and by the authority of the House. Any such reprimand or admonishment is received by the member standing in their place and is entered into the minutes.¹⁴²

Apology and withdrawal of words spoken

During debate, when a member uses offensive language or imputes improper motives it is normal practice for a point of order to be taken at the time of the offence (SO 91). If the President rules that the words spoken are offensive or impute improper motives, then the member is required to withdraw them immediately. Failure to do so can result in suspension of the member concerned. If the words spoken are considered to be so grave that their simple withdrawal is deemed insufficient, the House may order the member not only to withdraw them but to make a formal apology as well. The form of the apology would depend on the nature of the words spoken, and could include the requirement to apologise to a particular individual, if such was considered necessary.

There has been one case where the Council has considered words spoken to be so offensive that the member has been required to withdraw them and apologise to the House. The issue arose from a speech given by the Hon Franca Arena in the Council on 17 September 1997, in which she suggested that certain prominent persons, including the Premier and the Commissioner of the Royal Commission into the New South Wales Police Service, had been involved in meetings or agreements concerning an alleged 'cover-up' of high-profile paedophiles. The events that followed are discussed later in this chapter under the heading 'Express statutory abrogation of parliamentary privilege'.

141 (1842) 12 ER 225.

142 *Erskine May*, 23rd edn, p 163.

However, for the purposes of this discussion it is relevant to note that the Standing Committee on Parliamentary Privilege and Ethics tabled a report on the matter in the House on 29 June 1998,¹⁴³ in which it found that the conduct of Mrs Arena in making certain allegations in her speech on 17 September 1997 fell below the standards which the House is entitled to expect from its members and brought the House into disrepute. The Committee recommended that Mrs Arena withdraw the imputations and make a written apology to the House within five sitting days. In addition, the Committee recommended that, in the event that the member failed to submit the apology and withdraw the imputations by the required time, she be suspended from the service of the House until such time as the apology and withdrawal were submitted.

On 1 July 1998, the Council passed a resolution substantially based on the terms of the Committee's recommendation, although an amendment was successfully moved by the opposition deleting reference to two of the five people originally included in the terms of the apology. At the expiration of the five sitting days,¹⁴⁴ Mrs Arena moved a motion that the House accept a 'statement of regret' in specified terms as a sufficient response to the resolution requiring an apology. The substance of the regret was that Mrs Arena had not intended to imply a criminal conspiracy, but that if people had drawn such an inference she withdrew any implication. She gave two grounds for amending the terms of the resolution of the House:

First, I could not make an apology for imputations of criminal conspiracy because I never made such imputations. Such an apology would require me to mislead the House. Second, because of advice given by my barrister ... I believe that there is a real doubt whether the House had the implied power to suspend a member from the service of the House until tendering of an apology in terms specified by the House.¹⁴⁵

The motion was passed with the support of the majority of opposition and cross-bench members, and Mrs Arena's 'statement of regret' was accepted by the House.

Censure

A vote of censure against the government or a particular minister is usually a motion expressing the House's lack of confidence. Such a motion may be moved for various reasons, including perceived maladministration, refusal to answer a question or provide a document, misleading the House, interfering with the justice system and failing to declare an interest in a particular matter.¹⁴⁶ A vote of censure against a private member is usually a criticism of the member for some particular action.

143 *LC Minutes* (29/6/1998) 613; see also the *Arena Report*, above n 55.

144 The date was 16 September 1998, since the House had gone into recess after the first sitting day had elapsed.

145 *LC Minutes* (15/9/1998) 7457.

146 *Odgers*, 11th edn, p 457.

Censure of ministers in the Council is discussed in more detail in Chapter 16 (Relations with the Executive).

Suspension

Suspension and expulsion are the more severe forms of disciplinary action that can be taken by the House against a member. Suspension from the House is usually only employed if a member disregards the authority of the Chair or abuses the rules of the House.

Under standing orders 190 and 191, a member may be suspended for a period of time determined by the House on motion moved without notice. Standing order 192 allows the President or Chair of Committees to suspend a member after the member has been called to order three times in any one sitting. The duration of the suspension is decided by the Chair but may not exceed the termination of the sitting.

Nineteenth century case law makes it clear that, while the Council has the right to take reasonable measures to prevent disorderly conduct in the chamber, that right does not extend to 'unconditional suspension, for an indefinite time'.¹⁴⁷ Nor can the House go beyond self-protection in disciplining its members.

In 1866 in *Doyle v Falconer*, the Privy Council considered the period of suspension that would be considered reasonable:

The principle on which the implied power is given confines it within the limits of what is required by the assumed necessity. That necessity appears to their Lordships to extend as far as the whole duration of the particular meeting or sitting of the Assembly in the course of which the offence may have been committed. It seems to be reasonably necessary that some substantial interval should be interposed between the suspensory resolution and the resumption of his place in the assembly by the offender, in order to give opportunity for the subsidence of heat and passion, and for reflection of his own conduct by the person suspended; nor would anything less be generally sufficient for the vindication of the authority and dignity of the assembly.¹⁴⁸

The matter was further considered by the Privy Council in *Barton v Taylor* in 1886:

[I]t may very well be, that the same doctrine of reasonable necessity would authorise a suspension until submission or apology by the offending member; which, if he were refractory, might cause it to be prolonged (not by the arbitrary discretion of the Assembly, but by his own wilful default) for some further time. The facts pleaded in this case do not raise the question whether that would be ultra vires or not. If these are the limits of the inherent or implied power, reasonably deducible from the principle of general necessity, they have the advantage of drawing a simple practical

¹⁴⁷ *Barton v Taylor* (1886) 11 AC 197 at 204-205.

¹⁴⁸ (1866) 16 ER 293; quoted with approval in *Willis and Christie v Perry* (1912) 13 CLR 592 at 597.

line between defensive and punitive action on the part of the Assembly. A power of unconditional suspension, for an indefinite time, or for a definite time depending only on the irresponsible discretion of the Assembly itself, is more than the necessity of self-defence seems to require, and is dangerously liable, in possible cases, to excess or abuse.¹⁴⁹

Although suspension of a member usually results from some action in the House, it is possible that the conduct of a member outside the House may cause the House to feel compelled, for its own protection, to take action to remove the member. This was acknowledged by the Supreme Court in *Armstrong v Budd* where, citing *Harnett v Crick*,¹⁵⁰ Herron CJ, stated:

[T]he power of the House to defend the regularity of its proceedings – for example, by suspension – is not confined within any narrow limits such as misconduct committed in the face of the House, but may extend in special circumstances for the protection of the House where bribery and corruption have been charged against a member.¹⁵¹

The Council has exercised its power to suspend members on only a few occasions in recent years. Two members were suspended for the remainder of the sitting day, one in October 1989 and the other in November 1991, for refusing to withdraw words when directed to do so by the Chair.¹⁵²

On 2 May 1996, the Treasurer and Leader of the House, the Hon Michael Egan, was judged guilty of contempt and suspended from the House for the remainder of the sitting day for failing to table papers. When Mr Egan refused to leave the chamber, arguing that the House had no authority to compel the production of documents and therefore no grounds for suspending him, the Usher of the Black Rod was directed by the President to escort Mr Egan from the chamber and the parliamentary precincts. The Usher of the Black Rod did this, taking Mr Egan from the chamber and the parliament building out onto the footpath of Macquarie Street. The suspension subsequently became the trigger for the decision of the New South Wales Court of Appeal in *Egan v Willis and Cahill*¹⁵³ and in turn the High Court decision in *Egan v Willis*.¹⁵⁴

149 (1886) 11 AC 197 at 204-205; quoted in *Egan v Willis* (1998) 195 CLR 424 at 455.

150 [1908] AC 470.

151 (1969) 71 SR (NSW) 386 at 393-395. *Harnett v Crick* [1908] AC 470 concerned adverse findings by a Royal Commission against a member of the Legislative Assembly, Mr William Crick. The House was prevented from debating Mr Crick's alleged misconduct by the Speaker ruling that the matter was *sub judice*. A standing order was then passed to the effect that, in such circumstances, a member could be suspended 'until the verdict of the jury had been returned, or until it is further ordered'. Consistent with this, the House then passed a resolution suspending Crick. His defiant insistence on attending and taking part in proceedings in the House resulted in his removal by the Sergeant-at-Arms.

152 *LC Minutes* (18/10/1989) 976-980; (14/11/1991) 268-269.

153 (1996) 40 NSWLR 650.

154 (1998) 195 CLR 424.

In suspending the Treasurer, the House was acting under its implied common law power to order the production of papers, as well as its power to enforce compliance with its standing orders by disciplining members.

In its 1996 decision, the Court of Appeal did not question the power of the House to remove a member, but did find that the language of the standing order did not justify the forcible exclusion of Mr Egan from more than the chamber and all rooms set apart for the use of members.¹⁵⁵ The action of removing the member from the parliamentary precincts onto the footpath in Macquarie Street, as opposed to the action of removing him from the chamber, was judged to constitute a trespass.

The High Court decision did not revisit the ‘footpath point’. However, in their joint judgment, the members of the High Court commented that, while the House could not punish a member, it could ‘coerce or induce compliance with its wish’.¹⁵⁶ In doing so, however, the High Court acknowledged the difficulty involved in distinguishing between ‘punishing and merely inducing compliance’. There is no single test. The nature and object of the coercive action of the House must be considered in the context of reasonableness and proportionality.¹⁵⁷

Following his suspension on 2 May 1996, Mr Egan was suspended on a further two occasions for failing to table documents ordered by resolution of the House. On the first occasion, Mr Egan was suspended from the service of the House for five sitting days, and left the chamber accordingly.¹⁵⁸ On the second occasion, Mr Egan was suspended for the remainder of the session (a total of three days) and was again accompanied from the chamber by the Usher of the Black Rod.¹⁵⁹

Expulsion

The power of expulsion for conduct unworthy of the House is one that has been claimed and exercised by representative and unrepresentative legislative bodies since ancient times. The British House of Commons has claimed the power to expel members since at least the 16th century, and members have been expelled for a wide variety of causes.¹⁶⁰ While expulsion is still regarded by the House of

155 Former standing order 262 provided: ‘When a Member is suspended from the service of, or removed from the House, he shall be excluded from the House and from all the rooms set apart for the use of the Members’. In the revised standing orders adopted in 2004, this standing order has been replaced by standing order 191(3), which provides: ‘A member who is suspended from the service of the House is excluded from the chamber and galleries, and may not serve on or attend any proceedings of a committee of the House during the period of suspension. If a member enters the chamber during the member’s suspension, the President will order the Usher of the Black Rod to remove the member from the chamber’. *Egan v Willis and Cahill* (1996) 40 NSWLR 650.

156 *Egan v Willis* (1998) 195 CLR 424 at 455.

157 Campbell E, ‘Parliamentary privilege and order for production of state papers’, *Public Law Review*, Vol 8, 1997, p 223.

158 *LC Minutes* (20/10/1998) 774-776.

159 *LC Minutes* (27/11/1998) 970.

160 *Erskine May*, 23rd edn, pp 164-166.

Commons as a power at their disposal, it is now rarely used.¹⁶¹ Members found guilty of contempt or a serious breach of the privileges of the House are nowadays usually suspended with loss of pay.¹⁶² The 1964 edition of *Erskine May* commented that for the House of Commons:

The purpose of expulsion is not so much disciplinary as remedial, not so much to punish Members as to rid the House of persons who are unfit for membership. It may justly be regarded as an example of the House's power to regulate its own constitution.¹⁶³

The only case of expulsion in the Council occurred in 1969. This was when Mr Alexander Armstrong was expelled for 'conduct unworthy of a member' following judicial comments by Justice Street that Mr Armstrong had been a party to an arrangement to procure false evidence in divorce proceedings and had contemplated bribing a Supreme Court judge.¹⁶⁴

Mr Armstrong subsequently challenged the validity of the House's actions in the New South Wales Court of Appeal. In upholding the validity of the expulsion, the Court of Appeal in three separate judgments held that the powers which are 'necessary' to the existence of the House and the proper exercise of its functions include:

[I]n a proper case a power of expulsion for reasonable cause ... provided the circumstances are special and its existence is not a cloak for punishment of the offender.¹⁶⁵

In his concluding comments, Sugerman JA stated that:

[T]he continued presence of an unworthy member is inconsistent with the honour and dignity of the House and thus inimical to its authority and standing and the respect in which it should be held by the community. But the cardinal principle is that the implied grant of powers on the ground of necessity ... comprehends not only the orderly conduct of deliberations in the sense of freedom from disturbance and unseemly conduct but also the integrity of those who participate therein which is essential to mutual trust and confidence amongst the members.¹⁶⁶

161 There have been three cases of expulsion in the past century. Mr Bottomley was expelled in 1922, after being convicted of fraudulent conversion of property and sentenced to seven years' imprisonment. Mr Alligham was expelled in 1947 for lying to a committee and a gross contempt of the House after publication of an article accusing members of insobriety and of taking fees or bribes for the supply of information. Mr Baker was expelled in 1954 after being sentenced to seven years' imprisonment for forgery.

162 In 1990 a member was suspended for 20 days, with suspension of salary, for failure to declare a pecuniary interest in the Register of Members' Interests (HC Deb (1989-90) 168, c 973). In 1995 two members were formally reprimanded and suspended for 10 and 20 days respectively, with suspension of salary, for accepting £1000 in return for tabling a question in Parliament (CJ (1994-95) 286).

163 *Erskine May*, 17th edn, Butterworth and Co, 1964, p 105.

164 *LC Minutes* (25/2/1969) 318-320; *LC Debates* (25/2/1969) 3858.

165 *Armstrong v Budd* (1969) 71 SR (NSW) 386 at 396.

166 *Ibid* at 403.

Wallace P found that the power of expulsion ‘extends to conduct outside the Council’, provided the exercise of the power is solely for defensive purposes.¹⁶⁷ Herron CJ agreed, commenting that:

[T]he power which arises out of necessity arises not only from conduct within the Chamber but may arise also from misconduct outside the House provided it be held to be of sufficient gravity to render the member unfit for service and requiring a decision on the facts that continued membership would tend to disable the Council from discharging its duty and one necessary for protecting that dignity essential to its functions. As to the latter it would seem that conduct involving want of honesty and probity of members is just as relevant a criterion as for example disorderly conduct.¹⁶⁸

Although there has been some criticism of the decision in *Armstrong*,¹⁶⁹ the case remains the authority for the proposition that the power to expel a member is in addition to, and separate from, the disqualification of a member under the *Constitution Act 1902* on grounds which include conviction for ‘an infamous crime’.¹⁷⁰ In 2000, the Act was amended to expressly provide that nothing in the disqualification provisions ‘affects any power that a House has to expel a member of the House’.¹⁷¹

There have been several other attempts to expel members of the Council. Following Mrs Arena’s speech of 17 September 1997 in relation to an alleged ‘cover-up’ of high-profile paedophiles, as discussed earlier, the Attorney General, the Hon Jeff Shaw, moved a motion on 11 November 1997 that Mrs Arena be expelled from the Council on the ground that she had been found ‘guilty of conduct unworthy of a member of the Legislative Council’. As noted earlier, however, the House ultimately accepted a ‘statement of regret’ from Mrs Arena.

167 *Ibid.*

168 *Ibid* at 397.

169 A comment in the *Australian Law Journal* from June 1969 was concerned about the width of the power, saying it would be ‘unrealistic to expect that the courts will always be able to check’ its political abuse and adding, ‘It would be equally unrealistic to pretend that there is no danger of abuse’. The comment ended on this cautionary note: ‘There is a very heavy responsibility on the Speaker and members, backed by whatever weight public opinion and the press may have, to ensure that such powers as the *Armstrong* case endorsed are exercised only where the individual’s conduct clearly and seriously threatens the very functioning of the institution itself’. See ‘Parliamentary self-protection’, *Australian Law Journal*, Vol 43, No 6, 1969, pp 213-214. More recently, *Armstrong* came under scrutiny in argument before the High Court in *Egan v Willis*. In his judgment Callinan J commented that a number of matters touched upon in argument did not need resolution in the case, including ‘whether *Armstrong v Budd* was correctly decided’ and ‘whether, notwithstanding anything that was said in *R v Richards; Ex parte Fitzpatrick and Browne*, a House should be absolutely entitled to suspend for a lengthy period, or expel a member, rather than, as here, merely suspend him for a brief period’. See *Egan v Willis* (1998) 195 CLR 424 at 511.

170 *Armstrong v Budd* (1969) 71 SR (NSW) 386 at 391 and 403. It was common ground that the relevant provision, then s 19 of the *Constitution Act 1902*, did not constitute ‘a complete code for the vacation of a seat’.

171 *Constitution Act 1902*, s 13A(3).

A second instance of near expulsion of a member occurred in 2003 following a report of the Independent Commission Against Corruption which found that the Hon Malcolm Jones had engaged in corrupt conduct in relation to the use of entitlements provided under the *Parliamentary Remuneration Act 1989*.¹⁷² Notices of motions for the expulsion of the member were given by both the Leader of the Government and another member.¹⁷³ Before considering a motion for expulsion, the House resolved that Mr Jones be invited to address the House strictly in relation to the matters contained in the Commission's report. On 3 September 2003, Mr Jones gave a lengthy speech to the House in regard to the findings and allegations made against him by the Commission.¹⁷⁴ On 16 September, before the House had proceeded to the business on the Notice Paper, the President informed the House that she had received a communication from Mr Jones indicating that he had tendered his resignation to the Governor as a member of the Council.¹⁷⁵

There have been three cases of expulsion in the Assembly: Ezekiel Baker in 1881, William Crick in 1890 and Richard Price in 1917. All were subsequently re-elected to the Assembly.

By contrast, expulsion from the Council effectively prevents a former member from being re-elected and serving again in the House. Unlike the Legislative Assembly, where the expelled member is at liberty to contest their own vacancy in a by-election, a vacancy arising from the expulsion of a member from the Council would be filled according to the provisions of section 22D of the *Constitution Act 1902*. This effectively prevents expelled members from filling their own casual vacancy as they would be 'otherwise disqualified from sitting or voting'.¹⁷⁶

In 1984, the Commonwealth Joint Select Committee on Parliamentary Privilege recommended the abolition of the power of expulsion in the Commonwealth Parliament. The recommendation was based on three considerations: 'the general and worrying potential for abuse' by a partisan vote; the specific constitutional provisions in Australia which amount to 'something approaching a statutory code of disqualification'; and 'the basic consideration that it is for the electors, not members, to decide on the composition of Parliament'.¹⁷⁷ The power to expel a member was subsequently expressly abolished under section 8 of the *Parliamentary Privileges Act 1987* (Cth). Section 8 applies to the Legislative Assembly of the ACT, while the power of expulsion was abolished in the Northern Territory under the *Legislative Assembly (Powers and Privileges) Act 1992*.

172 Independent Commission Against Corruption, *Report into an investigation into the conduct of the Hon Malcolm Jones: ICAC Report*, Sydney, 2003.

173 See *LC Notice Paper* (3/9/2003).

174 *LC Minutes* (3/9/2003) 265-266, *LC Debates* (3/9/2003) 3003-3019.

175 *LC Notice Paper* (16/9/2003) 420, *LC Minutes* (16/9/2003) 283.

176 *Constitution Act 1902*, s 22D(2).

177 Joint Select Committee on Parliamentary Privilege, *Final Report*, Parliamentary Paper No 219, 1984, p 126.

By contrast, the Houses of the British Parliament have an unrestricted power of expulsion. This is true, subject to the implied constitutional freedom of political communication under the Australian Constitution, of the Parliaments of Queensland, South Australia, Victoria and Western Australia. All these Parliaments define their power and privileges by reference to the House of Commons, although as noted previously, the applicable date varies.

The power to deal with contempt

A definition of contempt

Erskine May defines contempt as follows:

Generally speaking, any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any Member or officer of such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results may be treated as a contempt even though there is no precedent of the offence.¹⁷⁸

A similar definition is contained in section 4 of the *Parliamentary Privileges Act 1987* (Cth), which provides that:

Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

A breach of privilege and a contempt of parliament, although often confused, are not necessarily one and the same thing. A breach of privilege occurs whenever any of the rights or immunities of the House and its members are disregarded or attacked by any individual or authority. A contempt occurs whenever an offence is committed against the authority of the House or a committee, and may not always involve a breach of a specific privilege.

The critical feature of contempt is that the relevant conduct must impede or obstruct the House or a committee, or its members or officers, in the performance of their functions, or have a tendency to produce this result. When dealing with contempt, successive committees, both in New South Wales and elsewhere, have determined that for a contempt to be found, the breach must be of such seriousness that it could have a substantial and detrimental impact on the ability of the House, its committee or the member concerned, to function. For example, in 1993 the Council's Standing Committee upon Parliamentary Privilege found that the unauthorised disclosure and subsequent publication in the *Sun Herald* newspaper of evidence given *in camera* before the Joint Select Committee Upon Police Administration constituted a clear breach of privilege, but that it did not amount

¹⁷⁸ *Erskine May*, 23rd edn, p 128.

to a contempt of the Parliament. Finding no evidence that the publication had obstructed or impeded the performance of the functions of the Select Committee, the House, or the members or officers of the House, the Privileges Committee concluded that 'no substantial interference with the [Select] Committee's or the House's functions has resulted or is likely to result from the disclosure of the *in camera* evidence, which is contrary to the public interest'.¹⁷⁹

In applying such definitions, it is a matter for the House in each case to determine whether or not particular conduct constitutes an improper interference, and consequently a contempt. Accordingly, it is not possible to define all the types of conduct which may amount to a contempt. Nevertheless, some guidance is available.

Conduct which has been investigated for possible contempt by the Council includes:

- disruption to proceedings of the House;
- failure to obey an order of the House;
- interference with committee witnesses;
- adverse reflections on committees;
- refusal to answer questions;
- abuse of freedom of speech;
- conduct unworthy of a member;
- unauthorised disclosure of material;
- attempting to intimidate a member;
- misuse of committee evidence;
- misuse of statements made in the House;
- misuse of members' documents.

These and other cases in the Council have involved conduct by members, non-members and non-identified persons, and are summarised in Appendix 4.

Conduct which has been treated as contempt by the House of Commons includes:

- disorderly conduct in the presence of the House;
- giving of false evidence by a witness;
- premature publication of committee proceedings;
- disobeying an order of a committee;
- intimidation of a member in respect of his or her parliamentary conduct;
- 'molestation' of or threats against witnesses.¹⁸⁰

179 Standing Committee upon Parliamentary Privilege, *Report Concerning the Publication of an Article Appearing in the Sun Herald Newspaper containing Details of In Camera Evidence*, 1993, p 16.

180 *Erskine May*, 23rd edn, Chapter 8.

Within Australia, the Senate has determined that contempts were committed in the following circumstances:

- unauthorised publication of a draft committee report;
- harassment of a senator;
- unauthorised publication of committee evidence taken in camera;
- adverse treatment of a witness as a consequence of the witness's evidence;
- charges laid against a witness as a consequence of the witness's evidence;
- threats made to a witness by an unknown person;
- unauthorised disclosure of a submission to a committee by an unknown person;
- legal action taken against a person to penalise the person for providing information to a senator;
- disciplinary action taken by a university against a person in consequence of the person's communication with a senator;
- unauthorised disclosures of committee documents;
- unauthorised disclosure of a draft committee report;
- disciplinary action taken by a local government body against an employee in consequence of his participation in proceedings of a committee;
- unauthorised publication of documents provided to committees.¹⁸¹

Dealing with contempt

The Council has both an inherent power, under the doctrine of reasonable necessity, and a statutory power to deal with contempt.

Under the standing orders, members who engage in disorderly conduct or who refuse to comply with a ruling from the Chair may be removed from the chamber and suspended from the service of the House and its committees for a specified time (SOs 190-194), while visitors may be removed from the precincts of the House for such time as the President directs (SO 197). At one time, the House believed it had the power to fine for contempt. A standing order in force between 1856 and 1895 provided:

Any Member, adjudged by the Council to be guilty of Contempt, shall be fined, at the discretion of the House, in a penalty not exceeding Twenty Pounds; and, in default of immediate payment, be committed, by Order of the President, for a period not exceeding fourteen days, to the custody of the Usher of the Black Rod; - who shall detain the Member in custody for the period directed, unless sooner discharged by Order of the House, or the Fine to be sooner paid.¹⁸²

181 *Odgers*, 11th edn, pp 64-65.

182 Former standing order 169, adopted 4 December 1856 and approved 6 December 1856.

However, it would appear that this purported power to fine was never exercised, and it is clear now that such a power does not exist without express statutory authority.

The *Parliamentary Evidence Act 1901* gives the House statutory power to deal with certain offences by witnesses. For example, a person who fails to comply with a summons to appear and give evidence before the House or a committee, without a just or reasonable excuse, may be apprehended, held in custody and brought before the House or committee from time to time.¹⁸³ A witness who refuses to answer a 'lawful question' is deemed guilty of contempt and may be committed into custody, and gaol if the House so orders, for up to one month.¹⁸⁴ A witness summoned to appear and give evidence who wilfully makes a false statement during the course of their evidence is liable to imprisonment for up to five years.¹⁸⁵ This is discussed further in Chapter 18 (The Inquiry Power).

In addition to the *Parliamentary Evidence Act 1901*, the *Public Works Act 1912* confers certain further powers to punish offences by witnesses before the Joint Standing Committee on Public Works,¹⁸⁶ and to compel the attendance of a witness before that Committee.¹⁸⁷ However, the Committee has not been appointed since 1930,¹⁸⁸ and the relevant powers have never been used.

The penalties provided under the *Parliamentary Evidence Act 1901* have also never been invoked. In most cases witnesses cooperate voluntarily with parliamentary inquiries and, where witnesses are reluctant to appear or to answer questions, committees endeavour to secure cooperation through negotiation. The use of coercion is considered a measure of last resort.

In a number of Houses, restrictions have been imposed on the circumstances in which the contempt power will be invoked. In particular, both the House of Commons¹⁸⁹ and the Australian Senate¹⁹⁰ have passed resolutions to the effect that the power to deal with contempt should only be exercised if the interference in question is *substantial*, and should not be used in respect of complaints of a trivial nature or unworthy of the attention of the House. In the Council, the House itself has not made any comparable declarations. However, the Privileges Committee has applied a number of principles in deciding cases of possible contempt. These include:

183 *Parliamentary Evidence Act 1901*, ss 7-9.

184 *Ibid*, s 11; the procedure applies in respect of a witness who has been sworn or affirmed under the Act.

185 *Ibid*, s 13.

186 *Ibid*, s 22.

187 *Ibid*, s 21.

188 The Assembly has appointed its own Standing Committee on Public Works which operates under the standing orders of that House.

189 *Erskine May*, 23rd edn, p 167.

190 Senate Privilege Resolution No 3, *Odgers*, 11th edn, p 597.

- The exercise of the contempt power must be necessary to the House and the proper exercise of its functions, and must be protective and self-defensive only, not punitive.¹⁹¹
- The conduct must obstruct or impede the House (or a committee, as the House's delegate) in the performance of its functions, or a member or parliamentary officer in the performance of his or her functions, or have a tendency to produce such result.¹⁹²
- The use of the contempt power should encompass preserving and safeguarding the dignity and honour of the Parliament, the House and its committees.¹⁹³
- The contempt power should be used as sparingly as possible. Action should only be taken in respect of a possible contempt or a *prima facie* contempt, where the interference with the performance of functions is, or is likely to be, substantial. In arriving at this view the Committee endorsed the approach adopted by the House of Commons.¹⁹⁴
- A breach of privilege will only amount to a contempt if substantial interference is judged to have occurred in any particular case.¹⁹⁵
- For an act to constitute contempt it need not be intentional in nature. A contempt may be intended or unintended.¹⁹⁶
- Contempt encompasses conduct which has a tendency to obstruct the performance of functions. Where a tendency for substantial interference is found, an intended act of contempt that does not, in fact, produce the proposed effect can still constitute a contempt. Equally, a threat that is not acted upon can constitute a contempt for the reason that the original threat may still have a tendency to substantially obstruct or interfere with the performance of functions. In the view of the Committee: 'A person who threatens a witness but then does not carry out the threat is guilty of contempt, even where the threat was made idly. The tendency of the act is to interfere with the witness'.¹⁹⁷

191 Standing Committee upon Parliamentary Privilege, *Documents issued by the Reverend the Honourable FJ Nile MLC*, December 1989, p 25.

192 *Ibid*, pp 12-13.

193 *Ibid*, pp 28-30.

194 *Ibid*, p 28; Standing Committee on Parliamentary Privilege and Ethics, *Possible intimidation of witnesses before GPSC 3 and unauthorised disclosure of committee evidence*, Report No 13, November 2001, p 38.

195 Standing Committee upon Parliamentary Privilege, *Report Concerning the Publication of an Article Appearing in the Sun Herald Newspaper containing Details of In Camera Evidence*, 1993, p 9.

196 Standing Committee on Parliamentary Privilege and Ethics, above n 194, p 35.

197 Standing Committee on Parliamentary Privilege and Ethics, *Report on special report from General Purpose Standing Committee No 2 concerning a possible contempt*, Report No 9, November 1998, p 23.

- It is not possible to list every act that might be considered a contempt, and acts may be treated as a contempt even though there is no precedent for the offence.¹⁹⁸
- The power to take action in relation to a possible contempt is discretionary.¹⁹⁹

At various times it has been suggested that the power of the parliament in exercising a judicial function to deal with contempt should be referred to the ordinary courts, possibly through the enactment of a statute specifying offences amounting to contempt of Parliament. *Odgers* notes in particular the criticisms of the powers of the Commonwealth Houses of Parliament to deal with contempt, and counter arguments why the Senate should retain its power to deal with contempt.²⁰⁰

These issues have not arisen to such an extent in New South Wales. Possibly this is because the Parliament possesses protective and self-defensive powers only, and not punitive powers to arrest, fine or otherwise punish a member or other person. As a result, there is less likelihood of cases arising in New South Wales where the exercise of judicial power by the Parliament significantly trespasses on the rights of an accused member or person.

The power to admit, exclude and remove strangers

The Council has a common law power to exclude and remove strangers from the House and its precincts. This flows from the implied power of the House to control its own proceedings. In *Willis and Christie v Perry*, Griffith CJ commented:

The Speaker undoubtedly has the power when any person who is outside the chamber is conducting himself in such a manner as to interfere with the orderly conduct of proceedings in the chamber to have that person removed, and for that purpose to obtain the aid of the police.²⁰¹

However, the common law power of the House in relation to strangers is subject to important limitations. It is clear that the protective powers afforded to the House under the common law principle of necessity would not extend to permit the arrest of strangers, either for disorderly conduct within the chamber or the precincts of Parliament. Nor can the House act against non-members for a punitive purpose.

As noted in Chapter 2 (The New South Wales Legislative Council), when it was first established in 1823, the Council conducted its business in secret. It was not until 1838, following demands from the press and the presentation of petitions to the Council in 1836 and 1838, that the House adopted a resolution to allow

198 Standing Committee on Parliamentary Privilege and Ethics, above n 194, p 6.

199 Standing Committee on Parliamentary Privilege and Ethics, above n 197, p 19.

200 *Odgers*, 11th edn, pp 67-70.

201 (1912) 13 CLR 592 at 598.

'strangers' to be admitted to the chamber during Council sessions, albeit under strict conditions.²⁰² In 1840 an area was allocated for the media to attend the proceedings.

The standing orders adopted in 1895 continued to restrict the admission of strangers and provided for their removal on motion, or by order of the President or the Chair of Committees 'whenever he thinks fit'.²⁰³ If a member took notice of the presence of strangers, the Chair was to put the question 'That strangers be ordered to withdraw'.²⁰⁴ This procedure was invoked in 1915, although when the question was put that strangers be ordered to withdraw there was only one member in favour and the question was resolved in the negative.²⁰⁵

The Chair also, under the former standing orders, had occasion to call members of the public to order during debate in the House. For example, during debate on the Constitution (Amendment) Bill (No 2) in January 1926 applause erupted in the public gallery, compelling the President to state:

We are not accustomed to disorder in this House, and if strangers cannot do better than that I must ask them to leave. If there is any further disorder I will have the whole of the galleries cleared. There is no need for a display of exuberance of spirits on an important matter of this kind.²⁰⁶

In 1930, during debate in committee of the whole on the Transport Bill, a member drew the Temporary Chair's attention to insulting words used by a stranger sitting behind the Bar of the House. The stranger was requested to 'leave the precincts of the House'. The stranger then attempted to address the House, at which point he was called to order.²⁰⁷

More recently, strangers were called to order on several occasions during the debate in November 1997 on the motion for the expulsion of Mrs Arena, as discussed earlier in this chapter. Members of the public in the upper gallery were ordered 'not to lean over the balcony', to 'listen to debate in silence' and to refrain from applauding. The President observed:

If there is any interjection of any nature, including applause, I may have to clear the gallery completely. If people want to remain and listen to this debate, they will observe the rules of the House.²⁰⁸

202 *LC Minutes* (5/6/1838) 11-12. Under the resolution 'strangers' would be admitted to the Gallery on condition that they observe good order and not express any opinion on the proceedings of the Council, that no stranger be admitted without an order in writing signed by a member, or by authority of the Governor, that the Governor may authorise any number of strangers but members would be limited to two strangers only, that upon the motion of any member strangers would withdraw forthwith and upon all divisions on any question before the Council strangers would withdraw.

203 Former standing orders 23-25.

204 Former standing order 24.

205 *LC Minutes* (3/2/1915) 113, *LC Debates* (3/2/1915) 2125.

206 *LC Debates* (20/1/1926) 4200.

207 *LC Debates* (8/5/1930) 4970.

208 *LC Debates* (11/11/1997) 1411.

In other cases, the Chair has directed that the gallery be cleared,²⁰⁹ and has left the chair until the gallery has been cleared.²¹⁰

Under the standing orders adopted in 2004, the Chair can no longer order the withdrawal of visitors 'whenever he thinks fit'. However, the standing orders do regulate the admission of strangers. Only members, a Clerk at the Table or an officer attending on the House may enter any part of the chamber reserved for members while the House is sitting, except in respect of a member breastfeeding an infant (SO 196). However, distinguished visitors may be admitted to a seat on the floor of the House, by motion without notice (SO 195).²¹¹

In addition, the standing orders allow the President to admit visitors to the President's gallery on either side of the President's Chair (SO 196(2)). When the House is sitting, the President invites attention to the presence of any distinguished visitors in the gallery, which is noted in the Minutes. Government and opposition advisers are also regularly permitted to sit in the President's gallery, most notably during Question Time, in order to assist members and ministers with briefing material and advice. Officers permitted on the floor of the House enable members to communicate with their advisers through delivery of messages and papers.

The standing orders also allow visitors, no longer referred to as strangers, to attend the public galleries during the sitting of the House without the restrictions of earlier standing orders. Indeed, the President at times acknowledges the presence of visiting groups in the public galleries, and it is common practice for the President to welcome visiting school groups seated in the galleries.

However, visitors in the galleries may not interrupt the proceedings and are expected to observe the normal courtesies which the House demands.²¹² Various Presidents' rulings have prescribed the behaviour expected of visitors. It is disorderly for a person in the public gallery to read a newspaper,²¹³ to converse with a member seated in the chamber,²¹⁴ to use a mobile phone,²¹⁵ to interject or make comments,²¹⁶ to applaud,²¹⁷ to pass messages to members in the chamber²¹⁸ or to wear hats.²¹⁹

209 *LC Minutes* (30/5/1995) 76, (26/11/1998) 962.

210 *LC Debates* (27/5/1997) 9155.

211 See, for example, the admission of Mr Xanana Gusmao, then President of the National Council of Timorese Resistance, *LC Minutes* (12/10/1999) 96; see also the admission of the Hon Fred Riebeling, Speaker of the Legislative Assembly of Western Australia, *LC Minutes* (7/6/2001) 1019.

212 *LC Debates* (24/4/1979) 4999, (26/11/1982) 3261.

213 Rulings: Johnson, *LC Debates* (30/10/1980) 2421, (9/10/1984) 1612.

214 Rulings: Johnson, *LC Debates* (22/11/1983) 3006, (17/5/1984) 957, (2/8/1989) 8933; Solomons (Deputy), *LC Debates* (30/8/1988) 714.

215 Ruling: Johnson (Deputy), *LC Debates* (12/12/1995) 4658.

216 Rulings: Johnson, *LC Debates* (2/4/1987) 9989, (18/10/1988) 2329, (15/8/1990) 5763.

217 Rulings: Willis, *LC Debates* (17/6/1997) 10328, (11/11/1997) 1411 and 1415.

218 Ruling: Nile (Deputy), *LC Debates* (30/8/2000) 8483.

219 Rulings: Johnson, *LC Debates* (20/10/1988) 2678.

In the past it was considered disorderly to take notes in the public galleries, in line with the former practice of the House of Commons.²²⁰ However, that rule changed in 2001, following a statement by President Burgmann, in which she stated that the rule against note-taking had been relaxed by various Houses in recent years and expressed the view that the practices of the Council should have contemporary relevance. On that basis, the President indicated that the reading of official parliamentary papers including bills and amendments or material related to proceedings in the House is permitted, as is the taking of notes, providing such activity is conducted in a discreet manner and does not disrupt proceedings in the House. However, sketching in the public galleries is only permitted with prior approval of the President.²²¹

If a visitor interrupts the proceedings of the Council, the standing orders provide that the President or Chair of Committees may order the Usher of the Black Rod to remove that person from the precincts of the House and to exclude them from the House for the period directed by the President or the Chair. Standing order 197 provides:

If a person, not being a member:

- (a) interrupts the orderly conduct of the business of the House,
- (b) obstructs the approaches to the House, or
- (c) creates a disturbance within the precincts of the House,

the President or Chair of Committees may order the Usher of the Black Rod to remove that person from the precincts of the House and to exclude them from the House for the period directed by the President or Chair.

In addition to these common law powers, 'authorised officers' have power under the *Parliamentary Precincts Act 1997* to remove strangers from the precincts of the Parliament.

The power to conduct inquiries

The Council has conducted inquiries since 1825 before the establishment of representative government in 1843 and responsible government in 1856. Without any statutory authority for these inquiries, the early Council relied on its inherent powers to inquire into those matters within its legislative competence, using those powers established by the principle of reasonable necessity.

After 1856, with the adoption of responsible government and the passage of the *Constitution Act 1855* setting out the constitutional function of the Parliament, this inquisitorial power was grounded on a firmer footing. Nevertheless, without the statutory adoption of the powers and privileges of the House of Commons, the power of the Council to conduct inquiries in New South Wales continues to derive from the common law.

220 Rulings: Johnson, *LC Debates* (13/11/1985) 9418, (29/10/1986) 5621, (27/10/1987) 15162, (21/8/1990) 5961.

221 Ruling: Burgmann, *LC Debates* (3/4/2001) 12955.

The inquiry power of the Council, and the concept of 'the Grand Inquest of the Nation', is discussed in more detail in Chapter 18 (The Inquiry Power).

The power to call witnesses

Under the *Parliamentary Evidence Act 1901* and the standing orders, the Council has extensive powers to compel the attendance of witnesses. Under section 4 of the Act, any person, except a member of Parliament, may be summoned to give evidence before the Bar of the House or a committee. This power does not extend, however, to compelling the attendance of a person who is outside the jurisdiction of the State of New South Wales.

Section 11 of the Act provides that a witness who refuses to answer a lawful question is guilty of a contempt and may be committed, by warrant under the hand of the President, either into the custody of the Usher of the Black Rod or, if ordered by the House, to gaol for a period not exceeding one month.

The power of the Council to call witnesses is discussed in greater detail in Chapter 18 (The Inquiry Power).

The power to order the production of documents

While there is no express power to order the production of documents under the *Parliamentary Evidence Act 1901*, the Houses of the New South Wales Parliament have an undoubted common law power to send for and order the production of documents. In recent years, the cases of *Egan v Willis*²²² and *Egan v Chadwick*²²³ have played an important part in defining the common law powers of upper Houses to order the production of documents. It should be noted, however, that those cases were concerned specifically with the power of the Council to order the production of State papers from the executive. The Council's power to order the public at large to produce documents was not considered.

The powers of committees to order the production of documents is an extension of the House's power to order the production of documents, as set out in *Egan v Willis*. In addition, several joint statutory committees have statutory power to 'send for persons, papers and records'. These include the Committee on the Independent Commission Against Corruption,²²⁴ the Committee on the Office of the Ombudsman and Police Integrity Commission,²²⁵ the Committee on Children and Young People,²²⁶ the Committee on the Health Care Complaints Commission,²²⁷

222 (1996) 40 NSWLR 650; (1998) 195 CLR 424.

223 (1999) 46 NSWLR 563.

224 *Independent Commission Against Corruption Act 1988*, s 69(1).

225 *Ombudsman Act 1974*, s 31G; *Police Integrity Commission Act 1996*, s 95.

226 *Children and Young People Act 1998*, s 5.

227 *Health Care Complaints Act 1993*, s 71.

the Legislation Review Committee²²⁸ and the Joint Committee on the Office of the Valuer-General.²²⁹

The powers of the House and of committees to order the production of documents are discussed in more detail in Chapter 17 (Documents).

PROCEDURES FOR DEALING WITH MATTERS OF PRIVILEGE

In 1985, the Joint Select Committee on Parliamentary Privilege recommended that Parliament legislate to determine its privileges and define its precincts. The Joint Select Committee also recommended that each House establish a Standing Committee upon Parliamentary Privilege.

The Council first established the Standing Committee upon Parliamentary Privilege by resolution of the House in October 1988.²³⁰ On 24 May 1995, the Committee was reconstituted as the Standing Committee on Parliamentary Privilege and Ethics.²³¹ On 1 June 2004, the Committee was reconstituted again as the Privileges Committee.²³² It was reappointed on 10 May 2007.²³³

The procedures for a member to raise a matter of privilege were previously provided for in the resolution of appointment of the Privileges Committee, but are now incorporated in standing order 77.

Under standing order 77, unless a matter of privilege arises suddenly in proceedings before the House, it must first be reported in writing to the President. The President must then determine whether or not there is a *prima facie* case of privilege and whether the matter should be given precedence over other business. If the President decides that there is a *prima facie* case of privilege, a member may then, at any time when there is no business before the House, give notice of a motion to refer the matter to the Privileges Committee. Any motion given precedence under standing order 77 has precedence over all other business on the day for which notice is given.

This procedure ensures that only genuine cases of privilege are brought before the House for consideration and to curtail attempts by members to bring matters before the House that might not otherwise fall within the ambit of privilege. For example, following the execution of a search warrant by the Independent Commission Against Corruption on his parliamentary office, the Hon Peter Breen submitted to the President a letter claiming that a breach of the immunities of the Council may have been involved in the search and seizure of documents. The President announced receipt of the letter to the House and determined that a

228 *Legislation Review Act 1987*, s 11.

229 *Valuation of Land Amendment (Valuer-General) Act 2003*, s 9.

230 *LC Minutes* (20/10/1988) 190.

231 *LC Minutes* (24/5/1995) 42-43.

232 *LC Minutes* (1/7/2004) 809-810.

233 *LC Minutes* (10/5/2007) 53-54.

motion to refer the matter of privilege to the Standing Committee on Parliamentary Privilege and Ethics should proceed. The motion was moved by leave and agreed to by the House.²³⁴

The resolution appointing the Privileges Committee also allows the President to refer matters directly to the Committee. On 7 June 2007, a member of the Council wrote to the President, the Hon Peter Primrose, requesting that the public comments of the Catholic Archbishop of Sydney, Cardinal Pell, concerning possible 'consequences' for members should they support the Human Cloning and Other Prohibited Practices Amendment Bill 2007 be referred to the Privileges Committee to investigate whether they constituted a contempt of Parliament. According to the resolution of the House establishing the Committee, the President subsequently wrote directly to the Chair of the Privileges Committee on 12 June 2007 referring an inquiry on the issue to the Committee, without reference first to the House. The President subsequently reported the inquiry to the House on 19 June 2007.²³⁵

The standing order does not preclude a member from raising a matter concerning the privilege of the House, its members or any of its committees which arises suddenly during proceedings in the House. In that case it is open to a member to raise the matter immediately by way of a point of order or motion without notice. Under standing order 74, debate on a motion of privilege, unless adjourned, suspends all other business until decided.

JUDICIAL REVIEW OF PARLIAMENTARY PRIVILEGE

The constitutional settlement embodied in the *Bill of Rights 1689* and the subsequent *Act of Settlement 1700* reflected the principles underlying judicial independence from the Crown, as well as the prevention of unwarranted interference by the courts in the business of Parliament.

From that time on there developed an ongoing debate between Parliament and the courts to determine the implications of Article 9 for their respective roles. On one side, the House of Commons claimed to be the absolute and exclusive judge of its own privileges while, on the other side, the courts approached *lex Consuetudo Parliameuti*²³⁶ as part of the 'law of the land' and within judicial notice, in particular where the rights of third parties were concerned.

These issues were largely resolved in four major cases in the 19th century: *Burdett v Abott*²³⁷ in 1811, *Stockdale v Hansard*²³⁸ in 1836-1837, *Howard v Gosset*²³⁹ in 1845 and *Bradlaugh v Gosset*²⁴⁰ in 1884.

234 LC Minutes (14/10/2003) 328.

235 LC Minutes (19/6/2007) 129.

236 That is, the law and custom of Parliament.

237 (1810) 104 ER 501.

238 (1836-37) 173 ER 319; the principal case was *Stockdale v Hansard* (1839) 112 ER 1112.

239 (1845) 10 QB 359.

240 (1884) 12 QBD 271.

In the leading case of *Stockdale v Hansard*, the court accepted that the British Houses of Parliament have exclusive jurisdiction over their own internal proceedings. At the same time, however, it was held that it was for the courts to determine whether or not a particular claim of privilege fell within that category.²⁴¹ Neither of the Houses of Parliament had exclusive power to define their privileges, because if they did they could alter the law by mere resolution.

In *Bradlaugh v Gosset*, the leading case on the right of the Houses to be the sole judge of the lawfulness of their own proceedings, the courts upheld the exclusive jurisdiction of the Commons in matters relating to the management of the internal proceedings of the House.²⁴² Lord Coleridge CJ stated:

What is said or done within the walls of Parliament cannot be inquired into in a court of law ... The jurisdiction of the Houses over their own members, their right to impose discipline within their walls, is absolute and exclusive.²⁴³

Erskine May comments:

In the nineteenth century, a series of cases forced upon the Commons and the courts a comprehensive review of the issues which divided them, from which it became clear that some of the earlier claims to jurisdiction made in the name of privilege by the House of Commons were untenable in a court of law: that the law of Parliament was part of the general law, that its principles were not beyond the judicial knowledge of the judges, and that it was the duty of the common law to define its limits could no longer be disputed. At the same time, it was established that there was a sphere in which the jurisdiction of the House of Commons was absolute and exclusive'.²⁴⁴

In Australia, the broad rule that has been accepted is that the courts may inquire into the existence and extent of privilege, but not its exercise.²⁴⁵ In *Egan v Willis*, Gleeson CJ commented on the principle of non-intervention in Australia:

As the High Court observed in *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 162, after a long period of controversy in England, it was established that disputes as to the existence of a power, privilege or immunity of a House of Parliament are justiciable in a court of law. The same principle applies in Australia. However, whilst it is for the courts to judge the existence in a House of Parliament of a privilege, if a privilege exists it is for the House to determine the occasion and the manner of its exercise.²⁴⁶

²⁴¹ *Erskine May*, 23rd edn, p 185.

²⁴² The case related to the exclusion of Charles Bradlaugh from the House. An atheist, Bradlaugh was not permitted to take the oath as required under the *Parliamentary Oaths Act 1866* on being elected to the House. He was held to have disturbed the proceedings of the House by attempting to administer the oath to himself, for which conduct he was, by order, excluded from the Commons.

²⁴³ (1884) 12 QBD 271 at 275.

²⁴⁴ *Erskine May*, 23rd edn, p 184.

²⁴⁵ See *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157.

²⁴⁶ (1996) 40 NSWLR 650 at 653; see also *Egan v Willis* (1998) 195 CLR 424 at 446; see also *Halden v Marks* (1996) 17 WAR 447 at 462.

Thus, a resolution of the House which exercises an asserted privilege may be examined by the Courts to determine if the resolution is consistent with that privilege.

However, the broad rule that the courts may inquire into the existence and extent of privilege, but not its exercise, does not always provide a clear guide. This is especially so where the courts, as in the New South Wales context, are called on to consider the purpose behind any order of a House to determine if it is punitive or non-punitive in nature.²⁴⁷

In the High Court in *Egan v Willis*, the question was whether the Court of Appeal had erred in holding that the Council had the power to order documents and to enforce an order to this effect by suspending the Hon Michael Egan for the remainder of the sitting day. The issue of justiciability was raised by an intervener, the Attorney General for South Australia, who argued that the reasons behind the Council's decision to suspend Mr Egan were not subject to judicial review. Only McHugh J (dissenting) agreed with that submission. His argument was that the power of the House to suspend a member who was obstructing its business had been established beyond any doubt. It followed therefore that '[i]t was for the Council, and the Council alone, to determine the facts of the case and whether they fell within the privilege or power to suspend for obstruction'.²⁴⁸

The approach adopted by McHugh J did not find support amongst the majority. The majority found that the courts may consider the purpose of any suspension of a member to determine if it was for the impermissible purpose of punishing the member.²⁴⁹ Consistent with this approach, where a House suspends a member because the member did not comply with an earlier resolution, the courts may determine whether the earlier resolution was in fact within the power of the House.²⁵⁰

It is also relevant to note the case of *House of Commons v Vaid* in 2005, in which the Canadian Supreme Court found that, if the existence and scope of a privilege has not been authoritatively established, a court may evaluate the validity of a claim of privilege against the doctrine of necessity.²⁵¹ The court found that the House of

247 See, for example, *Armstrong v Budd* (1969) 71 SR (NSW) 386.

248 (1998) 195 CLR 424 at 466-467. In taking this line, McHugh J accepted the submission of the Crown Solicitor for South Australia who later argued that, post *Egan*, 'there is now clear authority that the courts can inquire into the validity of the reasons for the orders made by the Council, including orders which affect the right of members of the House to vote in the House'; B Selway, 'Mr Egan, the Legislative Council and Responsible Government' in Stone A and Williams G (eds), *The High Court at the Crossroads*, The Federation Press, Sydney, 2000, pp 50-54.

249 (1998) 195 CLR 424 at 455, 463-436, 477, 504-505, 514. This would seem to be consistent with *Barnes v Purcell* [1946] QSR 87 at 103 where the Queensland Supreme Court found: 'There is no authority for the proposition that Parliament has the exclusive right to construe the standing orders to determine the punishment which may be inflicted upon a member who has been suspended by resolution of the House'.

250 Evans S, 'Commentary' in Stone and Williams (eds), above n 248, pp 66-67.

251 [2005] SCC 30 at 40.

Commons' privilege in relation to 'management of employees', in this case the Speaker's power to hire, manage and dismiss employees with immunity to judicial or legislative review, exceeded the classic definition of privilege as being the sum of privileges, immunities and powers enjoyed by the Houses of Parliament and individual members 'without which they could not discharge their functions'.²⁵² Despite the Speaker's protests to the contrary, the court ruled that the protections of the *Canadian Human Rights Act 1985* do apply to employees of the House of Commons and that parliamentary privilege does not deprive employees of these protections.²⁵³

EXPRESS STATUTORY ABROGATION OF PARLIAMENTARY PRIVILEGE

It is a well-established principle that parliamentary privilege is not affected by a statutory provision except by express words. The principle was judicially recognised by the House of Lords in *Duke of Newcastle v Morris* in 1870, in which Lord Hatherley observed that privilege could not be destroyed 'unless there was some special clause in the Act striking at and distinctly abolishing it'.²⁵⁴ In 2002, McPherson JA of the Queensland Supreme Court affirmed 'the general interpretive rule that express words (or, as would probably now be said, unmistakable and unambiguous language) are required to abrogate a parliamentary privilege'.²⁵⁵

In the absence of such special legislation abrogating parliamentary privilege, the position in New South Wales appears to be that the parliamentary privilege that attaches to 'proceedings in Parliament', as provided for in statute through the adoption of the *Bill of Rights 1689* under the *Imperial Acts Application Act 1969*, cannot be waived either by the Parliament or by an individual member or former member. Since the law comes from statute, it may only be changed by statute.

The Arena case

On 17 September 1997, the Hon Franca Arena delivered a speech in the Council in which she suggested that certain prominent persons, including the Premier and the Commissioner of the Royal Commission into the New South Wales Police Service, had been involved in meetings or agreements concerning an alleged 'cover-up' of high-profile paedophiles. The Parliament subsequently passed special legislation, the *Special Commissions of Inquiry Amendment Act 1997* (amending the *Special Commissions of Inquiry Act 1983*), to enable either House, by resolution, to authorise the Governor to establish a Special Commission of Inquiry

252 *Ibid* at 52-56.

253 *Ibid* at 82.

254 (1870) LR 4 HL 661 at 671.

255 *Criminal Justice Commission v Parliamentary Criminal Justice Commissioner* [2002] 2 Qd R 8 at 23.

(similar to a royal commission) to investigate such matters relating to parliamentary proceedings as was specified in the resolution.²⁵⁶ The Act also permitted the House to declare by resolution that parliamentary privilege was waived in connection with the inquiry.²⁵⁷

However, while permitting a collective waiver of privilege by the House, the Act preserved the right of any *individual* member to claim parliamentary privilege in relation to an inquiry.²⁵⁸ To ensure that there was no doubt that the freedom of speech guaranteed under Article 9 was being abrogated, section 33G of the *Special Commissions of Inquiry Act 1983* provided that Part 4A 'has effect despite any other Act, any Imperial Act or any other law'. Importantly, however, the provisions were specified to expire six months after their commencement date.²⁵⁹

On 25 September 1997, in accordance with the changes made by the *Special Commissions of Inquiry Amendment Act 1997*, the Council passed a resolution authorising the Governor to establish a Special Commission of Inquiry to investigate Mrs Arena's claims and whether she had any evidence to support them.²⁶⁰ The resolution waived parliamentary privilege in connection with the inquiry. A Commissioner was duly appointed by the Governor to conduct the inquiry, and a summons was issued to Mrs Arena requiring her to attend and give evidence in support of her claims.²⁶¹

Proceedings in the Court of Appeal

Mrs Arena immediately filed proceedings in the Supreme Court. In view of the importance of the proceedings, the case was removed to the Court of Appeal.²⁶² In the proceedings before the Court of Appeal, legal counsel for Mrs Arena challenged the validity of the *Special Commissions of Inquiry Amendment Act 1997* on five principal grounds. These were that the Act:

- impaired the institutional integrity of the Parliament and was invalid as a breach of the Commonwealth Constitution;
- contravened the implied guarantee of freedom of political discussion which the High Court had considered in *Lange v Australian Broadcasting Corporation*²⁶³ and *Levy v Victoria*;²⁶⁴

256 *Special Commissions of Inquiry Act 1983*, s 33B(1).

257 *Ibid*, s 33D(1).

258 *Ibid*, s 33D(3).

259 *Ibid*, s 33H.

260 Under s 33F of the *Special Commissions of Inquiry Act 1983*, the resolution required the support of at least two-thirds of the members of the House present and voting. In the event, all 29 members present and voting supported the motion, *LC Minutes (25/9/1997)* 94.

261 *LC Minutes (25/9/1997)* 93-94.

262 Under Part 12 r. 2 of the Rules of the Supreme Court.

263 (1997) 189 CLR 520.

264 (1997) 71 ALJR 837.

- changed the New South Wales Constitution within the meaning of section 106 of the Commonwealth Constitution in that it applied retrospectively;
- altered the powers of the Council, and could only become law following approval at a referendum as specified in section 7A of the *Constitution Act 1902*;
- was ineffective in waiving privilege because the member's individual right to claim privilege cancelled the waiver.

While Mrs Arena was successful in obtaining certain interlocutory orders which delayed the progress of the inquiry, overall the Court of Appeal rejected the arguments challenging the validity of the Act. In relation to the five points above, the Court found that:

- The alteration of the Parliament's privileges brought about by the Act did not effect an impairment of the institution of Parliament in the sense in which Gummow J had used the words in *Kable v Director of Public Prosecutions*.²⁶⁵
- The Act did not violate the implied constitutional freedom of political communication since the immunity of a member conferred by parliamentary privilege remained untouched by the Act.
- The colony had power to pass retrospective legislation altering its Constitution immediately before Federation, and that power was continued by section 106 of the Commonwealth Constitution.
- A referendum for the purposes of section 7A of the *Constitution Act 1902* was not required before the Act could become law, on the basis that the powers referred to in section 7A(1)(a) related to the law-making functions of the legislature, rather than the privileges of the Houses and that, while the Act clearly enlarged the scope of what a House may do in dealing with questions of privilege, this did not enlarge or alter, by diminution or limitation, the powers of the House.
- There is nothing incongruous in a House of Parliament being able to waive the privilege of the House, thereby permitting an external inquiry into statements made inside the House, while at the same time allowing the member to preserve their individual privilege.²⁶⁶

The proceedings were dismissed with costs.

Proceedings in the High Court

Having failed in the Court of Appeal, Mrs Arena applied for special leave to appeal to the High Court.

The principal attack on the validity of the *Special Commissions of Inquiry Amendment Act 1997* in the High Court was that it infringed the principle of

²⁶⁵ (1996) 189 CLR 51.

²⁶⁶ *Arena v Nader* (1997) 42 NSWLR 427.

parliamentary free speech protected by Article 9 of the *Bill of Rights 1689*.²⁶⁷ The basis of the alleged infringement was that the Act permits a House to determine that statements made by a member in the House may be 'questioned' in a 'place out of Parliament'.²⁶⁸ It was further argued that, although the Act purported to preserve an *individual* member's parliamentary privilege in the face of a collective waiver by the House, the effect of permitting an inquiry to proceed and take evidence is to destroy that *individual* privilege.²⁶⁹ While the member herself was not required to submit to the Special Commission, the legislation allowed the information which the member sought to protect to be obtained compulsorily from other persons, including, for example, the member's informants.

It was conceded on behalf of Mrs Arena that parliamentary privilege is open to regulation by the Parliament.²⁷⁰ However, it was submitted that such regulation may not occur in a manner which 'removes or undermines the essential character of Parliament itself'²⁷¹ and that the courts have recognised freedom of speech as forming part of that essential character.²⁷²

In its decision, the Court began from the general proposition that the Parliament has power to affect the privileges of its Houses, identifying as the source of this power the plenary power conferred by section 2(2) of the *Australia Act 1986*. That provision, which is similar to statutory formulations operating in various Commonwealth Parliaments, states that the powers of the Parliament include:

[A]ll legislative powers that the Parliament of the United Kingdom might have exercised before the commencement of [the *Australia Act*] for the peace, order and good government of that State.²⁷³

The Court referred to various Privy Council decisions where provisions similar to section 2(2) in force in other Parliaments have been construed as supporting laws affecting the privileges of Parliament.²⁷⁴

Despite this general proposition, the Court accepted that there may be limits on the powers of Parliament to affect its privileges by statute. If it could have been shown that the Act affected the parliamentary privilege of free speech to the extent that it invalidly eroded the institution of Parliament itself, a case for a grant of special leave would have been established. However, the Court considered that, whatever limits there might be on the Parliament's powers to affect its privileges,

267 Article 9 applies in New South Wales by virtue of the *Imperial Acts Application Act 1969*, s 6 and Part 1 of Sch 2.

268 *Arena v Nader*, High Court transcript, 15 October 1997, at 10.

269 *Arena v Nader*, High Court transcript, 10 October 1997, at 3.

270 *Arena v Nader*, High Court transcript, 15 October 1997, at 9.

271 *Ibid.*

272 *Ibid* at 9-10, citing *Chenard v Arissol* [1949] AC 127.

273 *Ibid* at 26.

274 *Fielding v Thomas* [1896] AC 600; *Chenard v Arissol* [1949] AC 127; *Arena v Nader*, High Court transcript, 15 October 1997, at 26.

it is not possible to regard the *Special Commissions of Inquiry Amendment Act 1997* as exceeding those limits:

The critical question on the present application is whether the Act so affects the parliamentary privilege of free speech that it invalidly erodes the institution of Parliament itself. If an affirmative answer could be given to that question, the applicant would have made a case for the grant of special leave. But whatever limits there might be upon the powers of Parliament legislatively to affect its privilege, it is not possible to regard this Act as exceeding those limits.

A House of Parliament in which allegations are made has a legitimate interest in knowing, and perhaps a duty to ascertain, whether there is substance in allegations made by a member on a matter of public interest. It is within the power of the Parliament to authorise that House to engage, or to authorise the engagement of a Commissioner to inquire into such allegations, and to report to the House. That is in substance what the Act – and the Commission issued in the instant case – seek to achieve.²⁷⁵

In determining whether the *Special Commissions of Inquiry Amendment Act 1997* ‘erodes the institution of Parliament’, the Court appeared to consider a relevant factor to be whether the Act affects the nature of the relationship between the executive and the Parliament.²⁷⁶ In response to a query from the Court along these lines, the Crown characterised the present Act as not authorising the executive of its own motion to conduct an inquiry into ‘proceedings in Parliament’, but as providing a facility by which a House can call on the assistance of the executive to appoint an independent body to investigate.²⁷⁷

Mrs Arena’s counsel also raised during proceedings the interpretation to be given to section 7A(1)(a) of the *Constitution Act 1902*. In response, the High Court adopted the reasoning of the Court of Appeal. It was held that the Act did not alter the powers of the House, but only affected its privileges. In support of this view, reference was made to *Chenard v Arissol*,²⁷⁸ where the Privy Council characterised a law that dealt with the privileges of Parliament as not being a law respecting the powers of the legislature.²⁷⁹ As the Act affected only the privileges of the Council, it was held to be not subject to the referendum procedure set down by section 7A of the *Constitution Act 1902*.

Effect of the waiver of parliamentary privilege

The view taken in the House by the proponents of the *Special Commissions of Inquiry Amendment Act 1997* was that infringements of Article 9 were justified as Mrs Arena’s claims concerning certain individual members had cast a cloud over

²⁷⁵ *Arena v Nader* (1997) 71 ALJR 1604 at 1605.

²⁷⁶ *Arena v Nader*, High Court transcript, 10 October 1997, at 12.

²⁷⁷ *Ibid.*

²⁷⁸ [1949] AC 127.

²⁷⁹ *Arena v Nader*, High Court transcript, 15 October 1997, at 13.

all parliamentarians.²⁸⁰ Only an external, independent, inquiry would be able to lift the cloud, to restore public confidence in the integrity of the institution of Parliament and the processes of government.²⁸¹ The High Court seemed to take a similar view, characterising the allegations as a matter of public concern which the Parliament had a legitimate interest in referring to an external body for clarification. Similarly, at least two Court of Appeal judges appeared to see little material distinction between the external inquiry in this case, and inquiries and royal commissions over the years which have investigated matters of public interest raised by members in Parliament (for example, police corruption).²⁸²

That said, the changes to the operation of parliamentary privilege brought about by the *Special Commissions of Inquiry Amendment Act 1997* were unprecedented, at least in New South Wales and the other Australian jurisdictions. Although it is not uncommon for royal commissions to be instigated to investigate matters raised by members in Parliament, the use of such a coercive and adversarial process to investigate the bona fides of the member's statement was highly unusual. Furthermore, although the Act preserved an individual member's right to claim privilege,²⁸³ the effect of that claim in this case was severely to curtail the opportunities for the member's side of the story to be put as the inquiry unfolded. In such circumstances it is difficult to achieve a balanced presentation of the issues.

EXPRESS STATUTORY PRESERVATION OF PARLIAMENTARY PRIVILEGE

It should also be noted that there are instances in the statute book of express preservation of parliamentary privilege, where the Act in question is said not to affect parliamentary privilege. These Acts are the *Independent Commission Against Corruption Act 1988* (s 122), the *Evidence Act 1995* (s 10), the *Police Integrity Commission Act 1996* (s 145), the *Administrative Decisions Tribunal Act 1997* (s 125) and the *Commission for Children and Young People Act 1998* (s 22(3)).

A number of statutes contain seemingly broad provisions for the abrogation of all grounds of privilege by witnesses before the relevant tribunal or commission of inquiry. For example, section 477 of the *Local Government Act 1993* provides that witnesses appearing before the Pecuniary Interest Tribunal cannot be excused from answering questions or producing documents on the ground of self-incrimination, 'on any other ground of privilege ... or on any other ground'. Section 18B(1) of the *New South Wales Crime Commission Act 1985* is in similar terms. These provisions are modelled on section 17 of the *Royal Commissions Act 1923*, which states:

280 *LC Debates* (23/9/1997) 300.

281 *Ibid*, 301.

282 *Court of Appeal transcripts*, 7 October 1997, p 23 (Handley JA), p 24 (Meagher JA).

283 Mrs Arena did not appear before the Special Commission of Inquiry.

A witness summoned to attend or appearing before the commission shall not be excused from answering any question or producing any document or other thing on the ground that the answer or production may criminate or tend to criminate the witness, or on the ground of privilege or any other ground. (emphasis added)

In the case of section 17 of the *Royal Commissions Act 1923* and section 23(1) of the *Special Commissions of Inquiry Act 1983*, these sections only apply if, in the letters patent establishing the Commission, the Governor specifically declares that 'the section shall apply to and with respect to the inquiry'. The relevant second reading speeches for the 1923²⁸⁴ and 1983²⁸⁵ Acts fail to reveal a clear intention to override Article 9. However, in the second reading speech on the *Special Commissions of Inquiry Amendment Act 1997* which amended the *Special Commissions of Inquiry Act 1983* to permit waiver of parliamentary privilege, the minister explained that:

As this inquiry concerns allegations made in Parliament under parliamentary privilege, the Solicitor General has raised a concern as to whether the Special Commissions of Inquiry Act supports such inquiries. While it is arguable that it does, the Government is concerned that this matter not get bogged down in litigation. Moreover, the Government also wishes to ensure that parliamentary privilege remains within the control of the Parliament and is not taken to have been abrogated by legislation.²⁸⁶

Comparable provisions at section 37(2) of the *Independent Commission Against Corruption Act 1988* and section 40(2) of the *Police Integrity Commission Act 1996* providing broad grounds of compellability are specifically qualified by the relevant sections stating 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.²⁸⁷

This issue was raised following the serving of notices on the Hon Franca Arena on 11 November 1996 by the Royal Commissioner into the New South Wales Police Service, calling for documents concerning allegations of paedophilia made by Mrs Arena in the Council. On that occasion, the Council received advice that although the *Royal Commission (Police Services) Act 1994* did not contain an express provision which expressly preserved privilege, nevertheless nothing in the *Royal Commission (Police Services) Act 1994* removed the protection of Article 9 of the *Bill of Rights 1689*.²⁸⁸

On a related matter, express provision is also made for exempting members of Parliament from the *Freedom of Information Act 1989*. Neither the Legislative

284 *LC Debates* (4/12/1923) 2999.

285 *LC Debates* (2/11/1983) 2338-2343.

286 *LC Debates* (23/9/1997) 298.

287 *Independent Commission Against Corruption Act 1988*, s 122; *Police Integrity Commission Act 1996*, s 145.

288 Lakatos and Walker, above n 83.

Council nor the Legislative Assembly, nor their committees, are defined to be ‘public authorities’ under section 7 of the Act, and under section 8 members ‘shall not be taken to be the holder of a public office’.

Section 18 of the *Privacy and Personal Information Protection Act 1998* is less clear. The section places a general prohibition on the disclosure of personal information by a public sector agency. Although specific exemptions to the privacy principles operate, none of these applies expressly to either of the Houses of Parliament or their committees.

It is also worth noting that a broad exemption from the privacy principle is provided to both the Independent Commission Against Corruption and the Police Integrity Commission. Both these investigatory commissions are oversighted by parliamentary joint committees and it is doubtful that those investigatory commissions enjoy greater access to information than the House or committees charged with the task of oversighting them.

THE IMPLIED CONSTITUTIONAL FREEDOM OF POLITICAL COMMUNICATION

Since 1992, the High Court has recognised in a series of cases rights which are said to be implied by the structure and text of the Commonwealth Constitution but are not themselves expressly stated. Chief amongst these is an implied right to freedom of communication on political matters. At its simplest, the High Court has reasoned that because the Commonwealth Constitution requires direct election of members of the Commonwealth Parliament, and since moreover the ministers are required to be members of that Parliament, the result is that representative democracy is constitutionally entrenched. That being so, freedom of public discussion of political matters is essential to allow the people to make their political judgments so as to exercise their right to vote effectively.

The implied freedom of political communication was first mentioned by the High Court in 1992²⁸⁹ and later defined and redefined, notably in a series of defamation cases involving politicians: *Theophanous v Herald & Weekly Times Ltd*,²⁹⁰ *Stephens v West Australian Newspapers Ltd*²⁹¹ and later *Lange v Australian Broadcasting Corporation*.²⁹² The terminology of the constitutional freedom of ‘political communication’ dates back to *Lange*.

Federally, the potential of the implied freedom to make incursions into the absolute privilege of Parliament has been evident in two defamation proceedings –

289 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

290 (1994) 182 CLR 104.

291 (1994) 182 CLR 21.

292 (1997) 189 CLR 520.

*Laurence v Katter*²⁹³ and *Rann v Olsen*.²⁹⁴ In these cases, the courts upheld the constitutional power of the Commonwealth Parliament to widen and narrow the existing privileges and immunities enjoyed by members of Parliament under sections 49 and 51(xxxvi) of the Commonwealth Constitution and found that section 16 of the *Parliamentary Privileges Act 1987* (Cth) should be seen as a valid exercise of this power. However, some doubts remain as to the implications of these decisions.²⁹⁵

At the State level, it was found in *Muldowney v South Australia*²⁹⁶ that a State law on freedom of speech in State parliaments has no implications for the system of government under the Commonwealth Constitution, and that therefore the implied freedom of political communications places no burden whatsoever on freedom of speech in State parliamentary proceedings.

As noted earlier, this issue was also raised in *Arena v Nader*, in which Mrs Arena contended that the *Special Commissions of Inquiry Amendment Act 1997* had the effect of contravening the implied guarantee of freedom of political discussion. The New South Wales Court of Appeal found that:

[I]t does not in any event seem to us that political discussion is impaired by the 1997 Act. It has given each House of Parliament the power to waive parliamentary privilege in one sense but even when a House does waive parliamentary privilege in that sense the waiver declaration ‘does not operate to waive parliamentary privilege to the extent that it can be asserted by a member ... in relation to anything said or done by the member in parliamentary proceedings’. This seems to us quite plainly to mean that the immunity of a member conferred by parliamentary privilege remains untouched by the 1997 Act.²⁹⁷

It is also relevant to note that since *Lange v Australian Broadcasting Corporation*,²⁹⁸ and in particular in *Roberts v Bass*,²⁹⁹ the High Court has sought to extend under the umbrella of the implied freedom of political communication the common law of qualified privilege.³⁰⁰

CONCLUSION

Erskine May describes parliamentary privilege as ‘the sum of the peculiar rights enjoyed by each House collectively and by members of each House individually

293 (1996) 141 ALR 447.

294 (2000) 76 SASR 450.

295 Commonwealth House of Representatives Committee of Privileges, *Parliamentary privilege: the operation of the committee, some historical notes and Guidelines for Members*, November 2002, Appendix B, p 15.

296 (1996) 186 CLR 352.

297 (1997) 42 NSWLR 427 at 434.

298 (1997) 189 CLR 520.

299 (2003) 194 ALR 161.

300 Chesterman M, *Freedom of Speech in Australian Law: A Delicate Plant*, Ashgate, 2000, p 96.

without which they could not discharge their functions; and which exceed those possessed by other bodies or individuals'.³⁰¹

Parliamentary privilege is essential to the conduct of parliamentary business, to the maintenance of the authority of Parliament and to the autonomy of the institution itself. Parliamentary privilege developed in the United Kingdom over hundreds of years in order to allow Parliament to proceed with the business of making legislation and reviewing the activities of the executive without undue interference. Today, the rules, conventions and practices of parliamentary privilege regulate relations between the legislature on the one hand, and the executive and judiciary on the other.

The New South Wales Parliament has not legislated for its privileges. Instead, the powers and immunities of Parliament rely on the common law principle of 'reasonable necessity', the adoption of the *Bill of Rights 1689* and those privileges that are conferred by other legislation. The common law powers of the Parliament are protective and self-defensive in nature and not punitive.

Significant immunities of the Council include the freedom of speech, the effect of which is that members are immune from liability for anything they may say in Parliament, and the immunity of parliamentary proceedings from impeachment or questioning in the courts or any other place outside of Parliament. Significant powers of the Council include the power to deal with contempt, the power to discipline members, the power to conduct inquiries and call witnesses, and the power to order the production of documents.

There also continues to be uncertainty in relation to certain areas of the law of parliamentary privilege in New South Wales. As highlighted in this chapter, those areas of uncertainty often relate to the meaning of 'proceedings in Parliament', and include issues such as the repetition outside the House of statements made in the House, the provision of information to members and the execution of subpoenas and search warrants. Another area of contention is the boundary between common law powers which are protective and self-defensive and those which are punitive.

301 *Erskine May*, 23rd edn, p 75.