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***Parliamentary Privilege: Use,
Misuse and Proposals for Reform***

by

Gareth Griffith

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Misuse and Proposals for Reform*

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EXECUTIVE SUMMARY

The powers and privileges of the NSW Parliament: The privileges of the NSW Parliament are uncertain; NSW is the only one of the Australian Parliaments which has not legislated to define its privileges; and it is the only Australian Parliament which has not legislated to provide powers to deal with contempt. The NSW Parliament has only the following powers and privileges: as are implied by reason of necessity; those imported by the adoption of the *Bill of Rights 1689*; such privilege as is conferred by the *Defamation Act 1974*; and such privilege as is conferred by other legislation. (Pages ??)

Other Australian Parliaments: All the other Australian Parliaments have legislated to define their powers and privileges, either by reference to the powers enjoyed by the House of Commons and/or in more express terms. (Pages ??)

The rationale for parliamentary privilege: Parliamentary privilege is concerned, in essence, with the freedom of the Houses of Parliament to conduct their proceedings without interference from outside bodies, notably the Crown and the courts. (Pages ??) To a significant extent the immunities and rights which attach to parliamentary privilege flow from Article 9 of the English *Bill of Rights 1689*. (Pages ??)

Individual immunities/collective rights and powers: Parliamentary privilege may be divided into those rights and immunities enjoyed by Members and parliamentary officers *individually* (but not for their personal benefit), on one side, and the rights and powers of the Houses of Parliament in their *collective* capacity, on the other. (Pages ??)

Breach of privilege and contempt of Parliament: A further distinction is to be made between two terms which tend to be used interchangeably, namely, 'breach of privilege' and 'contempt of parliament'. On one side, a breach of privilege involves a breach of a specified privilege of Parliament, such as where it appears to a court that a parliamentary debate has been called into question during the course of a trial. On the other side, contempt is not confined to breaches of privilege, which means that a contempt can occur without there being a breach of any specific right or immunity of Parliament. Further, whereas a breach of privilege must fall within one of the already existing categories, the Houses of Parliament are said to have 'complete discretion to decide without legislation what is or is not contempt of the House'. (Page ??)

Parliament and the courts: In the recent NSW case of *Egan v Willis*, Gleeson CJ summed up this relationship as far as parliamentary privilege is concerned as follows: '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'. Thus, the courts will inquire into the existence and extent of privilege, but not its exercise. Grey areas and the potential for dispute still exist, but over the past 150 years or so dispute has been avoided by the courts and Parliaments exercising mutual respect and understanding for their respective rights and privileges. Some argue that the decisions of the courts in this area have been too favourable to Parliament. (Pages ??)

Parliamentary precincts: The word ‘precincts’ appears to have no precise meaning in this context and the point is made that the approach to definition ‘differs from Parliament to Parliament’. The 1985 Joint Select Committee Report Upon Parliamentary Privilege recommended that a statute be enacted physically defining the precincts of the NSW Parliament and vesting their control in the Presiding Officers. (Pages ??)

For what purposes may evidence be given in court of what was said or done in the course of parliamentary proceedings? This concerns the interpretation of the term ‘impeached or questioned in any court or place out of Parliament’ from Article 9 of the *Bill of Rights 1689*. The issue is how broadly or otherwise is the term to be interpreted by the courts. The dominant line of interpretation, associated with the recent *Prebble* case, takes a relatively broad view of the prohibition stated in Article 9. It holds that there is no objection to the use of Hansard to prove what was done and said in Parliament as a matter of historical fact; what is not permissible is for the courts to rely on matters said and done in the House for the purpose of calling those matters into question. The distinction is between the right to prove the occurrence of parliamentary events, on one side, and the prohibition on questioning their propriety, on the other. (Pages ??)

What is meant by the term proceedings in Parliament? The term denotes the formal transaction of business in either House or in Committees. The difficulty is that the application of the term ‘proceedings in Parliament’ is less clear-cut in relation to matters only connected with, or ancillary to, the formal transaction of parliamentary business. It has been suggested that the relevant test should be functional and not geographical in nature. In other words, the question to be asked should be ‘Are the proceedings the transactions of Parliamentary business?’; not ‘Were the proceedings held inside the Houses of Parliament?’. (Pages ??)

Which parts and versions of Hansard are protected by absolute privilege? The Defamation Bill 1996 seeks to remove the uncertainties in this area. (Page ??)

Does parliamentary privilege protect communications between Members and Ministers? This vexed question has been debated many times. The assumption behind it is that the communication, in the form of a letter for example, is made for the purposes of discharging a Member’s parliamentary or constituency duties and the issue is whether these should be treated as ‘proceedings in Parliament’. At present the answer seems to be that the defence of qualified (not absolute) privilege would apply to a communication of this kind. Opinion differs as to whether legislation should be introduced to provide for the operation of absolute privilege in these circumstances. (Pages ??)

Can a House by its own resolution create new privileges? No. New privileges can be created by legislation but not otherwise. (Page ??)

Waiver of privilege: The position in NSW does not appear to have been tested in the courts, but the balance of opinion from other jurisdictions seems to be that, in the absence of specific legislation, privilege cannot be waived, certainly not by an individual MP. Waiver of privilege is provided for under section 13 of the UK *Defamation Act 1996*. (Pages ??)

Does parliamentary privilege protect persons who provide information to MPs ? *Erskine May* suggests that it does not. What is available, it is said, is the defence of qualified privilege to informants who voluntarily and in their personal capacity provide information to MPs - 'the question whether such information is subsequently used in proceedings in Parliament being immaterial'. However, that view was disputed recently by Harry Evans, Clerk of the Australian Senate, who thought the answer to the question 'is likely to be determined by the closeness of the connection between the communication of the information to the member and potential or actual proceedings in a house or committee'. (Pages ??)

Can an MP use parliamentary privilege as a basis for refusing to give evidence to a Royal Commission concerning something he or she said or did in the House? Subject to a number of qualifications, it seems that under the *Royal Commissions Act 1923* in NSW an MP cannot rely on parliamentary privilege in these circumstances. However, regard must be had to the terms of any particular legislation establishing a Royal Commission. (Pages ??)

Can the distribution of extracts from Hansard be suppressed by the courts? This occurred recently in *Commonwealth Bank v Malouf*. (Pages ??)

Criticisms of parliamentary privilege and arguments for change: Perhaps inevitably, the operation of parliamentary privilege has attracted criticism, including the view that the broad interpretation of Article 9 means that parliamentary privilege acts as a trump which sets aside all other claims of public interest. (Pages ??) The arguments for change include the contention that parliamentary privilege has the capacity to cause substantial injustice to individuals who have no means of redress. (Pages ??)

Proposals for reform: A citizens right of reply has been adopted by the NSW Legislative Assembly and is currently under consideration by the Legislative Council's Standing Orders Committee. (Pages ??) Other reform proposals include: the introduction of comprehensive legislation; guidelines for the exercise of parliamentary privilege; and (in those jurisdictions where it applies) the abolition of Parliament's penal jurisdiction. (Pages ??)

1. INTRODUCTION

Parliamentary privilege has in recent years been the subject of considerable debate and some controversy. The purpose of this paper is to present an overview of these developments, thereby highlighting the key questions at issue. Before focusing on these the paper begins with a brief account of parliamentary privilege in Australia, followed by a comment of a more general kind regarding what is meant by parliamentary privilege. An historical note is then presented, which includes an analysis of the relationship between Parliament and the courts in this context. The paper then sets out the particular situation in NSW in more detail.

It has been said on many occasions that the law relating to parliamentary privilege in NSW is characterised by ‘manifest uncertainty’.¹ Of parliamentary privilege generally, one noted New Zealand commentator, Sir Geoffrey Palmer, has said ‘The law relating to it is ancient, obscure and potentially draconian’.²

There is no shortage of material on the subject of parliamentary privilege, including in NSW a major Joint Select Committee report from 1985. This paper, therefore, builds on and is guided by a substantial body of work which, to an extent, it seeks to synthesise and update. Its primary concern, however, is to focus on issues of particular relevance or interest, something it seeks to achieve by raising questions and issues of particular moment.

2. PARLIAMENTARY PRIVILEGE IN AUSTRALIA

2.1 *The powers and privileges of ‘colonial’ legislatures:*

The NSW Parliament is the only Parliament in Australia which has no legislation comprehensively defining its powers and privileges.³ Briefly, to explain the relevance of this, the situation in Australia is that, in the absence of such specific legislation, the Parliaments do not possess the full range of powers and privileges enjoyed by the Parliament at Westminster, in particular the right to punish for contempt. Notably, it was decided in a series of nineteenth century cases that ‘colonial’ legislatures which derive their authority from Imperial statute have only such inherent powers and privileges as are reasonably necessary for them to carry out their legislative functions. Two leading

¹ NSWPD, 21 March 1991, p 1522.

² G Palmer, ‘Parliament and privilege: whose justice?’ (September 1994) *New Zealand Law Journal* 325 at 326.

³ Parliament of NSW, Legislative Council, Standing Committee Upon Parliamentary Privilege, *Report Concerning the Publication of an Article Appearing in the Sun Herald Newspaper Containing Details of In Camera Evidence*, October 1993, p 19.

cases to note in this regard are *Kielley v Carson*⁴ and *Barton v Taylor*,⁵ where it was decided that protective and self-defensive powers, not punitive, are necessary.

That is the position currently in NSW. As suggested earlier, the extent and level of these inherent, common law powers in NSW has been ‘a point of contention’.⁶ More specifically, it is explained later that some aspects of parliamentary privilege are the subject of legislation in NSW, but that there is nothing like a comprehensive statutory regime in place. On the other hand, all the other Australian Parliaments have legislated to define their powers and privileges, either by reference to the powers enjoyed by the House of Commons and/or in more express terms.

2.2 *Legislation in the States:*

In relation to the States, the power to make laws for the peace, welfare or order and good government of their respective State, which all the State legislatures possess, includes the power to legislate conferring privileges on a House of Parliament and the penal powers to enforce the privileges.⁷ In fact the Imperial Constitution Acts establishing responsible government in Victorian, South Australian and Western Australian expressly gave their parliaments power to declare and define the privileges of parliament for their respective jurisdictions; moreover, all of these incorporated reference to the privileges of the House of Commons.⁸ At present section 19 of the Victorian *Constitution Act 1975*, to take one example, grants to the House of Parliament and their committees and members the privileges, immunities and powers of the House of Commons as at 21 July 1855.⁹ On the other hand, in addition to the privileges which inherently attach to a House of Parliament, the Tasmanian Houses of Parliament have those privileges granted under

⁴ (1842) 4 Moo. PC 63; 13 ER 225.

⁵ (1886) 11 App. Cas. 197.

⁶ NSW Attorney General's Department, *Discussion Paper - Parliamentary Privilege in New South Wales*, 1991, p 18.

⁷ *Dill v Murphy* (1864) Moo PC NS 63; 15 ER 784; E Campbell, *Parliamentary Privilege in Australia*, Melbourne University Press 1966, pp 20-25.

⁸ E Campbell, *Parliamentary Privilege in Australia*, Melbourne University Press 1966, p 24.

⁹ A similar provision operates in South Australia - *Constitution Act 1934* (SA), section 38; in Western Australia, Parliament's power to define its privileges is found in section 36 of the *Constitution Act 1889* and, subsequent to this, section 1 of the *Parliamentary Privileges Act 1891* (WA) defines these privileges by reference to those enjoyed by the House of Commons ‘for the time being’.

the *Parliamentary Privileges Act 1858* (Tas).¹⁰

2.3 *Federal legislation:*

In relation to the Federal Parliament, section 49 of the Commonwealth Constitution provides that the privileges of the Houses of Parliament (and their members and committees) shall be those of the House of Commons as at the establishment of the Commonwealth. By the *Parliamentary Privileges Act 1987* (Cth) these privileges remain in force, unless they are altered by the Act itself.¹¹ For example, section 8 abolishes the power to expel a Member, a power possessed by the House of Commons¹² and, at common law, by the NSW Parliament.¹³

3. *PARLIAMENTARY PRIVILEGE - DEFINITIONS AND DISTINCTIONS*

3.1 *Definitions:*

Parliamentary privilege is concerned, in essence, with the freedom of the Houses of Parliament to conduct their proceedings without interference from outside bodies, notably the Crown and the courts. It has been defined by Colin Munro, Professor of Constitutional Law at the University of Edinburgh, as that part of constitutional law:

which consists of special rules developed by the Houses of Parliament so as to augment their dignity and independence, and in order to protect themselves collectively and their members when acting for the benefit of their House, against interference, attack or obstruction.¹⁴

¹⁰ In Queensland, under the *Constitution Act Amendment Act 1978*, the powers, privileges and immunities of the Legislative Assembly are as defined by any Act, and until so defined, are those powers etc for the time being of the House of Commons so far as those powers are not inconsistent with any Act. That amending Act inserted section 40A into the *Constitution Act 1867-1978* (Qld). The enforcement of the powers etc of the Queensland Legislature is provided for in the Standing Orders of the Assembly, further to the *Constitution Act 1867* (Qld), section 8.

¹¹ Changes to the law of privilege at the Commonwealth level under the legislation include: the expression 'proceedings in Parliament' which is contained in the *Bill of Rights 1689* was defined; the offence of being in contempt of the House by reason only of publishing words or carrying out acts which are defamatory or critical of the Parliament was abolished; the penalties which can be imposed by both Houses were limited to six months for an offence against the House and fines not exceeding \$5,000 in the case of a natural person and \$25,000 in the case of a corporation; the power to expel Members was abolished; and it was provided that warrants committing persons to custody 'shall set out the particulars of the matters determined by the House to constitute that offence'.

¹² Erskine May, p 112.

¹³ *Armstrong v Budd* (1969) 71 SR (NSW) 386.

¹⁴ CR Munro, *Studies in Constitutional Law*, Butterworths 1987, p 136.

Precisely what constitutes parliamentary privilege varies in terms of detail from one jurisdiction to another and, therefore, any broad definition must be treated with some caution. Thus, the exact content of the term differs as between, for example, the Parliaments of NSW and Westminster. For all that it will be useful to cite the most renowned definition of parliamentary privilege which is found in *Erskine May*:

Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Thus privilege, though part of the law of the land, is to a certain extent an exemption from the general law. Certain rights and immunities such as freedom from arrest or freedom of speech belong primarily to individual Members of each House and exist because the House cannot perform its functions without unimpeded use of the services of its Members. Other such rights and immunities such as the power to punish for contempt and the power to regulate its own constitution belong primarily to each House as a collective body, for the protection of its Members and the vindication of its own authority and dignity. Fundamentally, however, it is only as a means to the effective discharge of the collective functions of the House that the individual privileges are enjoyed by Members.¹⁵

Professor Enid Campbell's definition is in similar terms:

The privileges of parliament refer to those rights, powers and immunities which in law belong to the individual members and officers of a parliament and the Houses of parliament acting in a collective capacity.¹⁶

3.2 *Individual immunities:*

From this it can be seen that parliamentary privilege may be divided into those rights and immunities enjoyed by Members and parliamentary officers *individually* (but not for their personal benefit), on one side, and the rights and powers of the Houses of Parliament in their *collective* capacity, on the other. In the main the immunities enjoyed on an individual basis provide exemptions from the ordinary law and include:

- ***freedom of speech in Parliament***, the effect of which is that Members of Parliament are immune from liability for anything they may say or write in the

¹⁵ CJ Boulton ed, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 21st edition, Butterworths 1989, p 69.

¹⁶ E Campbell, *Parliamentary Privilege in Australia*, Melbourne University press 1966, p 1.

course of parliamentary proceedings;¹⁷

- by extension, there is *immunity for parliamentary witnesses* from being questioned or impeached in relation to evidence given before either House of Parliament or any parliamentary committee. In *Prebble v Television New Zealand* the rationale for the immunity was explained thus: ‘The important public interest protected by such privilege is to ensure that the member or witness at the time he speaks is not inhibited from stating fully and freely what he has to say’;¹⁸
- the *qualified immunity of Members of Parliament from legal process* , notably exemptions from compulsory attendance before a court or tribunal when Parliament is sitting. It is said that the scope and nature of this immunity varies from one jurisdiction to another and remains relatively ill-defined in NSW;¹⁹
- in all Australian jurisdictions, members and officers of Parliament are *exempted from jury service*;
- as well, *legal process cannot be served within the precincts of Parliament* . However, according to Professor Campbell, almost all the incidents up to that time had arisen out of service of subpoenas and civil processes. She added, ‘Whether service or execution of criminal processes within the precincts of parliament would be in breach of privilege is not certain’.²⁰

3.3 *Collective rights and powers:*

Those rights and powers enjoyed by the Houses of Parliament on a collective or corporate basis include:

- *the right to control publication of debates and proceedings* , which means that there is a right to exclude strangers, to debate with closed doors, as well as to prohibit the publication of debates and proceedings.²¹
- *the right to regulate internal affairs and procedures free from interference from the courts* , which entails the right to make Standing Orders for the conduct of parliamentary business and the power to determine when those rules have

¹⁷ Article 9 of the *Bill of Rights 1689*.

¹⁸ [1994] 3 All ER 407 at 415 (per Lord Browne-Wilkinson).

¹⁹ E Campbell, *Parliamentary Privilege in Australia*, Melbourne University Press 1966, pp 59-73.

²⁰ Ibid at 71.

²¹ Erskine May, op cit, p 85.

been breached.²² In NSW, as in most other Australian jurisdictions, this right to regulate its own internal constitution and proceedings includes the power to expel Members guilty of conduct unworthy of a Member of Parliament.²³ This derives from the power of the House of Commons to expel a Member for disgraceful and infamous conduct.²⁴ For the Houses of the Commonwealth Parliament, the power to expel Members was removed by section 8 of the *Parliamentary Privileges Act 1987* (Cth);

- ***the power to conduct inquiries***, which means that witnesses before parliamentary committees (or, more unusually, before either House of Parliament) can be compelled to attend, that the production of documents can be ordered and that evidence can be taken under oath;²⁵
- ***the right to publish papers containing defamatory matter***, which means that no liability arises from the publication of a report of the proceedings of a House of Parliament. In NSW, for example, under section 17 of the *Defamation Act 1974* the publication of debates of either House of Parliament or of documents published by order of or under the authority of a House are absolutely privileged; and
- ***the right to punish persons who are guilty of breaching privilege or contempt***. In fact the penal jurisdiction exercised by the British House of Commons is not one of the inherent common law powers of any of the Australian Parliaments: the Commons is said to have exercised penal jurisdiction not because it was incidental to the powers of a representative legislature, but ‘by ancient usage and prescription’ connected to the fact that, together with the House of Lords, it had inherited the jurisdiction of the High Court of Parliament. However, except in NSW, all Australian Houses of Parliament now have statutory powers to punish contempts of parliament and breaches of privilege. In NSW the inherent powers of the Houses of Parliament are said to be ‘protective and self-defensive’ and not

²² E Campbell, op cit, p 74. Campbell continues: ‘But in making standing rules and orders for the orderly conduct of business, no House can alter the general law of the land and confer on itself additional powers. What comes within the scope of the internal procedure of parliament and is therefore a fit subject for regulation by the Houses of Parliament, is a question of law which can be determined in the ordinary courts’.

²³ *Armstrong v Budd* (1969) 71 SR (NSW) 386; Parliament of NSW, Legislative Assembly, *Standing Rules and Orders*, 12 December 1994, Standing Order 294.

²⁴ Erskine May, op cit, p 112. The issue is discussed in Erskine May in Chapter 8 which is headed ‘Penal Jurisdiction of Both Houses’, but it is said that the power of expulsion is really an example of the House’s power to regulate its own constitution.

²⁵ H Evans ed, *Odgers’ Australian Senate Practice*, 7th edition, AGPS 1995, p 51.

punitive in nature.²⁶

3.4 *Immunities and powers:*

The distinction between immunities and powers, as this affects parliamentary privilege, is drawn out in a particular way in *Odgers' Australian Senate Practice* where it is said:

The term 'parliamentary privilege' refers to two significant aspects of the law relating to Parliament, the privileges or immunities of the Houses of the Parliament and the powers of the Houses to protect the integrity of their processes.²⁷

For *Odgers*, the distinction is between the immunity from the ordinary law which attaches to the Houses of Parliament and their Members, on one side, and the powers of the Houses, particularly the power to punish contempts, on the other. *Odgers* continues:

The power of the Houses in respect of contempts is a power to deal with acts which are regraded by the Houses as offences against the Houses. That power is not an offshoot of the immunities which are commonly called privileges, nor is it now the primary purpose of that power to protect those immunities, which are expected to be protected by the courts in the processes of the ordinary law.²⁸

3.5 *Breach of privilege and contempt of parliament:*

It follows from the above that a further distinction is to be made between two terms which tend to be used interchangeably, namely, 'breach of privilege' and 'contempt of parliament'. On one side, a breach of privilege involves a breach of a specified privilege of parliament, such as where it appears to a court that a parliamentary debate has been called into question during the course of a trial, thereby contravening the protection given by Article 9 of the *Bill of Rights 1688*. As suggested by *Odgers*, in this case enforcement of the relevant privilege will be a matter for the courts. On the other side, contempt is not confined to breaches of privilege, which means that a contempt can occur without there being a breach of any specific right or immunity of parliament. Further, whereas a breach of privilege must fall within one of the already existing categories, the Houses of Parliament are said to have 'complete discretion to decide

²⁶ *Fenton v Hampton* (1858) 11 Moo PC 347; 14 ER 727; *Armstrong v Budd* (1969) 71 Sr (NSW) 386.

²⁷ H Evans ed, *Odgers' Australian Senate Practice*, 7th edition, AGPS, p 27.

²⁸ *Ibid*, pp 28-29.

without legislation what is or is not contempt of the House'.²⁹ Thus, contempt is not limited to conduct for which there is a precedent. According to Wilding and Laundry: 'The distinction between a contempt and a breach of privilege lies in the fact that the latter is an offence against a specifically established privilege of Parliament, whereas the former is an offence based on precedents which are less easily defined.'³⁰ The term 'Contempt of parliament' is defined in *Erskine May* 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 contempt even though there is no precedent of the offence.³¹

At the federal level in Australia the category of acts which can be treated as contempts is restricted by the statutory definition of contempt of parliament under section 4 of the *Parliamentary Privileges Act 1987 (Cth)*.³²

Often quoted in this context is the comment, 'All breaches of privilege amount to contempt; contempt does not necessarily amount to a breach of privilege'.³³ However, in 1993 the NSW Legislative Council's Standing Committee on 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 to a contempt of the Parliament. The Privileges Committee found no evidence that the publication had 'obstructed or impeded the performance of the functions of the Select Committee, of either of the House of Parliament, or of the Members or officers of either House'; its conclusion was 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'.³⁴ This

²⁹ The parliament of the Commonwealth of Australia, *Joint Select Committee on Parliamentary Privilege*, October 1984, p 29. (Henceforth, *Spender Committee*).

³⁰ N Wilding and P Laundry, *An Encyclopaedia of Parliament*, 4th edition, Cassell 1972, p 175.

³¹ Erskine May, *op cit*, p 115.

³² Section 4 provides: 'Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended 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.'

³³ *Spender Committee*, *op cit*, p 29. Cited is the Memorandum by the General Council of the Bar, HC 34 (1967) 171.

³⁴ *Report Concerning the Publication of an Article Appearing in the Sun Herald Newspaper Containing Details of In Camera Evidence*, p 16.

would seem to be consistent with the statement found in *Odgers* to the effect that: ‘Acts judged to be contempts in the extensive modern case law of both the Senate and the British House of Commons have been so judged and treated because of their tendency, directly or indirectly, to impede the performance of the functions of the Houses’.³⁵

3.6 *Contempts by Members and contempts by strangers:*

Contempts of parliament can be divided into two categories: contempts by Members and contempts by strangers. By way of illustration the Explanatory Note to the New Zealand Parliamentary Privileges Bill 1994 said that the types of *conduct by Members* found to be in contempt include:

- deliberately misleading the House;
- corruption in the execution of a Member’s office;
- acceptance of fees for professional services connected with proceedings in parliament; and
- advocacy by Members of matters in which they have a professional interest.

Types of *conduct by strangers* found to be in contempt are said to include:

- disobedience to orders of the House or its committees;
- interrupting or disturbing proceedings of the House;
- serving or executing process within the precincts of the House without leave while the House is sitting;
- refusing to be sworn as a witness;
- refusing to answer questions or lying to or misleading a committee;
- appearing before a committee intoxicated or giving insulting answers to a committee;
- abuse of right of petition;
- premature publication of a committee’s proceedings or evidence;
- publication of false reports of debates; and
- publication of words defamatory of the House, its proceedings and its Members (in their capacity as such).

To this New Zealand list can be added: obstructing officers of the House;³⁶ obstructing

³⁵ *Odgers’ Australian Senate Practice*, p 53.

³⁶ *Erskine May*, p 129.

witnesses³⁷; and the attempted intimidation of Members.³⁸

3.7 *The power of punishment, coercion, protection and self-defence :*

As noted, in contrast to the other Australian jurisdictions, NSW the Parliament does not have a power to punish for contempt. This is explained in more detail later in this paper, but the basic reason is that it does not possess a penal jurisdiction. Instead of a power to punish for contempt, the inherent common law powers of the NSW Houses of Parliament are said to be ‘protective and self-defensive’ in nature. Elaborating on this, in *Egan v Willis* Gleeson CJ was of the opinion that the Legislative Council had such ‘coercive powers as are reasonably necessary’ to compel compliance with a particular order. In appropriate circumstances this includes the power to suspend Members from the services of the House.³⁹ However, the general point to make is that this debate involves difficult distinctions. For example, the Legislative Council’s Standing Committee Upon Parliamentary Privilege reported in 1993 that ‘The boundaries between a power that is “necessary” and “self-defensive” and one which is “punitive” are in many circumstances uncertain and open to considerable debate’.⁴⁰

Writing in 1992, Patricia Leopold, Senior Lecturer in Law at Reading University and a noted commentator on matters relevant to parliamentary privilege, said that the power of the British House of Commons to punish those who are in contempt is ‘the important guarantee that its authority will be respected’. These punitive powers, it is said, include the power to commit to prison until the end of the session, to censure, to reprimand and to admonish. With reference to the uncertainties involved in this area, Leopold’s argument is that even the power of imprisonment may in some cases be ‘coercive’ and not ‘punitive’ in nature. For example:

If the House decided to commit a reluctant witness [before a committee] to prison, this would be the exercise of a coercive rather than a punitive power, since the object would be to obtain the evidence required, rather than to punish the individual concerned.⁴¹

On this analysis, a purposive approach is appropriate to distinguish between punishment and non-punishment: it is not what happens to the offender that matters, viewed in terms

³⁷ Ibid, p 131.

³⁸ Ibid, p 126.

³⁹ *Egan v Willis* (SCNSW, unreported 29 November 1996) at 32 (per Gleeson CJ).

⁴⁰ *Report Concerning the Publication of an Article Appearing in the Sun Herald Newspaper Containing Details of In Camera Evidence*, p 19.

⁴¹ PM Leopold, ‘The power of the House of Commons to question private individuals’ (Winter 1992) *Public Law* 548.

of degrees of severity, but the purpose motivating the action of the House. In fact, to complicate matters somewhat, the situation envisaged by Leopold is covered by statute in NSW. Thus, under section 11 of the *Parliamentary Evidence Act 1901* (NSW), a witness refusing to answer a lawful question is guilty of contempt and may be ordered by the House to be imprisoned for any period not exceeding one month. Be that as it may, the point to emphasise at present is the uncertainty at issue in situations which may be less well-defined or simply outside the scope of statute law, that being the norm in NSW.

4. HISTORICAL NOTE

4.1 Preface to the Bill of Rights 1689:

As *Erskine May* shows, the historical development of parliamentary privilege reaches back beyond the seventeenth century, so that for example it seems that by the latter part of the fifteenth century the House of Commons enjoyed an ‘undefined right to freedom of speech, as a matter of tradition rather than by virtue of a privilege sought and obtained’.⁴² However, as with so many aspects of our constitutional law, it was during the tumultuous 1600s, as a consequence of the struggles of the English House of Commons with the Stuart kings, that this most basic privilege became part of what might be called the private law of Parliament and not merely a ‘concession of a very doubtful nature’ made by the Crown.⁴³ The climax of the struggle for freedom of speech was reached in 1641 when Charles I, attended by an armed escort, entered the Commons Chamber and attempted to arrest five Members on a charge of treason resulting from their proceedings in the House.⁴⁴ Challenges of this kind to freedom of speech in Parliament were not renewed after the Restoration of the monarchy in 1660. As *Erskine May* puts it, ‘Even James II made no direct assault on freedom of debate on the same lines as his father and grandfather’.⁴⁵ There was, however, the case of Sir William Williams who in 1680, as Speaker of the House of Commons, authorised the publication of a pamphlet which contained libels on the Duke of York among the papers of the House of Commons. By 1686, by which time the Duke of York had become King James

⁴² Erskine May, p 71.

⁴³ N Wilding and P Laundy, op cit, p 452.

⁴⁴ M Kishlansky, *A Monarchy Transformed: Britain 1603-1714*, Allen Lane/The Penguin Press 1996, p 135. Kishlansky writes: ‘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 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’.

⁴⁵ Erskine May, p 73.

II and the Williams had lost his parliamentary seat, the former Speaker had been prosecuted and fined a substantial sum for his actions.⁴⁶ Subsequently, when the House of Commons was debating Article 9 of the *Bill of Rights* in 1689, Sir George Treby said, addressing the then Speaker: ‘This article was put in for the sake of one, once in your place, Sir William Williams, who was punished out of Parliament for what he had done in Parliament’.⁴⁷ Thus the preamble to the Bill stated, ‘the late King did endeavour to subvert...the law and liberties of the people by prosecutions in the Court of King’s Bench for matters and causes cognisable only in Parliament’. Clearly, therefore, as Patricia Leopold explains, the original intention behind Article 9 of the Bill of Rights was to serve as a protection to Members from actions being brought against them by the Monarch in respect of things said by them in Parliament.⁴⁸ As early as 1621 the Commons had declared that ‘every member hath freedom from all impeachment, imprisonment, or molestation, other than by censure of the House itself, for or concerning any bill, speaking, reasoning, or declaring of any matter or matters touching the Parliament of Parliament business’.⁴⁹ In 1689 that principle received statutory recognition.

4.2 *Article 9 of the Bill of Rights 1689:*

To a significant extent the immunities and rights which attach to parliamentary privilege flow from Article 9 of the English *Bill of Rights 1689*. Article 9 provides:

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.

A number of related questions arise in relation to Article 9. First, there are specific *questions of interpretation* concerning the meaning of: ‘debates or proceedings in Parliament’; ‘impeached or questioned’; ‘in any court or place out of Parliament’. These are looked at in some detail later in this paper. Secondly, the very fact that the privilege derives from a seventeenth century statute of English origin begs the *question of its relevance and scope of application* in Australia over 300 years later. The argument presented by Hunt J in *R v Murphy*⁵⁰ was that its present day application should be constructed narrowly so as to reflect the original intention behind the making of Article 9. In particular, his Honour argued that the relevant mischief which the article was

⁴⁶ The prosecution was instigated in 1684.

⁴⁷ GF Lock, ‘Parliamentary privilege and the courts: the avoidance of conflict’ (Spring 1985) *Public Law* 64 at 74.

⁴⁸ PM Leopold, ‘Freedom of speech in Parliament - its misuse and proposals for reform’ (Spring 1981) *Public Law* 30.

⁴⁹ Cited in G Marshall, ‘Impugning parliamentary impunity’ (Winter 1994) *Public Law* 509.

⁵⁰ (1986) 5 NSWLR 18 at 30.

enacted to remedy the ‘previous availability in the courts of process whereby *legal consequences were visited upon members of parliament for what they had said and done in parliament*’ (emphasis added).⁵¹ Applying this narrow ‘legal consequences’ construction, Hunt J found that use could be made by the courts of evidence given before a Select Committee to the Senate: in particular, Article 9 did not prohibit cross-examination of a witness’s earlier evidence to the Select Committee, with a view to showing a previous inconsistent statement. Again, this issue is dealt with later in this paper. For the moment, the point to make is that Hunt J’s approach illustrates a narrow construction of Article 9, derived from the historical context in which it was enacted. That approach has not found judicial favour.⁵² Indeed, as Geoffrey Marshall states the relatively clear protective principle embodied in Article 9, protecting Members of Parliament against the risk of seditious libel or victimisation by the Crown, has ‘over the years become conflated with various wider claims, made by the Commons and conceded by the courts, as to admissibility of evidence about proceedings in the House in actions of other kinds in which members or non-members may be involved’.⁵³

Explaining the relationship between the courts and parliament where Article 9 is concerned, the New Zealand Committee of Privileges said that while the Article has been loosely referred to as a ‘privilege’ attaching to the House or individual Members of the House:

it is more appropriately regarded as a rule of substantive law going to the jurisdiction of the courts. Where article 9 applies (and this is, of course, a matter for the courts to determine) the courts cannot inquire further.⁵⁴

4.3 *Parliament and the courts:*

Behind that view of Article 9, as well as the expansive interpretation of the scope of parliamentary privilege generally, lies a wider principle concerning the maintenance of the separate constitutional roles of the courts and Parliament. Looking back to the position before the enactment of the *Bill of Rights* in 1689, that separation had been breached on at least four occasions. As identified by Lord Denning these occasions were as follows:

- *Strode’s case* (1512), in which the Court of Stannay administering justice in the

⁵¹ Ibid.

⁵² *R v Jackson* (1987) 8 NSWLR 116; *Prebble v Television New Zealand* [1994] 3 All ER 406, PC. Section 16(3) of the *Parliamentary Privileges Act 1987* (Cth) made it clear that *R v Murphy* does not represent the law at the federal level.

⁵³ G Marshall, ‘Impugning parliamentary impunity’ (Winter 1994) *Public Law* 509.

⁵⁴ PM Leopold, ‘Free speech in parliament and the courts’ (1995) 15 *Legal Studies* 204 at 206.

tin mines of Cornwall fined and imprisoned Strode for having proposed in the House of Commons a Bill to regulate tanners;

- *Sir John Eliot's case* (1629), in which an information was prosecuted in the Court of King's Bench against three Members of Parliament for their conduct in parliament and for which they were imprisoned;
- *Jay v Topham* (1689), in which the Serjeant-at-Arms of the Commons was sued for damages after having taken into custody several persons who had been committed by the House for breach of privilege; and
- *Sir William Williams' case* (1684), in which as noted the former Speaker of the Commons was prosecuted and fined for having ordered the publication of a paper which defamed the Duke of York (later King James II).⁵⁵

Under the Stuarts the courts had been used as an instrument in the Crown's struggles with the Commons. Reacting to this, the constitutional settlement embodied in the *Bill of Rights 1689* and the *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. For Lord Denning, writing in 1958, Article 9 was a 'direction to the courts of law not to allow speeches or debates or proceedings in Parliament to be impeached or questioned'.⁵⁶ William Blackstone's classic work, *The Commentaries on the Laws of England* (1765-1769), argued the case in categorical terms, reminiscent of Coke's view in the early seventeenth century which held that the law of Parliament was a particular law, not part of the general law of the land.⁵⁷ For Blackstone:

The whole of the law and custom of Parliament has its original from this one maxim, "that whatever matter arises concerning either House of Parliament ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere."⁵⁸

Less categorical is *Erskine May* who traces the development of the relationship between Parliament and the courts to the present day. Presented there is a picture of an ongoing debate, in which the Commons claimed to be the absolute and exclusive judge of its own privileges, on one side, and with the courts approaching *lex parliamenti* as part of the law of the land and within judicial notice, on the other, in particular where the rights of third

⁵⁵ GF Lock, 'Parliamentary privilege and the courts: the avoidance of conflict' (Spring 1985) *Public Law* 64 at 87-88; *R v Murphy* (1986) 5 NSWLR 18 at 31 (per Hunt J).

⁵⁶ G F Lock, 'Parliamentary privilege and the courts: the avoidance of conflict' (Spring 1985) *Public Law* 64 at 89.

⁵⁷ Erskine May, p 145.

⁵⁸ Cited with approval in *Prebble v Television New Zealand* [1994] 3 All ER 407 at 413 (per Lord Browne-Wilkinson).

parties were concerned. It is noted in *Erskine May* that a series of cases in the nineteenth century forced a comprehensive review of this whole issue, from which it became clear:

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.⁵⁹

The four major nineteenth century cases were: *Burdett v Abbott* (1811);⁶⁰ *Stockdale v Hansard* (1836-1837);⁶¹ *Howard v Gosset* (1845);⁶² and *Bradlaugh v Gosset* (1884).⁶³ In the leading case of *Stockdale v Hansard*, the court accepted that the Houses of Parliament have exclusive jurisdiction over their own internal proceedings; at the same time, however, it was held that it is for the courts to determine whether or not a particular claim of privilege fell within that category.⁶⁴ Neither of the Houses of Parliament had exclusive power to define their privileges, therefore, because if they did they could alter the law by mere resolution. *Bradlaugh v Gosset* upheld the exclusive jurisdiction of the Commons in matters found to relate to the management of the internal proceedings of the House.⁶⁵

In the recent NSW case of *Egan v Willis*, Gleeson CJ summed up these developments as follows:

As the High Court observed in *The Queen 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

⁵⁹ Erskine May, p 150.

⁶⁰ 14 East 1.

⁶¹ The principal case was (1839) 9 Ad & E 1.

⁶² 10 QB 359.

⁶³ 12 QB 271.

⁶⁴ Erskine May, p 152.

⁶⁵ *Ibid*, p 154. 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.

manner of its exercise.⁶⁶

One general rule, therefore, is that the courts will inquire into the existence and extent of privilege, but not its exercise.⁶⁷ That is not to say this rule always provides a clear guide. Between the fields where Parliament is seen as sole judge of its affairs and those in which the courts enjoy exclusive jurisdiction, grey areas exist where there is still the possibility of dispute between parliament and the courts. However, over the past 150 years or so such dispute has been avoided by the courts and parliaments exercising mutual respect and understanding for their respective rights and privileges.⁶⁸ As noted, it is also the case that the decisions of the courts on parliamentary privilege have been mostly favourable to Parliament, an approach re-affirmed in *Prebble v Television New Zealand*. That in itself is seen in some quarters as problematic, an issue which is taken up later in this paper.

5. PARLIAMENTARY PRIVILEGE IN NSW

5.1 *The privileges of the NSW Parliament:*

In its 1991 discussion paper on parliamentary privilege in NSW the Attorney General's Department made the point that: the privileges of the NSW Parliament are uncertain; NSW is the only one of the Australian Parliaments which has not legislated to define its privileges; and it is the only Australian Parliament which has not legislated to provide powers to deal with contempt.

Based on the advice of the Solicitor General of the day, in its 1985 report on parliamentary privilege in NSW the Joint Select Committee said that the Parliament, not having legislated generally in respect of privilege, has only the following powers:

- such powers and privileges as are *implied by reason of necessity*.⁶⁹ In *Barton v Taylor* these were found to include the power to suspend a Member during the

⁶⁶ *Egan v Willis* (SCNSW, unreported 29 November 1996) at 3 (per Gleeson CJ), at 18 (per Mahoney P). Note that section 9 of the *Parliamentary Privileges Act 1987* (Cth) may make the findings of a House of the Federal Parliament capable of judicial review by providing that, where a House imposes a penalty of imprisonment, 'the warrant committing the person to custody shall set out particulars of the matters determined by the House to constitute that offence'.

⁶⁷ *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319 at 350 (per Lamer CJ).

⁶⁸ PM Leopold, 'Proceedings in parliament: the grey area' (Winter 1990), *Public Law* 475.

⁶⁹ The following account of the relevant cases is based on: Parliament of NSW, Legislative Council, Standing Committee Upon Parliamentary Privilege, *Report Concerning the Publication of an Article Appearing in the Sun Herald Newspaper Containing Details of In Camera Evidence*, October 1993.

continuance of the current sitting in order to protect the House (in this case the Legislative Assembly) against obstruction or 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. In *Harnett v Crick*⁷⁰ the Privy Council held that the Legislative Assembly had the power to make a Standing Order empowering the House to suspend a Member until a verdict in a criminal trial affecting that Member was returned, or until otherwise ordered. The power of the Houses of Parliament to make Standing Orders is found in section 15 of the *Constitution Act 1902* (NSW) and it was held that, as long as the relevant Standing Order was within the terms of the power conferred (in this case to regulate the orderly conduct of the Assembly) the House was to be the sole judge as to the occasion requiring its use. In *Armstrong v Budd*⁷¹ the Supreme Court of NSW held that, in a proper case, the Legislative Council could exercise a power of expulsion, provided the circumstances are special and its exercise is not a cloak for punishment of the offender. In *Egan v Willis*⁷² the NSW Court of Appeal found, by defining the function of scrutinising the executive arm of government as part of the necessary powers of a House of review, that the Legislative Council has the power to order the production of State papers by a Member of that House, even when the Member is a Minister (in this case the NSW Treasurer, Vice President of the Executive Council and leader of the Government in the Legislative Council). The Court also upheld the Council's power to suspend for the remainder of the day's sitting a Member adjudged guilty of contempt. However, it did not have the power, under Standing Order 262, to remove the Member from the precincts of parliament and into Macquarie Street.

Importantly, the decisions in both *Armstrong v Budd* and *Egan v Willis* affirmed the point that the interpretation of what is implied by reason of necessity must take account of historical developments. Thus, Wallace P stated in the former case: 'the 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' (emphasis added).⁷³ From *Egan v Willis*, a key determinant in defining the powers of the Houses of the NSW Parliament, is the status the Parliament now enjoys, subsequent to the *Australia Acts 1986*, as part of a sovereign, independent and federal nation. As Gleeson CJ observed: 'The development of the New South Wales Parliament from a subordinate colonial legislature to a legislature of a State which is part of a sovereign, independent, and federal nation, is of central

⁷⁰ [1908] Ac 470.

⁷¹ (1969) 71 SR (NSW) 386.

⁷² (SCNSW, unreported 29 November 1996).

⁷³ (1969) 71 SR (NSW) 386 at 402.

importance to the application, in modern circumstances, of the common law principles relating to the powers of parliament'.⁷⁴

- such privileges as were *imported by the adoption of the Bill of Rights 1689*. Doubts were expressed in *Namoi Shire Council v Attorney General* as to the applicability of Article 9 to the NSW Parliament, with Mr Justice McLelland stating that the Article 'does not purport to apply to any legislature other than the Parliament at Westminster'.⁷⁵ However, as the NSW Law Reform Commission said recently, the balance of opinion is that Article 9 is in force in NSW by operation of the *Imperial Acts Application Act 1969*, a view which is supported by the Solicitor General, the Crown Solicitor and by the Joint Select Committee on Parliamentary Privilege.⁷⁶ That the extent of the privilege provided by the Article is unclear is another matter.
- such privilege as is *conferred by the Defamation Act 1974*. Section 17 of the Act extends absolute privilege to parliamentary papers.⁷⁷ Certain questions arising from this are considered later in the paper.
- such privilege as is *conferred by other legislation*, for example, the *Parliamentary Evidence Act 1901* and the *Public Works Act 1912*. The former stipulates the power to call witnesses before the either of the Houses of Parliament or their committees and provides that a witness refusing to answer a lawful question is guilty of contempt and may be ordered by the House to be imprisoned for any period not exceeding one month. A witness wilfully making a false statement may be liable for up to five years imprisonment. Conversely, the Act makes it clear that no witness giving evidence under its authority can be sued for defamation. Under the *Public Works Act 1912* the powers in respect of witnesses of the Standing Committee on Public Works are specifically defined to include the possibility of fine or imprisonment for, among other things, refusal

⁷⁴ (SCNSW, unreported 29 November 1996) at 15 (per Gleeson CJ).

⁷⁵ (1980) 2 NSWLR 639 at 644.

⁷⁶ NSW Law Reform Commission, *Discussion Paper 32 - Defamation*, August 1993, p 126. The operation of Article 9 in NSW was also endorsed in clear terms by Carruthers J in *R v Jackson* (1987) 8 NSWLR 116.

⁷⁷ Section 17 provides: (1) There is a defence of absolute privilege for the publication of a document by order or under the authority of either House or both Houses of Parliament. (2) There is a defence of absolute privilege for the publication by the Government Printer of the debates and proceedings of either House or both Houses of Parliament. (3) There is a defence of absolute privilege for the publication of - (a) a document previously published as mentioned in subsection (1) or of a copy of a document so published; and (b) debates and proceedings previously published as mentioned in subsection (2) or a copy of debates and proceedings so published.

to produce documents mentioned in the relevant summons.⁷⁸ Thus, the possibility of the NSW Parliament exercising a penal jurisdiction is contemplated under such legislation, which serves to re-enforce the point that this or any other Parliament can alter the scope of its powers and privileges by statute.

5.2 *The Joint Select Committee Upon Parliamentary Privilege:*

The Committee was established in 1982 to report on whether any changes are desirable in respect of: (i) the law and practice of parliamentary privilege in NSW; and (ii) the powers and procedures by which cases of alleged breaches of parliamentary privilege may be raised, investigated and determined. The Committee tabled its report on 26 September 1985 and a full list of its recommendations is set out at Appendix A. Some of the main recommendations were as follows:

- ***constitutional amendment:*** that *Constitution Act 1902* (NSW) be amended to place beyond doubt that the powers, privileges and immunities of the Houses of the NSW Parliament are those of the House of Commons as at the establishment of responsible government in 1856. That approach would be similar to that adopted in Victoria, South Australia, Western Australia and federally where reference to the privileges of the House of Commons at a key date is incorporated in their constitutions. In its 1991 Discussion Paper the NSW Attorney General's Department commented that, while the historical significance of the date 1856 is acknowledged, 'It may be preferable to choose a more recent date than 1856 as the privileges of the then House of Commons are not easily discernible and have in some respects been amended or partially repealed by consequential legislative action'.⁷⁹
- ***parliamentary precincts:*** that a statute be enacted physically defining the precincts of the NSW Parliament and vesting their control in the Presiding Officers. The statute would make it clear that (i) the Presiding Officers have absolute authority over access to the precincts of the Parliament or any individual sections of those precincts; (ii) no law enforcement agency has any right to operate within the precincts of the Parliament without the express permission of the Presiding Officers; and (iii) the control of demonstrators within the Parliamentary precincts should be by the Parliamentary attendants and the Police directed by the Serjeant-at-Arms and Usher of the Black Rod using the delegated powers of the Presiding Officers. In addition, a number of civil provisions relating to Police Officers within the precincts of Parliament were recommended, including a prohibition on the carrying of firearms.

⁷⁸ Section 22.

⁷⁹ NSW Attorney General's Department, *Discussion Paper - Parliamentary Privilege in NSW*, 1991, p 11.

As the 1991 Discussion Paper from the NSW Attorney General's Department noted, this recommendation involved three major issues. First was the need for the specification of the precincts of the NSW Parliament for which, to date, no statutory provision has been made. Most other Australian jurisdictions have legislated on this subject, including the federal *Parliamentary Precincts Act 1988* (Cth), with the intention of avoiding any uncertainty as to the extent of their relevant parliamentary precincts. In evidence to the Joint Select Committee, the then President of the Legislative Council, Hon JR Johnson MLC, spelt out the physical limits of the NSW Parliamentary precincts, but added 'I know of no legal basis which would support the foregoing but it is highly desirable to me that the parliamentary buildings and the land occupied or used by Members in their parliamentary duties should be regarded within the Parliamentary precincts'.⁸⁰ The 1991 Discussion Paper commented in this regard: 'In the absence of specific legislation there is little agreement evident in decisions of the Courts as to the exact scope of the term "precincts", although the balance of opinion would appear to support a meaning of "in the Parliamentary buildings"'.⁸¹ Such was the tenor of the view expressed by Fox J in *Rees v McCay*. He added, however, that control by the Presiding Officers would extend to 'the use of the immediate precincts of those buildings'.⁸² This would suggest an approach encompassing both the buildings and the grounds of Parliament House. The difficulty is that the word 'precincts' appears to have no precise meaning in this context and the point is made that the approach to definition 'differs from Parliament to Parliament'.⁸³

The second issue relates to the basis and extent of the authority of the Presiding Officers to control the precincts of Parliament. This relies on the assumed powers

⁸⁰ Parliament of NSW, Joint Select Committee Upon Parliamentary Privilege, *Parliamentary Privilege in NSW*, 26 September 1985, pp 70-71. Hon JR Johnson MLC said: 'I consider the precincts of Parliament House to be the area bounded by the front fence facing Macquarie Street, the dividing wall, or line, between the Parliamentary premises and Sydney Hospital, the building alignment fronting Hospital Road, and a dividing line upon which a fence existed - prior to the present building operations being carried out - between Parliament House and the State library'.

⁸¹ NSW Attorney General's Department, *Discussion Paper - Parliamentary Privilege in NSW*, 1991, p 16.

⁸² (1975) 26 FLR 228 at 232.

⁸³ 'Parliamentary precincts: where do the borders of House authority lie?' (1993) 74 *The Parliamentarian* 240-241. The article quotes Professor St John Bates as saying that 'the English case law would suggest that the notion of "precincts" may extend beyond walls and physical boundaries to an "imaginary" line drawn outside and around such physical manifestations'. On the other hand, Mary Anne Griffith, Deputy Clerk of the Canadian House of Commons, noted that 'steps and entrances into the building are not included within the parliamentary precincts. Only the area within the walls is included in the definition of precincts in the Canadian House'.

of the British House of Commons to maintain order and decorum within its precincts, in addition to which the relevant Standing Orders of the Houses of the NSW Parliament permit the Presiding Officers to control the conduct of strangers on Parliamentary precincts.⁸⁴

The third issue was the ability of the Presiding Officers to direct Police in attendance on the precincts. One question the 1991 Discussion Paper asked was whether the proposal to extend to the Presiding Officers ‘absolute authority’ over access to Parliamentary precincts, thereby having the potential to deny the inherent authority of the State law enforcement agencies, would not ‘greatly exceed’ the powers required to maintain the order and decorum necessary for the Parliament to fulfil its functions. It was suggested therefore that, viewed in the context of modern law enforcement, the proposal might exceed ‘the level of protection warranted to preserve against impediments to the due course of proceedings’.⁸⁵

- ***Standing Committees of Privilege:*** that Standing Committees of Privilege of the Houses of Parliament should be established. The Legislative Council established such a Committee by motion of the House on 20 October 1989.

Various other recommendations made by the Joint Select Committee are discussed in the remaining sections of this paper.

6. KEY QUESTIONS AND ISSUES

6.1 *For what purposes may evidence be given in court of what was said or done in the course of parliamentary proceedings?*

This concerns the interpretation of the term ‘impeached or questioned in any court or place out of Parliament’ from Article 9 of the *Bill of Right 1689*. The issue is how broadly or otherwise is the term to be interpreted by the courts. The NSW Law Reform Commission noted that in the broadest interpretation ‘even the tender of Hansard in court without the consent of the House would be a breach of the privileges of Parliament’.⁸⁶

In fact two lines of interpretation can be noted. The dominant line takes a relatively broad view of the prohibition stated in Article 9. It holds that there is no objection to the

⁸⁴ Legislative Assembly, Standing Orders 300 and 301; Legislative Council, Standing Order 263.

⁸⁵ NSW Attorney General's Department, *Discussion Paper - Parliamentary Privilege in NSW*, 1991, p 18.

⁸⁶ NSWLRC, *Discussion Paper 32 - Defamation*, August 1993, p 133.

use of Hansard to prove what was done and said in Parliament as a matter of historical fact; what is not permissible is for the courts to rely on matters said and done in the House for the purpose of calling those matters into question. The distinction is between the right to prove the occurrence of parliamentary events, on one side, and the prohibition on questioning their propriety, on the other. In particular, it was found in the *Prebble* case that parties to litigation ‘cannot bring into question anything said or done in the House by suggesting (whether by direct evidence, cross-examination, interference or submission) that the actions or words were inspired by improper motives or were untrue or misleading’.⁸⁷ In that case a former Labour Minister, Richard Prebble, alleged that a TVNZ program had cast him as having conspired with business leaders and public officials to sell state assets at fire-sale prices in return for donations to the Labour Party. TVNZ pleaded truth and fair comment and mitigation of damages on the basis of the plaintiff’s reputation as a politician and sought to refer to speeches in the House by the plaintiff and other Ministers. The Privy Council struck out the evidence TVNZ was seeking to rely on, holding that to impugn, or even simply to inquire into, a Member’s motives is to ‘impeach’ or ‘question’ and is prohibited. It made no difference that the plaintiff in the case was an MP. On the other hand, Hansard could be used to prove what Mr Prebble had said in the House on certain days, or that the *State-Owned Enterprises Act 1986* (which facilitated the sale of state assets) had passed the House and received the Royal Assent.⁸⁸

An example of where the use of Hansard has been permitted under this broad view of Article 9 is *Mundey v Askin*.⁸⁹ This concerned a defamation action arising from an election speech, where Hansard was admitted into evidence to prove, as a fact, that certain things had been said in the course of a debate in the NSW Legislative Assembly. The NSW Court of Appeal said that ‘there was no question of any further examination of the circumstances in which the debate had taken place or the motives of the participants, or of anything else which might infringe the privilege...’.⁹⁰ Following the same strict view, the use of Hansard was rejected in *R v Jackson*.⁹¹ In support of the tender of Hansard in that criminal trial, the prosecution had argued that the evidence was admissible in that the statements made by the accused, then a Minister, in the House related to material issues in the trial and were, by reference to the other evidence in the trial, ‘patently untrue’. Rejecting the submission, Carruthers J distinguished the case from *Mundey*, stating ‘Here the prosecution sought to do far more than merely prove what Jackson said in the House. It sought in support of its case to establish that Jackson

⁸⁷ [1994] 3 All ER 407 at 417-418.

⁸⁸ This synopsis of the case is based on the account in - PA Joseph, ‘Parliamentary privilege: Cushing v Peters’ (August 1996) *New Zealand Law Journal* 287 at 288.

⁸⁹ (1982) 2 NSWLR 369.

⁹⁰ *Ibid* at 373.

⁹¹ (1987) 8 NSWLR 116.

told lies in the House in relation to matters which were material issues in the trial..’⁹² According to Carruthers J, this would have involved an inquiry into Jackson’s ‘motives and intentions in what he said in the House’, something which, in turn, would necessarily involve ‘an impeaching or questioning’ by the court of debates or proceedings in Parliament.⁹³ Likewise, in *NSW AMA v Minister for Health*⁹⁴ Hungerford J found that a Public Accounts Committee report was admissible in evidence to prove objective events, but not for the purpose of establishing the accuracy of the report’s facts and conclusions.

The leading example of the alternative approach to the interpretation of Article 9 is the judgment of Hunt J in *R v Murphy*.⁹⁵ As noted, based on an historical reading of the original intention behind the making of Article 9, Hunt J ruled, in advance of the trial, that witnesses could be cross-examined in relation to the evidence which they had given before a Senate Select Committee and that this evidence could be the subject of comment or used to draw inferences or conclusions. Hunt J held that the only protection given by Article 9 is to prevent court or similar proceedings having *legal consequences* against a Member of Parliament or a witness before a parliamentary committee where those legal consequences have the effect of preventing that Member (or committee witness) exercising his or her freedom of speech in Parliament (or before a committee) or of punishing for having done so.

Hunt J’s formulation of the purpose of Article 9 was approved by the Full Court of the South Australian Supreme Court in *Wright and Advertiser Newspapers Ltd v Lewis*.⁹⁶ It was held that the privilege embodied in Article 9 does not extend to prevent challenges to the truth or bona fides of statements made in Parliament *where the maker of the statements (the MP in question) is a plaintiff and therefore initiates the proceedings.*

⁹² Ibid at 120.

⁹³ Ibid.

⁹⁴ (1992) 26 NSWLR 114. It was found, in addition, that parliamentary privilege would not be breached by the examination of a Parliamentary Committee report on a provisional basis to determine whether its admission into evidence might involve a breach of privilege. Hungerford J referred to the authority of *Amann Aviation Pty Ltd v Commonwealth of Australia* (1988) 81 ALR 710.

⁹⁵ (1986) 5 NSWLR 18.

⁹⁶ (1990) 53 SASR 416. The plaintiff, a Member of the South Australian House of Assembly, made an allegation in the House that the first defendant, Wright, had obtained an advantage as a result of a close association with a former Government. Wright wrote a letter to the second defendant, a newspaper, which published it. The letter accused the MP (the plaintiff) of abusing his parliamentary privilege and of cheap political opportunism. The MP sued alleging that the letter was libellous. The defendant pleaded justification, qualified privilege and fair comment. The case was therefore one in which the plaintiff’s integrity in making statements in the House was determinative of the action: the letter was plainly defamatory and unless the defendants could challenge the truthfulness of what the plaintiff had said in Parliament, they had no defence.

The court considered that such a limitation on parliamentary privilege would not inhibit the Member from exercising his or her freedom of speech ‘because he would be aware that his actions and motives could not be examined in court unless he instituted the proceedings which rendered such examination necessary’.⁹⁷ The court was impressed by the manifest injustice to the defendant were the plaintiff to succeed and use had not been made of *Hansard*. King CJ observed that ‘The defendant would be precluded...from alleging and proving that what was said by way of criticism was true. This would amount to a gross distortion of the law of defamation in its application to such a situation’.⁹⁸

In the *Jackson* case, Carruthers J rejected the argument of Hunt J in *Murphy*, preferring instead to rely on English authority and drawing on the view expressed by Gibbs ACJ in *Sankey v Whitlam* to the effect that ‘a member of Parliament should be able to speak in Parliament with impunity and without fear of the consequences’.⁹⁹ In *Prebble* the Privy Council rejected the arguments advanced in both *Murphy* and *Wright* in clear terms.¹⁰⁰ In doing so the Privy Council affirmed a related principle, defining the constitutional relationship between the courts and Parliament and of which Article 9 is merely one manifestation, namely, ‘that the courts and Parliament are both astute to recognise their respective constitutional roles’. Lord Browne-Wilkinson continued:

So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges.¹⁰¹

That would appear to be the prevailing interpretation of the term . At the federal level in Australia section 16(3) (the full text of which is set out at Appendix ??) of the *Parliamentary Privileges Act 1987* (Cth) was enacted explicitly for the purpose of avoiding the consequences of the interpretation of Article 9 in the *Murphy* case, which was said to pose a ‘serious threat to the freedom of speech of members of Parliament’.¹⁰² In turn, section 16 (3) was approved by the Privy Council in *Prebble*.

An interesting application of the *Prebble* approach to Article 9 is found in another New

⁹⁷ Ibid at 426.

⁹⁸ Ibid at 421-422.

⁹⁹ (1987) 8 NSWLR 116 at 121.

¹⁰⁰ [1994] 3 All ER 407 at 414-416.

¹⁰¹ Ibid at 413.

¹⁰² *Amann Aviation Pty Ltd v Commonwealth Bank of Australia* (1988) 81 ALR 710 at 715-716.

Zealand case, *Cushing v Peters*.¹⁰³ The case was heard at first instance in the District Court before Judge Dalmer and is currently the subject of an appeal to the High Court. Its interest is that it suggests certain difficulties involved in the *Prebble* interpretation.¹⁰⁴ The facts of the case were not in dispute. In June 1992 Winston Peters alleged on Australian and New Zealand television that a prominent businessman had offered him bribes in an attempt to obtain his support for Business Roundtable policies. The businessman in question was not named at this stage. However, in Parliament a week later Mr Peters identified 'Mr Selwyn J Cushing of Brierley Investments Limited' as the person involved. Mr Cushing then appeared on television denying the bribery allegation. In October 1993 the two parties confronted one another on television where Mr Peters said: 'You've seen Selwyn Cushing on TV, as have the public of this country. They can take his word or they can take mine. They can believe me or believe him'.

As Philip Joseph of the University of Canterbury goes on to explain, the first cause of action arose from the June television interviews and the subsequent naming of Mr Cushing in the House of Representatives and it is in that context that the question of parliamentary privilege arises.¹⁰⁵ Permitting the use of Hansard in the case, Judge Dalmer ruled:

The flaw in the argument put forward for Mr Peters is that the present action does not in any way call into question what was said in the House. It does not impugn what was said and it does not examine, discuss, adjudicate upon, probe or otherwise challenges in any way whatsoever what was said. The statement made in the House of Representatives on 10 June 1992 is relied upon as evidence of identification linking Mr Cushing with the defendant's statements of 1 and 3 June 1992 as pleaded. The statement in the House...is simply relied upon as evidence of the surrounding public knowledge at or about the time the statements sued upon were made...It makes no difference that the identification came after the earlier defamatory statements...Applying the test in *Prebble* by looking at the purpose for which the statement is relied upon, I think in this case that purpose is simply to record as a matter of historical fact that it was made rather than call it into question in any way.

Joseph said he found it difficult to envisage a clearer example of the right to admit Hansard. He distinguished this case from the English authority established in *Church of*

¹⁰³ (District Court at Wellington, unreported 3 July 1996, No 1340/92).

¹⁰⁴ However, not to overstate its significance, the Privileges Committee recommended against the House intervening in the case, in part because 'The point at issue is a relatively narrow one' - D McGee, 'Parliament and the courts: the use of Hansard in a defamation action' (October 1996) 77 *The Parliamentarian* 418.

¹⁰⁵ PA Joseph, 'Parliamentary privilege: Cushing v Peters' (August 1996) *New Zealand Law Journal* 287.

Scientology v Johnson-Smith,¹⁰⁶ where again an MP was sued for statements made on television, on the ground that there the court was asked to infer from parliamentary statements that the Member was actuated by malice. Joseph was sure that Judge Dalmer's ruling was consistent with *Prebble*. Against this view, others have said that the decision was 'highly arguable', with Dr Andrew Ladley of Victoria University stating, 'If this judgment is upheld, it will have reduced the boundaries of the statutory protections of parliamentary privilege quite significantly'.¹⁰⁷ In particular, it could be argued that the decision erodes a wider principle established in the *Church of Scientology* case to the effect that the scope of Parliamentary privilege is not limited to the exclusion from evidence of what was said or done in the House itself but that it extends 'to the examination of proceedings in the House for the purpose of supporting a cause of action even though the cause of action arose out of something done outside the House'.¹⁰⁸ The question for the New Zealand High Court, presumably, is whether the naming of Mr Cushing in the House was fundamental to the plaintiff's cause of action and that to rely on the evidence amounted to 'questioning' within the meaning of Article 9. In any event, *Cushing v Peters* suggests some of the directions in which the debate concerning what is meant by the term 'impeached or questioned' is likely to develop after *Prebble*.

6.2 What is meant by the term 'proceedings in Parliament'?

It is often remarked that probably the single most controversial interpretation issue arising out of Article 9 is the meaning of the words 'proceedings in Parliament'. Mr Russell Grove, Clerk of the NSW Legislative Assembly briefed the Legislation Committee on the Defamation Bill 1992 to the effect that: 'Anything said in Parliament by a member is protected against action in defamation by absolute privilege, based on the principle that they should be able to speak absolutely freely, without fear of court action. However, this privilege has been tightly restricted to the actual proceedings in Parliament, including the evidence of a witness before a House of Parliament or a Parliamentary committee'.¹⁰⁹ Clearly, the term denotes the formal transaction of business in either House or in Committees. The difficulty is that the application of the term 'proceedings in Parliament' is less clear-cut in relation to matters only connected with, or ancillary to, the formal transaction of parliamentary business.

One major area of uncertainty noted by the NSW Law Reform Commission is *whether absolute privilege extends to the repetition outside Parliament of defamatory statements made in the House or to a Committee either by Members or witnesses*. The

¹⁰⁶ [1972] 1 QB 522.

¹⁰⁷ S Boyd, 'Expert disputes Peters ruling', *The Evening Post* (NZ), 19 June 1996.

¹⁰⁸ *NSW AMA v Minister for Health and Community Services* (1992) 26 NSWLR 114 at 121 (per Hungerford J).

¹⁰⁹ Parliament of NSW, Legislative Assembly, *Report of the Legislation Committee Upon the Defamation Bill 1992*, 14 October 1992, p 59.

Commission noted that a relatively expansive approach has been adopted by the courts in Canada so that, for example, a press release issued by a Minister and the dispatch of a telegram by the then Prime Minister, Mr Trudeau, were said to be ‘proceedings in Parliament’, on the ground that it could be viewed as the mere ‘enunciation in good faith’ of Government policy.¹¹⁰ In a second case the Ontario High Court held privilege extended to distribution of information to the media, but not beyond that to constituents.¹¹¹ On the other hand, Australian courts have been more cautious. The Canadian decisions were reviewed by the South Australian Supreme Court in *ABC v Chatterton*¹¹². Prior J observed there that a media interview in which a Member spoke on the subject of a question he had asked in the House was not part of proceedings in Parliament. Prior J did, however, contemplate that a statement made outside the House could be absolutely privileged, but only on the circuitous basis that ‘it was so related to a proceeding in the House that it was itself a proceeding in the House’.¹¹³ In the same case Zelling ACJ expressed his uncertainty on this point thus: ‘it is arguable but not certain that what was said by the appellant Chapman outside the House was covered by absolute privilege. Insofar as he simply repeated what he had said in the House, in my opinion, it was covered by privilege. The difficult question is whether it is part of the proceedings of Parliament or of a Member to answer questions in this day and age on television’.¹¹⁴ In *Beitzel v Crabb*¹¹⁵ the Supreme Court of Victoria found that a Minister’s endorsement at a press conference of allegations already made by him against a plaintiff in the Legislative Assembly could not be characterised as a ‘proceeding in Parliament’. It was held that MPs might be liable for afterwards publishing words spoken by them in Parliament, provided that the cause of action was founded on that subsequent publication. Having reflected on this uncertain state of affairs, the NSW Law Reform Commission said it did not consider that ‘proceedings in Parliament’ should ‘encompass statements made by a Member outside the chamber repeating what was said in the course of proceedings’.¹¹⁶

A second area of uncertainty relates to *correspondence received by Parliamentary Committees and passed on to other investigatory bodies such as the ICAC or the Ombudsman*. The matter was raised originally by Mr Russell Grove in his briefing to the Legislation Committee on the Defamation Bill 1992. In fulfilling their statutory functions committees handle a large amount of correspondence and, in order to ensure

¹¹⁰ *Roman Corp Ltd v Hudsons Bay Oil & Gas Co Ltd* (1972) 23 DLR (3d) 292.

¹¹¹ *Re Clark and AG of Canada* (1978) 81 DLR (3d) 33.

¹¹² (1986) 46 SASR 1.

¹¹³ *Ibid* at 36.

¹¹⁴ *Ibid* at 18-19.

¹¹⁵ [1992] 2 VR 121.

¹¹⁶ NSWLRC, *Report 75 - Defamation*, September 1995, p 174.

that the absolute privilege afforded to Hansard transcripts of committee proceedings is obtained, committees are at present prepared to hold formal hearings. As the NSW Law Reform Commission said, this is despite the fact that the committee's acknowledge that 'this is an overelaborate, expensive and inefficient means of referring a simple matter, such as a letter received from a member of the public which contains potentially defamatory allegations, to the ICAC or Ombudsman for comment and response'.¹¹⁷ Mr Grove commented, 'This impedes the Committee's ability to properly fulfil their statutory duties, and should be rectified'.¹¹⁸ Mr Grove proposed adoption of a provision along the lines of section 17 of the federal *Parliamentary Privileges Act 1987* (Cth) which, for the purposes of the Act, permits the Presiding Officers may certify as to whether any of the following are 'proceedings in Parliament': (a) a particular document prepared for the purpose of submission, and submitted to a House or a committee; (b) a particular document directed by a House or a committee to be treated as evidence taken in camera; (c) certain oral evidence taken by a committee in camera; and (d) a document not published dor authorised to be published by a House or a committee. The proposal was adopted by the Legislation Committee¹¹⁹ but not, it seems, by the NSW Law Reform Commission.¹²⁰

Several UK proposals for *the adoption of a statutory definition of the term 'proceedings in Parliament'* are noted in *Erskine May*, including the draft proposal of the 1967 Select Committee on Parliamentary Privilege which believed that the relevant test should be functional and not geographical in nature.¹²¹ In other words, the question to be asked should be 'Are the proceedings the transactions of Parliamentary business?'; not 'Were the proceedings held inside the Houses of Parliament?'.¹²² For example party caucuses are not regarded as proceedings in Parliament even though they occur within its precincts.¹²³ Similarly, it was held in *Rost v Edwards*¹²⁴ that the Register of Members' Interests, and the parliamentary practice and procedure relating to it, did not constitute 'proceedings in Parliament' and, accordingly, could be referred to in evidence. On the other hand, using the functional approach suggested above, *the reports of*

¹¹⁷ NSWLRC, *Discussion Paper 32 - Defamation*, August 1993, p 138.

¹¹⁸ *Report of the Legislation Committee Upon the Defamation Bill 1992*, p 60.

¹¹⁹ *Ibid*, p 62.

¹²⁰ NSWLRC, *Report 75 - Defamation*, September 1995, p 174.

¹²¹ *Erskine May*, pp 92-94.

¹²² BK Winetrobe, *Defamation Bill [HL], Bill 127 of 1995-96*, Research Paper 96/61, House of Commons Library, p 32.

¹²³ Explanatory Note, *Parliamentary Privilege Bill 1994 (NZ)*, p 9.

¹²⁴ [1990] 2 All ER 641.

*Parliamentary committees have been held to constitute ‘proceedings in Parliament’.*¹²⁵ In any event, no legislation intended to define ‘proceedings’ had been laid before the UK Parliament at the publication of the latest edition of *Erskine May*.

A statutory definition of ‘proceedings’ is found in section 16(2) of the *Federal Parliamentary Privileges Act 1987* (Cth), the text of which is set out in Appendix ???. For its part, the NSW Law Reform Commission was not convinced that certainty would come from adopting any statutory definition.¹²⁶ Most submissions to it noted that the definition would itself be open to interpretation.¹²⁷

Further questions arising from the meaning of the term ‘proceedings in Parliament’ are discussed separately under the next two sub-headings.

6.3 Which parts and versions of Hansard are protected by absolute privilege?

Under section 17(2) of the *NSW Defamation Act 1974* it is apparently clear that the final bound version of Hansard is protected by absolute privilege. The section provides, ‘There is a defence of absolute privilege for the publication by the Government Printer of the debates and proceedings of either House or both Houses of Parliament’. However, a complicating factor here is that Hansard is no longer published by the Government Printer, thus calling the contemporary relevance of section 17(2) into question.¹²⁸

To complicate matters further, the Joint Select Committee which reported in 1985 noted, on the advice of the senior Crown law officers, that ‘the defence [of absolute privilege] is available only for publication of the whole of the debate and not any part of it’. In other words, a Member choosing to extract his or her own speech for publication, or else for distribution as a photocopy, would not be protected by absolute privilege. Moreover, the Committee thought that the then Government Printer and the Editor of Debates could be liable when supplying reprints of Members’ speeches from Hansard where these contain defamatory material.

¹²⁵ In *Dingle v Associated Newspapers Ltd* [1960] 2 QB 405 it was held that the report of a Select Committee of the House of Commons, especially one which had been accepted as such by the House by being printed, was covered by Article 9. This was approved by Hungerford J in *NSW AMA v Minister for Health* (1996) 26 NSWLR 114 where it was held that a report of the Public Accounts Committee, taking into account the Committee’s membership and procedural rules, is a ‘proceeding in Parliament’ and therefore attracts the protection of Article 9. Hungerford J rejected the proposition, based on the argument the Committee was not restricted to hearing witnesses and carrying out its functions within the walls of the House, that there had to be a geographical nexus between the proceeding in question and with the House as being ‘in’ that place.

¹²⁶ NSWLRC, *Report 75 Defamation*, September 1995, p 176.

¹²⁷ NSWLRC, *Discussion Paper 32 - Defamation*, August 1993, p 129.

¹²⁸ Hansard is now printed by the Parliamentary Printing Services.

Further concern was expressed concerning the ‘indeterminate stages’ (particularly the ‘galley proofs’) of Hansard, and the question of the copying of or extraction from these documents which are subsequently corrected. More recently, of course, the proofs of Hansard have been available on-line and can be accessed via the Internet, thereby adding to the scope for uncertainty so far as extraction and copying is concerned.

For its part the Joint Select Committee recommended legislative amendment. Subsequently, this pursuit of certainty was taken up in the Defamation Bill 1992 and again, with the support of the NSW Law Reform Commission, in the Defamation Bill 1996. The 1996 proposal, the full text of which is set out at Appendix ??, would clarify the status of absolute privilege for proofs of Hansard and copies of such proofs, provided they are not known by the publisher¹²⁹ to contain substantial errors or omissions. Would this condition require careful checking of the contents on the publisher’s part? Further, absolute privilege would only apply while the official version of the reports has not become available. Would this involve some onus on individuals and organisations to ensure that proof versions were not used once the official version was available, something which may prove somewhat difficult where the various on-line versions are concerned. Authorised extracts of ‘an individual complete speech of a Member’ would also be covered by absolute privilege, as would audio recordings and transcripts of debates and proceedings in the stages preparatory to the printing of Hansard (but, again, only while the official version of the reports has not become available). Further, the Bill would specifically confer protection for papers relating to joint sittings and committees.

6.4 *Does parliamentary privilege protect communications between Members and Ministers?*

The assumption behind the question is that the communication, in the form of a letter for example, is made for the purposes of discharging a member’s parliamentary or constituency duties and the issue is whether these should be treated as ‘proceedings in Parliament’. At present the answer seems to be that the defence of qualified (not absolute) privilege would apply to a communication of this kind. On the other hand, were the Member to raise the matter contained in the correspondence in Parliament itself, during Question Time for example, then absolute privilege would apply.

This vexed issue has been debated many times, including in the reports of the NSW and Commonwealth Joint Select Committees on Parliamentary Privilege of 1984 and 1985 respectively. The Commonwealth Committee included a lengthy account of the *Strauss case* from 1957 in which the London Electricity Board took legal action against an MP who wrote a letter to a Minister criticising certain actions of the Board and asking the Minister to look into them. The O’Connell matter from NSW in 1977 was also discussed in detail. There a Member of the Legislative Assembly, Keith O’Connell,

¹²⁹ Absolute privilege would cover publication by an ‘authorised printer’ (presumably the Parliamentary Printing Services and possibly the Editor of Debates) ‘or under the authority of the Presiding Officer of either House of Parliament’.

wrote a letter marked 'Personal' to the NSW Minister for Housing expressing the view, based on a constituent's letter of complaint, that an officer of the Housing Commission, working in Mr O'Connell's electorate, was unsuitable for his job. Legal action for defamation against the Member was threatened but, in the event, the matter did not come to the courts. In its Exposure Report the Commonwealth Committee recommended that absolute privilege should apply to communications between members and ministers, provided that its publication was no wider than is 'reasonably necessary' for the purpose of enabling both Members and Ministers to carry out their functions. In its Final Report, however, the Commonwealth Committee said it had decided to make no specific recommendation, in part because the defence of absolute privilege for all communications of this kind 'could have the effect of protecting a Member who, actuated by malice, deliberately made a defamatory attack on another person'. The Committee also did not want to extend the protections or privileges accorded to MPs in new directions.¹³⁰

On the other hand, the 1985 NSW Joint Select Committee Report proposed that a Parliamentary Papers and Proceedings Act be passed to provide for, among other things, absolute privilege to attach to correspondence between Members and Ministers in matters relating to the responsibilities of the Member as an MP. Absolute privilege should also apply to the Minister's reply, it was recommended. However, only qualified privilege should apply to the correspondence while it is being processed by the Department, Instrumentality or Authority to which the Minister refers it.¹³¹

The NSW Attorney General's 1991 Discussion Paper, mindful of the potential to harm individuals by means of correspondence detailing a constituent's grievances, considered that 'Members writing to Ministers are adequately protected by the availability of the defence of qualified privilege'.¹³²

Likewise, the NSW Law Reform Commission recommended in 1995 against extending absolute privilege to correspondence between Members and Ministers. The Commission thought that a defence of qualified privilege was 'sufficient protection and one which balances the competing interests of freedom of speech and protection of reputation'.¹³³

6.5 Can a House by its own resolution create new privileges?

¹³⁰ The Parliament of the Commonwealth of Australia, Joint Select Committee on Parliamentary Privilege, *Final Report*, October 1984, pp 43-47.

¹³¹ The Parliament of NSW, *Joint Select Committee Report Upon Parliamentary Privilege*, 26 September 1985, pp 105-110.

¹³² NSW Attorney General's Department, *Discussion Paper - Parliamentary Privilege in NSW*, 1991, pp 26-27.

¹³³ NSWLRC, *Report 75 - Defamation*, September 1995, p 174.

No. New privileges can be created by legislation but not otherwise. Wade and Bradley comment in this regard, ‘Since neither House can separately exercise the legislative supremacy of Parliament, neither House can by its own resolution create new privileges’.¹³⁴ *Erskine May* states that the issue concerns the balance that needs to be struck between two potentially conflicting principles: on the one hand, the rights required by Parliament for the due execution of its powers; and, on the other, the consideration that those rights and powers should not be used against the public interest. *Erskine May* continues, ‘In consequence, it was agreed in 1704, for example, that “neither House of Parliament hath any power, by any vote or declaration, to create to themselves any new privilege that is not warranted by the known laws and customs of Parliament”’.¹³⁵

Thus, should the NSW Houses of Parliament want to create a power to punish for contempt, for example, this would have to be done by statute.

6.6 *Can the privilege prohibiting the questioning of what is said or done in Parliament be waived?*

Writing in a British context in 1995, Patricia Leopold commented that, while there is comparatively little legal authority on the issue, the answer was that privilege could not be waived. Her view at the time was that, as the privilege of freedom of speech comes from statute (Article 9 of the *Bill of Rights 1689*), it must be changed by statute. Thus, for the purposes of court proceedings affecting the free speech of a Member the privilege cannot be waived either by Parliament or by the Member concerned. The conundrum here is that an individual immunity is at stake which should not be waived by resolution of a House, for fear among other things that such a power of waiver could be used to deprive unpopular Members or groups of their rights. On the other side, were an individual Member to waive the privilege it would contradict the principle that a parliamentary privilege belongs in an ultimate sense to each House as a whole and not to any one Member. For her part, Leopold maintained: ‘It is possible for parliament to decide to exercise its discretion and not to enforce its penal jurisdiction in respect of every breach of privilege or contempt, but this does not amount to a waiver of privilege’.¹³⁶ Similarly, writing in 1978, David Mummery had arrived at the conclusion that an individual Member cannot waive privilege, stating:

If such a vicarious waiver by Parliament were possible, it would place the individual Member - and through him the legislature - under the duress of public opinion every time some question of veracity in Parliament

¹³⁴ ECS Wade and AW Bradley, *Constitutional and Administrative Law*, 11th ed, Longman 1993, p 224.

¹³⁵ *Erskine May*, p 82.

¹³⁶ P Leopold, ‘Free speech in Parliament and the courts’ (1995) 15 *Legal Studies* 204 at 207.

became of urgent general concern. Endless demands could arise for executive inquiries into the accuracy of statements in Parliament. This would appear to be contrary to the very purpose of Article 9 as elucidated by the courts.¹³⁷

In fact the new section 13 of the *Defamation Act 1996* (UK) specifically provides that ‘Where the conduct of a person in or in relation to proceedings in Parliament is in issue in defamation proceedings, he *may waive* for the purposes of those proceedings, *so far as concerns him*, the protection of any enactment or rule of law which prevents proceedings in Parliament being impeached or questioned in any court or place out of Parliament’ (emphasis added). This controversial provision was the subject of considerable debate.¹³⁸ It is said to have been the product of vigorous lobbying, not least by Mr Neil Hamilton MP who wanted at the time to clear his name of corruption in the execution of his parliamentary duties over the ‘cash for Questions’ scandal, involving the owner of Harrods, Mohammed Al-Fayed. In other words, a Member sought to waive parliamentary privilege on this occasion, thereby permitting the courts to ‘question’ what he had said or done in the course of parliamentary proceedings. Only the enactment of section 13 of the new *Defamation Act 1996* permitted this course of action, but even then it only allows parliamentary privilege to be waived ‘so far as it concerns’ that particular person. Section 13(3) provides that ‘the waiver by one person of that protection does not affect its operation in relation to another person who has not waived it’. In the event, Mr Hamilton withdrew his claim and the case did not proceed.¹³⁹

The view at the federal level in Australia is that privilege cannot be waived, with *Odgers* observing in this regard, ‘The immunities of the Houses are established by law, and a House or a member cannot change that law any more than they can change any other law’.¹⁴⁰ The example was given of the Senate refusing a petition by solicitors to waive privilege in relation to evidence given before a Senate committee.¹⁴¹ In *Hamsher v Swift*,¹⁴² French J confirmed the view that, further to section 16(3) of the *Federal Parliamentary Privileges Act 1987* (Cth), privilege cannot be waived by an individual

¹³⁷ DR Mummery, ‘The privilege of freedom of speech in Parliament’ (1978) 94 *The Law Quarterly Review* 276 at 288.

¹³⁸ BK Winetrobe, *Defamation [HL] Bill 127 of 1995-1996*, Research Paper 96/61, House of Commons Library.

¹³⁹ R Elliott, ‘Waiving parliamentary privilege under the Defamation Act 1996 (UK)’ (December 1996/January 1997) 3 *Australian Media Law Reporter* 134.

¹⁴⁰ *Odgers’ Australian Senate Practice*, p 64; AR Browning ed, *House of Representatives Practice*, 2nd ed, AGPS 1989, p 693; E Campbell, *Parliamentary Privilege in Australia*, p 33.

¹⁴¹ *Senate Debates*, 16 April 1985, pp 1026-30.

¹⁴² (1992) 33 FCR 545.

Member. As to whether a House could waive a privilege, his Honour was less categorical, stating: ‘Whether that prohibition [in section 16(3)] can be overcome by any permission of the House of Parliament concerned may be doubtful and need not be decided here’.¹⁴³

The Western Australian Royal Commission into Commercial Activities of Government and Other Matters was informed in 1991 by the Presiding Officers of the WA Parliament that it was not within their power, nor the power of Parliament, to grant a waiver of the immunities bestowed under Article 9.¹⁴⁴ The matter was reviewed by the WA Commission on Government in 1995 which recommended that no amendments be made to the *Parliamentary Privileges Act 1891* (WA) to permit ‘any general or specific waiver of parliamentary privileges’.¹⁴⁵

The head note to *Prebble v Television New Zealand Ltd* notes that the Privileges Committee of the New Zealand House of Representatives had considered the question of waiver but held that the House had no power to waive the privileges protected by Article 9.¹⁴⁶ For its part the Privy Council endorsed the proposition that privilege cannot be waived by an individual MP even, as Leopold explains, ‘if the privilege concerned is an individual rather than a collective privilege’.¹⁴⁷

¹⁴³ Ibid at 564.

¹⁴⁴ WA Commission on Government, *Report No 1*, August 1995, p 359; C Griffiths, ‘Article 9 and its application to the proceedings of a Royal Commission’, *XXII Presiding Officers and Clerks Conference*, Honiara July 1991; RKF Davis, ‘Parliamentary privilege - Parliament and the Western Australian Royal Commission’ (1993) 67 *ALJ* 671.

¹⁴⁵ WA Commission on Government, p 369; WA Royal Commission Into Use of Executive Power, November 1995, p 24. The report noted a resolution of the Legislative Council to the effect that the Council ‘has been consistently accepted and applied the opinion of the superior courts in Australia and other Commonwealth countries that [Article 9] privileges and immunities cannot be set aside by its own resolution’.

¹⁴⁶ [1994] 3 All ER 407; there was a difference of opinion among the judges of the New Zealand Court of Appeal on this issue, with only Cooke P finding in unequivocal terms that the House could waive its Article 9 privilege - *TVNZ v Prebble* [1993] 3 NZLR 513 at 521. Cooke P suggested that *Adam v Ward* [1917] AC 309 could be explained as a case where the British House of Commons had elected not to assert its privilege or the court had assumed that the House was content not to do so. Leopold has said that this House of Lords decision is the only case that supports the suggestion that privilege can be waived: ‘In this case several of their Lordships referred without comment to the fact that at the trial Hansard was used to provide extracts from the plaintiff’s speech in the Commons, and that the plaintiff was cross-examined in court on what he had said in parliament. There was no reference to what would appear to have been, if not a waiver of privilege by the plaintiff, at least a decision not to seek to rely on the privilege’ - PM Leopold, ‘Free speech in Parliament and the courts’ (1995) 15 *Legal Studies* 204 at 206.

¹⁴⁷ Ibid at 213.

The position in NSW does not appear to have been tested in the courts.¹⁴⁸ However, the issue of waiver did arise recently in relation to the Police Royal Commission which sought on 14 October 1996 leave to make public the fact that certain in camera evidence was given to the Select Committee upon Prostitution, and to tender the transcript except for certain words. The Speaker advised the House that the Crown Solicitor was of the opinion that the action proposed by the Royal Commission would breach Article 9 of the Bill of Rights. The Speaker added: 'In any event, it should also be remembered that parliamentary convention and law prevent the House from granting a waiver to this privilege other than to adduce into evidence, purely for the purpose of establishing the fact, that the evidence was given'.¹⁴⁹ A motion declining leave as requested was agreed to.

The opposing case, in support of the view that privilege can be waived, was reviewed by Sir Clarrie Harders in a 1993 article in the *Australian Law Journal*. Reference was made to a report presented in 1972 by the Commonwealth Law Officers, the reasoning of which was followed by the Ontario Law Reform Commission in its 1981 *Report on Witnesses Before Legislative Committees*. The conclusion of the former, based on a resolution adopted by the British House of Commons in 1818, was that no evidence given to a Parliamentary committee 'can be used against a witness in any other place without the permission of the House' (emphasis added).¹⁵⁰ The Ontario Law Reform Commission noted that this leaves witnesses in a vulnerable position but that this is the inevitable consequence of the fact that 'the privilege is one that belongs to the Legislature rather than to the witness'.¹⁵¹

Having set out these arguments, Sir Clarrie Harders went on to make a case for the power to waive privilege based on the language of Article 9 itself, stating:

Would it not have been the case, one might ask, that the language of Art 9 (freedom of speech 'ought not' to be impeached or questioned) was carefully chosen so as to allow for a measure of flexibility in its

¹⁴⁸ Gibbs ACJ touched on the issue in *Sankey v Whitlam* (1978) 142 CLR 1 at 36-37 only to leave it unresolved, saying that the case did not require him to consider 'what the position would be if it appeared that the House wished to insist upon the privilege but the member took no objection' to giving evidence about matters said or done in Parliament. However, his Honour opened his remarks by stating that 'No doubt the privilege is that of the House, rather than that of the individual member', which would seem to discount the possibility of an MP deciding to waive privilege in his or her own case, at least against the wishes of the House.

¹⁴⁹ NSWPD (Hansard proof), 27 November 1996, p 56.

¹⁵⁰ Sir C Harders, 'Parliamentary privilege - Parliament versus the Courts: cross-examination of committee witnesses' (1993) 67 *ALJ* 109 at 133.

¹⁵¹ Ontario Law Reform Commission, *Report on Witnesses Before Legislative Committees*, 1981, p 100.

application? In *Conway v Rimmer* Lord Pearce (though in another context) said of the word ‘ought’ that it is ‘the language of discretion not compulsion’. The only sanction available to a House of Parliament for non-compliance with Art 9 would be by way of punishment for contempt of the House and it is understandable that in those circumstances the Parliament of 1688 would have wished to keep its options open and ... to deal with each case on its merits.¹⁵²

Unfortunately Sir Clarrie did not seek to substantiate this claim either by reference to the debates relevant to the formulation of Article 9, or by a more general analysis of the *Bill of Rights 1689*. In support of his view Sir Clarrie relied instead on a number of instances in which the House of Commons has exercised its discretion to accede to a petition.

Two reasons can be given for rejecting Sir Clarrie’s view. One is that several other Articles in the *Bill of Rights 1689* use the word ‘ought’ but that it would be very curious in these cases to suggest that the language was intended to be that of ‘discretion not compulsion’. Take, for example, Article 8 ‘The election of members of Parliament *ought* to be free’, or Article 10 ‘That excessive bail *ought* not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted’. Surely the implication is that 300 years ago the word ‘ought’ was the equivalent of today’s ‘shall’. A second reason for rejecting Sir Clarrie’s view is that if the Parliament was able to apply a discretionary, case by case approach to waiving the privilege embodied in Article 9, then presumably the courts could adopt the same approach when deciding whether or not to use Hansard in evidence. In short, what is suggested here is a recipe for chaos.

6.7 Does parliamentary privilege protect persons who provide information to MPs?

Erskine May suggests that it does not, stating ‘Although both Houses extend their protection to witnesses and others who solicit business in Parliament, no such protection is afforded to informants, including constituents of Members of the House of Commons who voluntarily and in their personal capacity provide information to Members, the question whether such information is subsequently used in proceedings in Parliament being immaterial’.¹⁵³ What is available to such an informant is the defence of qualified privilege.¹⁵⁴ That interpretation was followed by Allen J in *Grassby’s* case, which involved a prosecution for criminal libel in respect of the provision of a document to a

¹⁵² Sir C Harders, op cit, pp 134-135.

¹⁵³ Erskine May, p 133.

¹⁵⁴ At common law, the defence of qualified privilege is available if the statement is made in the performance of any legal, moral or social duty or interest, to a person having a corresponding duty or interest to receive it. In NSW the common law defence is accompanied by a defence of statutory qualified privilege under section 22 of the *Defamation Act 1974*: NSWLRC, *Report 75 - Defamation*, September 1995, p 154.

Member of the NSW Parliament.¹⁵⁵

However, that interpretation was disputed recently by Harry Evans, Clerk of the Australian Senate, who thought the answer to the question ‘is likely to be determined by the closeness of the connection between the communication of the information to the member and potential or actual proceedings in a house or committee’.¹⁵⁶ That view was formulated with direct reference to the definition of ‘proceedings in Parliament’ under section 16(2) of the *Parliamentary Privileges Act 1987* (Cth), which refers to all words spoken and acts done in the course of ‘or for the purposes of or incidental to’ the transacting of the business of a House or of a committee. Nonetheless, the provision is said to be ‘a codification of the pre-existing law’; thus, the conclusion that, ‘given the right circumstances’, the provision of information by a person to an MP may attract the immunity of parliamentary privilege was intended to have general application.

To add a further twist, the one possible exception, according to Harry Evans, is the NSW Parliament which relies on the common law doctrine of parliamentary privilege and in regard to which the *Bill of Rights 1689* may not apply. As a matter of interpretation it would depend, presumably, on what was considered to be reasonably necessary for the functioning of the NSW Parliament, viewed in the context of the contemporary constitutional setting. On this point the discussion of the impact of the *Australia Acts 1986* in *Egan v Willis* suggests a tendency, in appropriate circumstances, to view the NSW Parliament as comparable to other Australian legislatures. In other words, it may be that following *Egan v Willis* the potential gap between the NSW and other Parliaments in Australia has narrowed, thus allowing an expansive interpretation of what is meant by ‘proceedings in Parliament’ for the purposes of offering immunity to whistleblowers and others who provide information to MPs.

Against the account found in *Erskine May* (and Allen J’s reliance on this), Harry Evans says that it ‘mixes up’ two related but distinct issues, namely, the scope of the legal immunity provided to informants, on one side, and the extent of the contempt jurisdiction, on the other. The contempt issue asks whether it would be lawful for a House to hold that a person taking legal action in respect of information conveyed to a member was in contempt of Parliament, on the ground that such action would constitute an interference with the conduct of proceedings in Parliament. Presumably this would not arise in NSW where there is no power to punish for contempt. In this State only the question as to whether an informant may have legal immunity under the doctrine of parliamentary privilege is relevant and to that there is no clear answer.

¹⁵⁵ (1991) 55 A Crim R 419 at 430.

¹⁵⁶ H Evans, ‘Protection of persons who provide information to members’, *27th Conference of Presiding Officers and Clerks*, Hobart 1996. It is noted that in the *Grassby* case ‘there was not even a remote connection between the provision of the document to the member by Mr Grassby and any parliamentary proceedings actual or potential’.

6.8 *Can an MP use parliamentary privilege as a basis for refusing to give evidence to a Royal Commission concerning something he or she said or did in the House?*

This issue arose recently in NSW when the Hon Franca Arena cited parliamentary privilege as her reason for refusing to give evidence before the Police Royal Commission. Various authorities were cited in the press for and against the proposition, with Professor George Winterton, on one side, saying that an MP had no legal right to refuse a subpoena to appear before the Royal Commission,¹⁵⁷ and a ‘former presiding officer of the Senate’, on the other side, claiming that a Member could not be made to give evidence on something he or she said in the House.¹⁵⁸

Professor Enid Campbell considered the question in 1966, noting that royal commissions had been appointed in the past to enquire into the truth of allegations made under parliamentary privilege and also sometimes into the sources of the Member’s information. Among others, she discussed the example that in June 1943 the Federal Government commissioned a Victorian Supreme Court judge to enquire into and report on the truth of a statement made in the House of Representatives by the then Minister for Labour and National Service, EJ Ward.¹⁵⁹

A NSW example, not discussed by Professor Campbell, is that of the establishment in 1951 of a Royal Commission under Justice Maxwell to enquire into the liquor laws. In part this was prompted by allegations concerning abuses of those laws, made in the Legislative Assembly by JL Geraghty. Geraghty was subsequently subpoenaed to appear before the Royal Commission. It seems he had been advised that he would not have to answer questions at the Commission but, in the event, that advice proved to be incorrect.¹⁶⁰ When Geraghty’s legal representative, Clive Evatt, raised the issue of privilege the following interchange took place:

Commissioner: It has been dealt with over and over again. As a Royal Commissioner in 1935, I allowed the whole of the examination of one witness on what he had said in Parliament.

Mr Evatt: I submit that that would exclude any -

Commissioner: No, it does not. I have held to the contrary on half a dozen

¹⁵⁷ ‘Arena in fight to defy Wood’, *The Australian*, 30 November 1996.

¹⁵⁸ ‘I will not testify, Arena tells Wood’, *The Daily Telegraph*, 29 November 1996.

¹⁵⁹ E Campbell, *Parliamentary Privilege in Australia*, pp 38-42.

¹⁶⁰ D Clune, *The New South Wales State Election 1953*, NSW Parliamentary Library/Department of Government, University of Sydney, pp 8-9.

occasions.¹⁶¹

In NSW at least the question would appear to be one of statutory interpretation. Section 17(1) of the *Royal Commissions Act 1923* provides:

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 other ground of privilege or on any other ground* (emphasis added).

Reference in the provision to ‘privilege’ is not limited in any way and it can be presumed to apply to parliamentary privilege. On this basis, the answer would appear to be clear enough - in NSW an MP cannot use parliamentary privilege as a basis for refusing to give evidence concerning something he or she said or did in the House to a Royal Commission.

However, that conclusion needs to be tempered by at least two qualifications. First, under sections 17(4) and (5) of the *Royal Commission Act 1923* it is provided that the above will 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’. Secondly, regard must be had to the terms of any particular legislation establishing a Royal Commission. The *Royal Commission (Public Service) Act 1994* is a case in point. This is to be read as if it formed part of the 1923 Act;¹⁶² also, the 1994 legislation provides the Commissioner with wide powers to obtain documents and information.¹⁶³ At the same time, however, it contains in section 8 a special provision relating to privilege which, it could be argued, may serve to retain the availability of parliamentary privilege for an MP. Section 8(2) provides that the requirement to produce information or any document must be set aside if the ‘person has a ground of privilege’. However, section 8(3)(b) then says that the person must comply despite ‘any privilege of a public authority or public official in that capacity which the authority or official could have claimed in a court of law’. The terms ‘public authority’ and ‘public official’ have the same meanings as in the *ICAC Act 1988*. Neither House of the NSW Parliament would constitute a ‘public authority’ for that purpose. On the other hand, Members of the Parliament are included under the ICAC list of ‘public officials’. However, bearing in mind the often repeated argument that parliamentary privilege belongs to the House and not to an individual Member, it may still be the case that the exception provided under section 8(2) would not be abrogated by section 8(3)(b). In other words, in certain cases a Member of the NSW Parliament may be able to use parliamentary privilege as a basis

¹⁶¹ *Royal Commission of Inquiry into the Liquor Laws and Allied Subjects*, Volume 4, p 2167.

¹⁶² Section 5(1).

¹⁶³ Sections 6 and 7.

for refusing to give evidence concerning what he or she said in the House to a Royal Commission. The Police Royal Commission may be a case in point.

From the earlier discussion of the 'WA Inc' Royal Commission, it would seem that Article 9 applied in that instance to prevent a Royal Commission from questioning what had been said or done in Parliament.¹⁶⁴ The experience of the Royal Commission Into Use of Executive Power (the Easton Royal Commission) seemed to confirm that view.¹⁶⁵

6.9 Can the distribution of extracts from *Hansard* be suppressed by the courts?

In an odd twist to the debate concerning parliamentary privilege, Justice Levine of the NSW Supreme Court recently issued an interlocutory injunction suppressing the distribution of extracts from the Hansard of 12 November 1996 in which Mr Peter Nagle MP set out the details of a long-running dispute between the parties in *Commonwealth Bank v Malouf*.¹⁶⁶ Justice Levine emphasised, 'It is the *defendant's* proposed dissemination of this publication that is the nub of the application not, as it cannot be, any conduct on the part of the Member of Parliament'.¹⁶⁷ Justice Levine continued:

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

What is it that qualifies privilege? Shortly stated, it is that the publication of the report...must be in good faith for public information or the advancement of education.¹⁶⁸

As for the defendant, his Honour said that his motive, purpose and intent 'is founded upon no perceptible public interest but rather an intent to influence, compromise,

¹⁶⁴ RKF Davis, 'Parliamentary privilege - Parliament and the Western Australian Royal Commission' (1993) 67 *ALJ* 671.

¹⁶⁵ Western Australia, *Report of the Royal Commission Into Use of Executive Power*, November 1995, pp 20-28; 'Privileged documents acquired by Royal Commission' (1996) 64 *The Table* 61. Reference should also be made to section 33 of the *Royal Commissions Act 1968* (WA) which appears to preserve parliamentary privilege in express terms.

¹⁶⁶ (unreported, SCNSW, 10 December 1996, No 21362 of 1996)

¹⁶⁷ *Ibid* at 10.

¹⁶⁸ *Ibid* at 12.

embarrass and pressure improperly the conduct of the plaintiff as a litigant'.¹⁶⁹ Evidence of the absence of good faith was said to be based on the defendant having twice withdrawn the fraud allegations against the bank.

Of the decision it has been said that it is the first time an Australian court has agreed that an organisation has 'the power to apply to a court to gag a person who wants to use outside Parliament what was said in Parliament if it can make out a case of contempt, defamation or bad faith'.¹⁷⁰

7. CRITICISMS AND PROPOSALS FOR REFORM

7.1 *Conflicting public interests:*

The case for parliamentary privilege and, in particular, a broad interpretation of Article 9, is that a legislative body must have certain powers and its Members must enjoy certain immunities if it is to discharge its functions effectively. As Harry Evans wrote in 1986, 'Every community, to be well run, requires some institution to energetically and thoroughly inquire into matters of public concern and to rigorously examine the laws and proposed laws and measures'.¹⁷¹ On the other hand, the same author warned two years later:

The retention of any immunity and powers...depends upon the wise exercise of them, and the respect commanded by the institution. If the gap between the theory of what Parliament should be and the perceived reality grows too wide there will be inevitably a demand for further changes.¹⁷²

Perhaps inevitably, the operation of parliamentary privilege has attracted criticism and more so in some jurisdictions than in others. These criticisms are basically a mixture of empirical and theoretical considerations. On the empirical side, instances of the alleged abuse of parliamentary privilege are cited, which then gives rise to more conceptual concerns regarding the balance that needs to be struck between competing public interests. These were discussed by the Privy Council in *Prebble* where Lord Browne-Wilkinson observed that the case illustrates how public policy, or human rights issues, can conflict. In respect to parliamentary privilege three conflicting public policy issues

¹⁶⁹ Ibid at 11.

¹⁷⁰ 'Aggrieved bank customer stopped from publishing Hansard extract', *The Sydney Morning Herald*, 11 December 1996.

¹⁷¹ H Evans, 'Privilege: what to remember and what to forget', (1986) 1 *Legislative Studies* 5 at 9.

¹⁷² H Evans, 'Parliamentary privilege: changes to the law at federal level' (1988) 11 *UNSW Law Journal* 11 at 47.

are in play: first, the need to ensure that the legislature can exercise its powers freely on behalf of the electors; secondly, the need to protect freedom of speech generally; and, thirdly, the interests of justice in ensuring that all relevant evidence is available to the courts.

However, Lord Browne-Wilkinson went to say that the law has been long settled that, 'of these three public interests, the first must prevail'.¹⁷³ It must prevail as a result of the 'wider principle' that the courts and Parliament are both astute to recognise their respective constitutional roles, the essence of which is that the courts will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges. Various criticisms can be made of this approach. One is that it strikes an inappropriate balance between Parliament and the courts, in that 'it goes too far in favour of freedom of speech in parliament at the expense of the proper administration of justice'.¹⁷⁴ A second criticism, formulated by Geoffrey Marshall, states that no balancing of conflicting public interests is in fact involved where the privileges of Parliament are at stake. He writes that if:

it really is settled that the first interest has to prevail, what sense can be given to the view that the other two interests are in play? If they are bound to lose, there is no conflict of interest and no balancing of public interests to be done.¹⁷⁵

In other words, in the way the courts have interpreted Article 9, parliamentary privilege acts as a trump which sets aside all other claims of public interest.

7.2 *Arguments for change:*

Following on from this, the case for the reform of parliamentary privilege includes the following arguments:

(i) *peculiar, arbitrary and obscure:* according to Sir Geoffrey Palmer, most people know nothing about parliamentary privilege and 'The law relating to it is ancient, obscure and potentially draconian'. He notes that it is, in the words of the noted English constitutional lawyer, O Hood Phillips, 'exceptional, peculiar and discretionary'.¹⁷⁶

¹⁷³ [1994] 3 All ER 407 at 417.

¹⁷⁴ P Leopold, 'Free speech in Parliament and the courts' (1995) 15 *Legal Studies* 204 at 209.

¹⁷⁵ G Marshall, 'Impugning parliamentary impunity' (Winter 1994) *Public Law* 509 at 512.

¹⁷⁶ G Palmer, 'Parliament and privilege: whose justice?' (September 1994) *New Zealand law Journal* 325.

(ii) ***potential for injustice***: parliamentary privilege has the capacity to cause substantial injustice to individuals who have no means of redress. Various examples of the alleged abuse of privilege can be cited in this context but the general point to make is that the privilege of freedom of speech in Parliament can and does come into conflict with the principle that ‘every person is entitled to access to the Courts...to obtain redress for alleged wrongs’.¹⁷⁷ Thus, a citizen defamed by an MP may be denied a remedy by the absolute privilege afforded to what is said in Parliament under Article 9. The reports of Parliamentary Committees are protected by the same absolute privilege and the point is made that potential exists for such Committees ‘to engage in activities which are oppressive or which may do irreparable harm to individuals’.¹⁷⁸

In *Prebble*, the Privy Council held that ‘in the most extreme circumstances’ a court may order a stay of proceedings in situations where, as a result of Article 9, the exclusion of material makes it impossible fairly to determine the issues between the parties.¹⁷⁹ The *Wright* case was one instance where a stay might have applied, for in that case parliamentary privilege would have excluded virtually all the evidence necessary to justify the libel. In *Prebble* itself, on the other hand, a stay of proceedings was not considered to be appropriate. At least one commentator has found this suggested compromise to be an inadequate response to the problem, stating that ‘members of the public must feel free to criticise their politicians without any fear that they may have to incur legal costs in defending actions brought by politicians, even though the actions may be stayed because they [the defendants] have no defences’.¹⁸⁰

(iii) ***contrary to democratic values***: according to the ‘WA Inc’ Royal Commission, the present construction of what is meant by freedom of speech in Parliament under Article 9 is ‘fundamentally inconsistent with the right of all citizens to subject their parliamentary representatives to scrutiny, and to be governed in an open and accountable manner’.¹⁸¹

(iv) ***inflated and unhistorical interpretation of Article 9***: the present construction of Article 9 makes inflated claims for parliamentary privilege which owe little or nothing to its original purpose and intent. Again, this was the view of Hunt J in *Murphy*’s case where his Honour proposed a ‘narrower interpretation’ consistent

¹⁷⁷ R Best, ‘Freedom of speech in Parliament: constitutional safeguard or sword of oppression?’ (1994) 24 *VUWLR* 91 at 95. Cited is a comment from McKay J in *TVNZ v Prebble* [1993] 3 *NZLR* 513.

¹⁷⁸ Explanatory Note, Parliamentary Privileges Bill 1994 (NZ), p 28.

¹⁷⁹ [1994] 3 *All ER* 407 at 418-420.

¹⁸⁰ D O’Brien, ‘Parliamentary privilege and the implied freedom of speech’ (December 1995) *Queensland Law Society Journal* 569 at 588.

¹⁸¹ Western Australia, *Report of the Royal commission into Commercial Activities of Government and other matters*, 1992, Part II, para 5.8.7.

with ‘both the mischief which the Bill of Rights was enacted to remedy and the history of what led to the enactment of art. 9’. He observed: ‘Freedom of speech in parliament is not now, nor was it in 1901 or even in 1688 so sensitive a flower that, although the accuracy and the honesty of what is said by members of parliament (or witnesses before parliamentary committees) can be severely challenged in the media or in public, it cannot be challenged in the same way in the courts of law’.¹⁸² As noted, for Hunt J only when legal consequences are to be visited on Members or witnesses should parliamentary privilege be used to prevent a court questioning what they said or did in Parliament. In support of this approach and contrary to the decision in *Prebble*, Geoffrey Marshall said the ‘formula in the Murphy case reflects a more rational attitude to parliamentary privilege as well as to the interests of justice and free speech’.¹⁸³ He went on to observe: ‘The freedom of debate is sufficiently protected if members enjoy absolute privilege from criminal and civil actions directed at what they say in the course of debate or proceedings in the House. There is no need to inflate claims of privilege beyond that’.¹⁸⁴

- (v) ***facilitating a regard for truth:*** witnesses to a parliamentary committee and MPs are more likely to tell the truth if they know there is a prospect that what they say may be challenged elsewhere, than if they know they are protected from such challenge. The ‘WA Inc’ Royal Commission commented in this regard: ‘Statements made in parliament should not be treated, for purposes associated with court and like proceedings, as if they were never uttered. To provide such immunity is likely to encourage, or at least facilitate, a disregard for the truth by those to whom the protection is given. We have no doubt that if it is understood by members of Parliament or persons appearing before a parliamentary committee that they may be called to account for their parliamentary statements at a later time, they are more likely than not to speak honestly, although no less freely. To suggest otherwise is to equate the right to speak freely in Parliament with the right to be disingenuous. Such a proposition is fundamentally inconsistent with the right of all citizens to be governed in an open and accountable manner’.¹⁸⁵
- (vi) ***procedural fairness:*** there is no mechanism for ensuring that witnesses before parliamentary committees generally will be protected by the requirements of procedural fairness. In 1991 the NSW Attorney General’s Discussion Paper commented that this had not proved to be a controversial matter in this

¹⁸² (1986) 5 NSWLR 18 at 34.

¹⁸³ G Marshall, ‘Impugning parliamentary privilege’ (Winter 1994) *Public Law* 509 at 512.

¹⁸⁴ *Ibid* at 513.

¹⁸⁵ Western Australia, *Report of the Royal Commission into Commercial Activities of Government and other matters*, 1992, Part II, para 5.8.6.

jurisdiction. But at the same time it said that ‘Procedural questions such as whether evidence should be heard in-camera, the degree to which counsel should be involved, and the admissibility of questions are currently left to the Committees themselves to determine’. The Discussion Paper went on to say that it is ‘essential that persons summoned to give evidence before a Committee be accorded procedural fairness’.¹⁸⁶ Likewise, in a New Zealand context Sir Geoffrey Palmer argued for a legislative provision ‘explicitly requiring select committees of Parliament to follow the rules of natural justice’.¹⁸⁷ Further to Privilege Resolution 1 (the text of which is set out at Appendix ??), in 1988 the Senate adopted a number of procedures for the protection of witnesses.

- (vii) ***infringement of the implied right to freedom of speech under the Australian Constitution:*** a theme of recent academic analysis in Australia is that the kind of approach to Article 9 adopted in the *Prebble* case is in fact inconsistent with the implied freedom of speech and communication in the Australian Constitution. Following the High Court’s decisions in *Nationwide News*,¹⁸⁸ *Theophanous*¹⁸⁹ and *Stephens*¹⁹⁰ that implied freedom is to discuss or publish material relating to ‘government and political matters’ and, in particular, ‘the views, performance and capacity of a member of Parliament and of the member’s fitness for public office, particularly when an election is in the offing’.¹⁹¹ It is said that the implied freedom extends to all levels of government in Australia and that the defence which flows from the freedom in proceedings for defamation take precedence over any other statute or common law. In an account which focuses on section 16 of the federal *Parliamentary Privileges Act 1987* (Cth), Damien O’Brien has argued that the High Court would find this unconstitutional, as involving an infringement of the ordinary citizen’s freedom of speech which cannot be justified or supported ‘on the grounds that it is reasonably necessary, appropriately adopted or proportionate’.¹⁹² Presumably, the same conclusion would apply to the operation of parliamentary privilege at the State level.

Irrespective of the merits of that conclusion, the picture is now further complicated by the fact that the High Court has decided to reconsider the cases which gave rise to the

¹⁸⁶ NSW Attorney General’s Department, *Discussion Paper - Parliamentary Privilege in NSW*, 1991, p 34.

¹⁸⁷ G Palmer, *op cit*, p 329.

¹⁸⁸ (1992) 177 CLR 1.

¹⁸⁹ (1994) 182 CLR 104.

¹⁹⁰ (1994) 182 CLR 211.

¹⁹¹ D O’Brien, ‘Parliamentary privilege and the implied freedom of speech’ (December 1995) *Queensland Law Society Journal* 569 at 581.

¹⁹² *Ibid* at 587.

implied freedom of speech discussed by O'Brien. Clearly, therefore, this is an issue which will be revisited to take account of the High Court's latest deliberations.

(viii) consistency with international obligations: various New Zealand and British commentators have argued that the enforcement of Parliament's contempt jurisdiction (where this applies) is in violation of international and regional obligations respectively. In relation to New Zealand, it is said that privilege is in breach of the due process provisions of Article 14 of the International Covenant on Civil and Political Rights, as well as the requirement in Article 9 of the Covenant that 'No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law'.¹⁹³ In relation to Britain's regional obligations, it was decided by the European Court of Human Rights in *Demicoli v Malta*¹⁹⁴ that the actions of the Maltese Parliament involving the fining of a journalist for breach of privilege was in breach of Article 6 of the European Convention on Human Rights, on the ground that the journalist had not received a fair and public hearing before an independent and impartial tribunal. The general point to make is that because the hearing of a charge of contempt by a Privileges Committee is similar to proceedings for a criminal offence, the right to be heard in this context should entail the detailed due process rights appropriate to the determination of a criminal charge. Not surprisingly, the suggestion has been made in many jurisdictions that the contempt powers of Parliament should be relinquished altogether and vested in the courts.

7.3 *Proposals for reform:*

Several proposals for reform have been canvassed already, notably in relation to the recommendations made by the 1985 Joint Select Committee Report on Parliamentary Privilege. The following proposals can be noted at this stage:

(i) citizens right of reply: the introduction of a citizens right of reply has been canvassed on many occasions on the ground that it would offer some means of reply for people who feel that they have been unfairly attacked under the cover of privilege. The 1984 Commonwealth Joint Select Committee on Parliamentary Privilege concluded on this issue: 'We think the only practical solution consistent with the maintenance in its most untrammelled form of freedom of speech and the rights of members of the public to their good reputation may lie - and we emphasise the word "may" - in adopting an internal means of placing on record an answer to a Parliamentary attack. If such an answer is to have any efficacy, we think it should become part of the record of

¹⁹³ G Palmer, *op cit*, p 328; Explanatory Note, Parliamentary Privileges Bill 1994 (NZ), p 31. The latter reference is to the power of the New Zealand Parliament to punish for contempt. As noted, that power does not apply in NSW at present. The same point is made by O'Brien in relation to the federal *Parliamentary Privileges Act 1987* (Cth) - D O'Brien, *op cit*, p 587.

¹⁹⁴ 14 EHRR 47 (1991); PM Leopold, 'Free speech in Parliament and the courts' (1995) 15 *Legal Studies* 204 at 216.

Parliament so as to carry back to the forum in which the attack was made a refutation or explanation'.¹⁹⁵ The Committee recommended that complaints be: (i) subject to rigorous screening; (ii) that there be clear limits on what may be put in an answer which is to be incorporated in Hansard; and (iii) that complaints be raised directly with the Privileges Committees.

The Australian Senate in 1988 was the first legislature to adopt a right of reply as part of a package of resolutions relating to parliamentary privilege.¹⁹⁶ A detailed account of its method of operation is set out in 1996 report of the Senate Committee of Privileges, but the essence of it is stated by Odgers in these terms: 'A person aggrieved by a reference to the person in the Senate may make a submission to the President requesting that a response be published. The submission is scrutinised by the Privileges Committee, which is not permitted to inquire into the truth or merits of statements in the Senate or of the submission, and provided the suggested response is not in any way offensive, it may be incorporated in Hansard or ordered to be published'.¹⁹⁷ The 1996 report says that since 1988 only 22 responses have been recommended for publication. A further five were not proceeded with because the person concerned chose not to pursue the matter after the Committee had made contact. In no case had the Committee refused a right of reply. The relative dearth of right of reply cases was analysed in the report but at the same time the conclusion was reached that 'the procedure is both desirable and successful'. In most cases, the report noted, the Committee found that 'the persons have been concerned not with vengeance or apology, but rather to ensure that their voice is heard or views are put in the same medium as the original comments were made'.¹⁹⁸ It added that the procedure is usually 'quick, cheap and effective' and open to anyone, 'regardless of either skill or financial capacity'.¹⁹⁹

The merits and demerits of a right of reply have been debated in several jurisdictions. In its 1995 report the WA Commission on Government reviewed developments in that State. It noted that in 1989 the Parliamentary Standards Committee had rejected the idea of introducing a right of reply and that in doing so it followed the 1988-89 report of the British House of Commons Select Committee on Procedure. Perhaps the most serious reservation expressed by both Committees was that, as the rebuttal is likely to appear several weeks after the original allegation, the reply will be robbed of 'any immediacy', with the WA Standing Committee adding that the Senate procedures also 'required the drafting of cumbersome regulations which are not easy to interpret in practice and it is

¹⁹⁵ Parliament of the Commonwealth, Joint Select Committee on Parliamentary Privilege, *Final Report*, October 1984, p 55.

¹⁹⁶ The 11 resolutions on parliamentary privilege agreed to by the Senate on 25 February 1988 are set out at Appendix ??.

¹⁹⁷ Odgers' *Australian Senate Practice*, p 65.

¹⁹⁸ The Senate Committee of Privileges, *62nd Report*, June 1996, p 17.

¹⁹⁹ *Ibid* at 18.

difficult to find any evidence to this stage that they have added significantly to the rights available to citizens'.²⁰⁰ On the other hand, the Commission on Government found in support of a right of reply, concluding 'we are firmly of the view that this innovation is a very high priority amongst the citizens of this State, and is one that is demonstrably workable'.²⁰¹

The Senate procedures were also reviewed in the 1993 report of the ACT's Legislative Assembly's Standing Committee on Administration and Procedures. Certain further innovations were recommended, including that the procedure be available both to private individuals and corporations, a model which has since been followed by the NSW Legislative Assembly (see below). In May 1995 the ACT Standing Committee reported that, despite several inquiries, no one had 'written to initiate proceedings' under the right of reply since its introduction in September 1993. The Committee commented that it was not concerned with its lack of use but rather believes that its mere existence gives 'those in the community a security by knowing that they do have access to the right of reply'.²⁰²

In New Zealand the Parliamentary Privileges Bill 1994 included draft right of reply provisions. The Explanatory Note commented that 'Such measures illustrate that it is possible to promote useful reform while at the same time maintaining the important principle that Parliament is free to regulate its own proceedings'.²⁰³

In its 1995 report on *Defamation* the NSW Law Reform Society made no formal recommendation on this matter, but it did urge 'that the Parliament should give careful consideration to the issue'. The report noted that the Speaker of the NSW Legislative Assembly, the Hon John Murray MP, had argued that 'Where the reputation of an individual or group has been unreasonably maligned under parliamentary privilege, the aggrieved party should be given an opportunity to provide a written response which, if deemed appropriate by the Speaker, will be recorded in Hansard'.²⁰⁴ The NSW Law Society has said it favours legislation ensuring a 'documentary right of reply in responsible and not offensive terms by affected persons as well as a requirement that the

²⁰⁰ Western Australia, *Report of the Parliamentary Standards Committee*, Vol 1, 1989, p 55.

²⁰¹ Western Australia, Commission on Government, *Report No 1*, August 1995, p 385.

²⁰² Legislative Assembly for the ACT, Report of the Standing Committee on Administration and Procedure, *Standing Orders and Citizen's Right of Reply*, May 1995, p 13.

²⁰³ Parliamentary Privileges Bill 1994 (NZ), p 64.

²⁰⁴ NSWLRC, *Report 75 - Defamation*, September 1995, p 178; Hon J Murray MP, *Some proposals worthy of consideration for parliamentary reform in the NSW lower house*, July 1995, p 11.

reply be published'.²⁰⁵

In the event, the right of reply procedure has been adopted in the Legislative Assemblies of Queensland and the ACT and, most recently of all, in the NSW Legislative Assembly on 27 November 1996.²⁰⁶ Introducing the motion on 25 September 1996 Hon Paul Whelan MP observed: 'From today the New South Wales Parliament will no longer be a coward's castle. In the past certain members of this House have overstepped the line. They have abused the privileges extended to them by virtue of their membership of the Parliament. They have ignored an essential element of democracy, that every right encompasses a corresponding responsibility. With the passing of this motion all honourable members will be more accountable for the statements they make in this place'.²⁰⁷ The full text of the relevant motion is set out at Appendix ??.

On 14 November 1996 the Legislative Council agreed to a motion that the Standing Orders Committee inquire into and report on procedures for a citizens right of reply.

(ii) *citizens right of reply to evidence given before a parliamentary committee:* one issue in this debate is whether a citizens right of reply should be restricted to what is said on the floor of the House, or should it extend more generally to whatever constitutes 'proceedings in Parliament'?. In particular, should a right of reply extend to evidence given before a parliamentary committee which reflects adversely on another person, including a person who is not a witness? Further to Privilege Resolution 1 (11)-(13), the Senate in 1988 adopted procedures requiring that the evidence must be made known to that other person and reasonable opportunity to respond given. The details are set out in *Odgers' Australian Senate Practice* where the observation is made, 'It would not be viewed as fair practice for a committee not to publish a person's response to an adverse reflection, if the person requests it, at least to the same degree as the adverse reflection was published'.²⁰⁸

(iii) *parliamentary privilege legislation:* from time to time this paper has discussed the proposal of introducing more or less comprehensive legislation in this field, in particular defining what is meant by 'proceedings in Parliament' and 'impeached or questioned in any court or place out of Parliament'. Thus, the argument is that the scope of Article 9 should be articulated in a statute. The pros and cons of that approach need not be revisited in detail at this stage. It is enough to say that the model which is usually referred to in this context is the Federal *Parliamentary Privileges Act 1987*. That

²⁰⁵ 'NSW citizens need right of reply to adverse parliamentary comment' (March 1997) 35 *NSW Law Society Journal* 73.

²⁰⁶ *NSWPD*, 27 November 1996, p 6752.

²⁰⁷ *NSWPD*, 25 September 1996, p 4625.

²⁰⁸ *Odgers' Australian Senate Practice*, 7th ed, pp 437-440.

codification of traditional understandings brings its own problems and dilemmas is clear enough, notably there is the danger of unduly restricting the powers and immunities of the Houses of Parliament by tying them to precise legislative terms.²⁰⁹ Such considerations notwithstanding, the proposal has many advocates, including the NSW Law Society which has argued for legislation to complement or replace Article 9.²¹⁰ Also, the Shadow Attorney General, Hon JP Hannaford MLC, has said that he will release a Bill relating to parliamentary powers and privilege for public release.²¹¹

(iv) guidelines for the exercise of parliamentary privilege: another proposal supported by the NSW Law Society is that, in addition to legislation on this issue, there should be guidelines which would operate as a code of conduct for Members when exercising freedom of speech in Parliament. These, it was suggested, could use Resolution 9 of the Senate's Privilege Resolutions of 1988 as a model (see Appendix ??).

(v) reform of penal jurisdiction: in those jurisdictions where Parliament has the power to imprison or fine, it has been argued that the power should be abolished. Conversely, in NSW where no such power exists, the 1985 Joint Select Committee recommended 'That a power to fine for contempt be invested by statute...'. Of this recommendation the NSW Attorney General's Department Discussion Paper counselled that a cautious approach be adopted, noting 'It must be queried to what extent a modern legislature should be empowered to act as judge and jury in its own cause'. That the Parliament should adopt procedural guidelines for dealing with complaints of contemptuous conduct was also suggested.²¹²

8. CONCLUSIONS

That parliamentary privilege is a large, complex and sometimes contentious subject is plain enough. That features of its operation in NSW are unique, including this Parliament's continuing reliance on its implied common law powers, is also clear. It may be that the debate in this State now stands at something of a watershed with recent developments suggesting an intensification of interest in the issues at stake, some of which have arisen in relation to the Police Royal Commission. Among other things, there has been the introduction of a proposed new Defamation Act, along with renewed calls for wider legislative intervention in this field; as well, a citizens right of reply now operates in the Legislative Assembly and is under consideration by the Standing Orders

²⁰⁹ For a comprehensive discussion of the federal legislation see - H Evans, 'Parliamentary privilege: changes to the law at federal level' (1988) 11 *UNSW Law Journal* 31.

²¹⁰ 'NSW citizens need right of reply to adverse parliamentary comment' (March 1997) 35 *NSW Law Society Journal* 73.

²¹¹ *NSWPD (Hansard Proof)*, 3 December 1996, p 3.

²¹² NSW Attorney General's Department, *Discussion Paper - Parliamentary Privilege in NSW*, 1991, p 40.

Committee of the Legislative Council. If special leave to appeal to the High Court is granted in *Egan v Willis* then another facet will be added to the debate concerning the powers of the NSW Parliament. The Bill proposed for release for public debate by the Shadow Attorney General will also be relevant to that debate.²¹³

In any event, even if the law relating to parliamentary privilege is described as obscure and arcane, recent developments both in this jurisdiction and elsewhere have shown that its practical significance and contemporary interest is not in doubt.

²¹³ NSWPD (Hansard Proof), 3 December 1996, p 3.

APPENDIX A

**Summary of Recommendations in the 1985 Report
of the Joint (NSW) Select Committee on Parliamentary
Privilege (Chairman: R. M. Cavalier)**

SUMMARY OF RECOMMENDATIONS IN THE REPORT OF THE JOINT SELECT COMMITTEE ON PARLIAMENTARY PRIVILEGE

Recommendation 1 - Legislation

That Parliament legislate to confirm the privileges and powers of the Parliament today and what they have been since the establishment of responsible Government.

Recommendation 2 - Constitutional Amendment

That the Constitution 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 House of Commons as at 1856; and the other provisions recommended elsewhere in the Report should be enacted.

Recommendation 3 - Codification

That extensive codification of privileges is not necessary.

Recommendation 4 - Commonwealth Powers

That, in the unlikely event that a conflict between Commonwealth laws and the privileges of the NSW Parliament be forced to litigation, the NSW Parliament should seek to intervene in any such litigation to advance the views that no Commonwealth power exists to over-ride the parliamentary privilege of the State Parliaments.

Recommendation 5 - The Precincts of Parliament

- (1) That a statute be enacted physically defining the precincts of the Parliament and vesting their control in the Presiding Officers. The Western Australian statutes would provide a useful starting point for such a statute. This statute would include provisions making it clear:
 - (a) that the Presiding Officers have absolute authority over access to the precincts of the Parliament or any individual sections of those precincts;
 - (b) no law enforcement agency has any right to operate within the precincts of the Parliament without the express permission of the Presiding Officers; and
 - (c) the control of demonstrators within the Parliamentary precincts should be by the Parliamentary attendants and the police directed by

the Serjeant-at-Arms and Usher of the Black Rod using the delegated powers of the Presiding Officers.

2) A number of civil provisions need be made with respect to Members of the New South Wales Police Force within the precincts of the Parliament. These would be:

- (a) the conducting by the Parliament, in conjunction with an officer delegated by the Commissioner of Police, of an induction course on the institution of Parliament and its privileges for officers whose duties will bring them to be part of the patrol of the Parliamentary precincts during Parliamentary Sittings;
- (b) the control of such police while they are within the precincts by the Serjeant-at-Arms and Usher of the Black Rod under delegated authority from the Presiding Officers; and
- (c) firearms should not be carried by Members of the Police Force within the precincts of the Parliament.

Recommendation 6 - Press Gallery Protocol

That the Presiding Officers and Press Gallery representatives discuss filming within Parliament House outside the interview and media facilities available on Level 6 of the parliamentary complex.

Recommendation 7 - Complaints by Members against Media Representatives

That any specific complaints by any aggrieved Member of the Parliament against an individual member of the media arising out of press scrutiny (within the Precincts) should be dealt with by means of consultative and control arrangements between the Presiding Officers and the Press Gallery.

Recommendation 8 - Photocopies of Galley Proofs

That absolute privilege should be attached, to quotation from the "galley proofs" of Parliamentary Debates provided that quotation was made during the period prior to the production of the pamphlet form.

1. That photocopies of "galley proofs" should be absolutely privileged, where the text of such photocopied material was made part of the final proof; and

2. Such photocopies retain absolute privilege provided they are used bona fide and without knowledge of any error in them which might subsequently have been corrected.

Recommendation 9 - Reproduction of Hansard in Pamphlet Form

That, absolute privilege attach to extraction by the Government Printer of Members' Speeches for reproduction in limited pamphlet form for Members, provided that a certificate be enclosed with such reproductions stating:

- i) the date of the debate from which the extract is taken;
- ii) the name of the Bill and the nature of the debate during which the Speech was made; and
- iii) the statement that it has been published under the authority of the NSW Parliament.

Recommendation 10 - The Cost of Galley Proofs

That the cost of distribution of "galley proofs" of Parliamentary Debates, other than those enumerated in the Report be charged to the receiving Departments, Authorities or Instrumentalities and not a cost borne by the Parliamentary Budget.

Recommendations 11 and 12 - The Distribution of Galley Proofs

That each Member of the Legislative Council and the Legislative Assembly be provided, on request, with a complete copy of the "galley proofs" of Debates in both Houses when those proofs are available.

That five (5) copies of galley proofs be made available to members of the Press Gallery.

Recommendation 13 - Production of Hansard in Court Proceedings

That litigants should be permitted to produce copies of Hansard or other formal records of the Parliament as proof of what is contained in them after an application is made to the Clerk of the appropriate House for the provision of a copy certified to be a true copy.

Recommendation 14 - Electronic Transmission of Hansard

That a Parliamentary Proceedings and Papers Act provide an absolute immunity for tape recorded material held by the Editor of Debates and recorded under the authority of the Parliament as well as attaching absolute privilege to broadcasting, within the precincts of the Parliament, by methods authorised by the Presiding Officers, of the verbatim words used in each of the Chambers.

Such privilege should not attach to any unauthorised recording or re-broadcast of proceedings within the precincts of the Parliament.

Recommendation 15 - Specific Legislation relating to Parliamentary Proceedings

That the various provisions of the Defamation Act 1974 relating to parliamentary proceedings together with the Parliamentary Papers (Supplementary Provisions) Act 1975 and its various amending Acts should be repealed and their provisions, as amplified or modified by the Recommendations of the Committee, be incorporated in a Parliamentary Papers and Proceedings Act.

Recommendation 16 - Induction Course for Newly Elected Members to Cover Responsibilities Relating to Parliamentary Speeches

That, as part of the induction course for newly elected Members, there be thorough discussion of the rights and responsibilities of parliamentarians in relation to the recording and editing of their parliamentary speeches.

Recommendation 17 - The "Publication" of correspondence between a Member and a Minister

That absolute privilege should attach to communications between a Member and a Minister and vice versa, all other distributional circulation of such correspondence to be covered only by qualified privilege.

Recommendation 18 - The Use of Members' correspondence

That a new Standing Order should be prepared by each House and presented to His Excellency for his concurrence in the following terms:

"No Member shall quote from, or advert to the circumstances of, representations by any other Member of either House to a Minister except with the consent of such other Member."

An alternative Standing Order to be considered could be the following terms:

"No Member shall quote from, or name any person referred to in any representation made by any other Member of either House to a Minister except with the consent of such other Member."

Recommendations 19-21 - Establishment and Composition of Privileges Committees

That Standing Committees of Privilege of the Houses of Parliament should be established and, to that end -

- (1) each of the Houses of the New South Wales Parliament should resolve to establish separately, a Standing Committee upon Parliamentary Privilege;
- (2) no specific terms of reference should be included in such resolution, in each House, as such terms might limit the scope of the authority of such a Committee;
- (3) for joint sittings of the Houses of the Parliament or when a matter arising constitutes a contempt of the Parliament rather than of either of the Houses, the Committees should be empowered, by specific resolution, at that time, to sit as a single joint Committee;
- (4) each House should invest its Standing Committee upon Parliamentary Privilege with the power to confer with the equivalent Committee of the other House;
- (5) the Committees should be of the same size and comprise seven Members with four of those being Members who are supporters of the Government;
- (6) the Presiding Officers should be specifically excluded from the membership of such Committees;
- (7) it be considered undesirable for Ministers to be appointed to such a Committee, but that they be eligible for membership;
- (8) a Minister should not be a Chairman of such a Committee;
- (9) the Clerks of both Houses be the Clerks to the respective Committees;
- (10) the three Members of the Committee not being Members supporting the Government should be nominated by the Leader of the largest minority party in that House; and

(11) the consideration of a report of such a Committee should take precedence over all other parliamentary business when it is presented to the House.

That the Standing Orders of each House of the New South Wales Parliament should be amended to provide that a Member who considers that his privileges have been breached should lodge the complaint, in writing, to his Presiding Officer "as soon as practicable" after the alleged breach is drawn to the Member's attention; and that such letter be clearly regarded as a "proceeding of the Parliament" and have absolute privilege attached to it.

That when a prima facie case of breach of Parliamentary privilege has been made out, the Presiding Officer shall respond in writing to the Member advising him of this; shall advise the House of his view and shall refer the matter to the Standing Committee upon Parliamentary Privilege which shall consider the matter and report to the House. However, when the Presiding Officer believes that no prima facie case has been established, the Member raising the matter should be advised of this fact and, if the Member is still aggrieved by the alleged breach, the Member should be able to raise the matter using the normal procedures of the House in which case no precedence over other business of the House should be afforded to that Member.

Recommendation 22 - The Role and Functions of Privileges Committees

That persons summoned to appear before a Privileges Committee be entitled to certain rights, viz:

1. public hearings with limited exceptions;
2. the right to be silent with respect to matters that might prove self-incriminating;
3. the right to be present throughout the hearings;
4. the right to professional advice;
5. the right to representation;
6. the right to be heard in their own cause;
7. the right to call witnesses; and
8. the right to cross-examine witnesses.

Recommendation 23 - Costs

That a power be vested in a Privileges Committee to recommend to the House to which such Committee reports that an award of costs be made to a successful "defendant" before a Privileges Committee.

Recommendations 24 and 25 - Protection of Witnesses

That witnesses before Committees of the New South Wales Parliament be provided with protection from self-incrimination relating to indictable offences, by means of an amendment to section 11(1) of the Parliamentary Evidence Act 1901.

That a witness should be able to make in camera submissions to the Committee as to why that witness ought not be compelled to answer a certain question or questions.

Recommendation 26 - Recalcitrant Witnesses

That the Parliamentary Evidence Act 1901 be amended to provide that:

1. witnesses who are summoned to give evidence before a Parliamentary Committee and who fail to do so without adequate excuse shall be reported forthwith, by the Chairman of the Committee to the appropriate Presiding Officer who shall then refer the matter to the appropriate Privileges Committee; and
2. any witness who refuses to answer a question, subject to exceptions in the proviso proposed to section 11, shall have that refusal reported to the appropriate Presiding Officer who shall refer the matter to the appropriate Privileges Committee.

Recommendation 27 - Contempt

That a power to fine for contempt be invested by statute to be used as an alternative to the power to imprison in appropriate cases.

Recommendation 28 - Expulsion

That Parliament retain the right to expel a Member as the ultimate sanction of a House to protect itself.

Recommendation 29 - Broadcasting

That, as a first step towards permitting electronic broadcasting of the proceedings of Parliament, a Select Committee of the Parliament examine this matter.

APPENDIX B

Federal Parliamentary Privileges Act 1987



PARLIAMENTARY PRIVILEGES ACT 1987

An Act to declare the powers, privileges and immunities of each House of the Parliament and of the members and committees of each House, and for related purposes

Short title

1. This Act may be cited as the *Parliamentary Privileges Act 1987*.¹

Commencement

2. This Act shall come into operation on the day on which it receives the Royal Assent.¹

Interpretation

3. (1) In this Act, unless the contrary intention appears:
“committee” means:
 - (a) a committee of a House or of both Houses, including a committee of a whole House and a committee established by an Act; or
 - (b) a sub-committee of a committee referred to in paragraph (a);“court” means a federal court or a court of a State or Territory;
“document” includes a part of a document;
“House” means a House of the Parliament;
“member” means a member of a House;
“tribunal” means any 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.

(2) For the purposes of this Act, the submission of a written statement by a person to a House or a committee shall, if so ordered by the House or the committee, be deemed to be the giving of evidence in accordance with that statement by that person before that House or committee.

(3) In this Act, a reference to an offence against a House is a reference to a breach of the privileges or immunities, or a contempt, of a House or of the members or committees.

Essential element of offences

4. 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.

Powers, privileges and immunities

5. Except to the extent that this Act expressly provides otherwise, the powers, privileges and immunities of each House, and of the members and the committees of each House, as in force under section 49 of the Constitution immediately before the commencement of this Act, continue in force.

Contempts by defamation abolished

6. (1) Words or acts shall not be taken to be an offence against a House by reason only that those words or acts are defamatory or critical of the Parliament, a House, a committee or a member.

(2) Subsection (1) does not apply to words spoken or acts done in the presence of a House or a committee.

Penalties imposed by Houses

7. (1) A House may impose on a person a penalty of imprisonment for a period not exceeding 6 months for an offence against that House determined by that House to have been committed by that person.

(2) A penalty of imprisonment imposed in accordance with this section is not affected by a prorogation of the Parliament or the dissolution or expiration of a House.

(3) A House does not have power to order the imprisonment of a person for an offence against the House otherwise than in accordance with this section.

(4) A resolution of a House ordering the imprisonment of a person in accordance with this section may provide that the President of the Senate or the Speaker of the House of Representatives, as the case requires, is to have power, either generally or in specified circumstances, to order the discharge of the person from imprisonment and, where a resolution so provides, the President or the Speaker has, by force of this Act, power to discharge the person accordingly.

(5) A House may impose on a person a fine:

- (a) not exceeding \$5,000, in the case of a natural person; or
- (b) not exceeding \$25,000, in the case of a corporation;

for an offence against that House determined by that House to have been committed by that person.

(6) A fine imposed under subsection (5) is a debt due to the Commonwealth and may be recovered on behalf of the Commonwealth in a court of competent jurisdiction by any person appointed by a House for that purpose.

(7) A fine shall not be imposed on a person under subsection (5) for an offence for which a penalty of imprisonment is imposed on that person.

(8) A House may give such directions and authorise the issue of such warrants as are necessary or convenient for carrying this section into effect.

Houses not to expel members

8. A House does not have power to expel a member from membership of a House.

Resolutions and warrants for committal

9. Where a House imposes on a person a penalty of imprisonment for an offence against that House, the resolution of the House imposing the penalty and the warrant committing the person to custody shall set out particulars of the matters determined by the House to constitute that offence.

Reports of proceedings

10. (1) It is a defence to an action for defamation that the defamatory matter was published by the defendant without any adoption by the defendant of the substance of the matter, and the defamatory matter was contained in a fair and accurate report of proceedings at a meeting of a House or a committee.

s. 11

(2) Subsection (1) does not apply in respect of matter published in contravention of section 13.

(3) This section does not deprive a person of any defence that would have been available to that person if this section had not been enacted.

Publication of tabled papers

11. (1) No action, civil or criminal, lies against an officer of a House in respect of a publication to a member of a document that has been laid before a House.

(2) This section does not deprive a person of any defence that would have been available to that person if this section had not been enacted.

Protection of witnesses

12. (1) A person shall not, by fraud, intimidation, force or threat, by the offer or promise of any inducement or benefit, or by other improper means, influence another person in respect of any evidence given or to be given before a House or a committee, or induce another person to refrain from giving any such evidence.

Penalty: (a) in the case of a natural person, \$5,000 or imprisonment for 6 months; or

(b) in the case of a corporation, \$25,000.

(2) A person shall not inflict any penalty or injury upon, or deprive of any benefit, another person on account of:

(a) the giving or proposed giving of any evidence; or

(b) any evidence given or to be given;

before a House or a committee.

Penalty: (a) in the case of a natural person, \$5,000 or imprisonment for 6 months; or

(b) in the case of a corporation, \$25,000.

(3) This section does not prevent the imposition of a penalty by a House in respect of an offence against a House or by a court in respect of an offence against an Act establishing a committee.

Unauthorised disclosure of evidence

13. A person shall not, without the authority of a House or a committee, publish or disclose:

- (a) a document that has been prepared for the purpose of submission, and submitted, to a House or a committee and has been directed by a House or a committee to be treated as evidence taken in camera; or
- (b) any oral evidence taken by a House or a committee in camera, or a report of any such oral evidence;

unless a House or a committee has published, or authorised the publication of, that document or that oral evidence.

Penalty: (a) in the case of a natural person, \$5,000 or imprisonment for 6 months; or

(b) in the case of a corporation, \$25,000.

Immunities from arrest and attendance before courts

14. (1) A member:

- (a) shall not be required to attend before a court or a tribunal; and
- (b) shall not be arrested or detained in a civil cause;

on any day:

- (c) on which the House of which that member is a member meets;
- (d) on which a committee of which that member is a member meets; or
- (e) which is within 5 days before or 5 days after a day referred to in paragraph (c) or (d).

(2) An officer of a House:

- (a) shall not be required to attend before a court or a tribunal; and
- (b) shall not be arrested or detained in a civil cause;

on any day:

- (c) on which a House or a committee upon which that officer is required to attend meets; or
- (d) which is within 5 days before or 5 days after a day referred to in paragraph (c).

(3) A person who is required to attend before a House or a committee on a day:

(a) shall not be required to attend before a court or a tribunal;
and

(b) shall not be arrested or detained in a civil cause;

on that day.

(4) Except as provided by this section, a member, an officer of a House and a person required to attend before a House or a committee has no immunity from compulsory attendance before a court or a tribunal or from arrest or detention in a civil cause by reason of being a member or such an officer or person.

Application of laws to Parliament House

15. It is hereby declared, for the avoidance of doubt, that, subject to section 49 of the Constitution and this Act, a law in force in the Australian Capital Territory applies according to its tenor (except as otherwise provided by that or any other law) in relation to:

(a) any building in the Territory in which a House meets; and

(b) any part of the precincts as defined by subsection 3 (1) of the *Parliamentary Precincts Act 1988*.

Parliamentary privilege in court proceedings

16. (1) For the avoidance of doubt, it is hereby declared and enacted that the provisions of article 9 of the Bill of Rights, 1688 apply in relation to the Parliament of the Commonwealth and, as so applying, are to be taken to have, in addition to any other operation, the effect of the subsequent provisions of this section.

(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.

(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.

(4) A court or tribunal shall not:

- (a) require to be produced, or admit into evidence, a document that has been prepared for the purpose of submission, and submitted, to a House or a committee and has been directed by a House or a committee to be treated as evidence taken in camera, or admit evidence relating to such a document; or
- (b) admit evidence concerning any oral evidence taken by a House or a committee in camera or require to be produced or admit into evidence a document recording or reporting any such oral evidence, unless a House or a committee has published, or authorised the publication of, that document or a report of that oral evidence.

(5) In relation to proceedings in a court or tribunal so far as they relate to:

- (a) a question arising under section 57 of the Constitution; or
- (b) the interpretation of an Act;

neither this section nor the Bill of Rights, 1688 shall be taken to prevent or restrict the admission in evidence of a record of proceedings in Parliament published by or with the authority of a House or a committee or the making of statements, submissions or comments based on that record.

(6) In relation to a prosecution for an offence against this Act or an Act establishing a committee, neither this section nor the Bill of Rights, 1688 shall be taken to prevent or restrict the admission of evidence, the asking of questions, or the making of statements, submissions or comments, in relation to proceedings in Parliament to which the offence relates.

(7) Without prejudice to the effect that article 9 of the Bill of Rights, 1688 had, on its true construction, before the commencement of this Act, this section does not affect proceedings in a court or a tribunal that commenced before the commencement of this Act.

Certificates relating to proceedings

17. For the purposes of this Act, a certificate signed by or on behalf of the President of the Senate, the Speaker of the House of Representatives or a chairman of a committee stating that:

- (a) a particular document was prepared for the purpose of submission, and submitted, to a House or a committee;
- (b) a particular document was directed by a House or a committee to be treated as evidence taken in camera;
- (c) certain oral evidence was taken by a committee in camera;
- (d) a document was not published or authorised to be published by a House or a committee;
- (e) a person is or was an officer of a House;
- (f) an officer is or was required to attend upon a House or a committee;
- (g) a person is or was required to attend before a House or a committee on a day;
- (h) a day is a day on which a House or a committee met or will meet; or
- (i) a specified fine was imposed on a specified person by a House;

is evidence of the matters contained in the certificate.

NOTE

1. The *Parliamentary Privileges Act 1987* as shown in this reprint comprises Act No. 21, 1987 amended as indicated in the Tables below.

Table of Acts

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
<i>Parliamentary Privileges Act 1987</i>	21, 1987	20 May 1987	20 May 1987	
<i>Parliamentary Precincts Act 1988</i>	9, 1988	5 Apr 1988	Ss. 1-4, 7, and 14 (in part): Royal Assent S. 11: 6 May 1988 (see <i>Gazette</i> 1988, No. S129) Remainder: 1 Aug 1988 (see <i>Gazette</i> 1988, No. S229)	S.12

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
S. 15	am. No. 9, 1988

APPENDIX C

Defamation Bill 1996, Absolute Privilege - General Defences

Schedule 1 Absolute privilege

(Section 19)

Part 1 General defences

- 1 Parliamentary papers** (cf 1974 Act s 17 (1) and (3) (a))
- (1) There is a defence of absolute privilege for the publication of a document by order or under the authority of a parliamentary body. 5
- (2) There is a defence of absolute privilege for the publication of a document previously published as mentioned in subclause (1) or a copy of a document so published. 10
- 2 Other parliamentary papers of this State** (cf 1974 Act s 17 (2) and (3) (b))
- (1) There is a defence of absolute privilege for the publication by an authorised printer or under the authority of the Presiding Officer of either House of Parliament of: 15
- (a) reports of the debates and proceedings of the House or any committee of that House, and
- (b) a report of an individual complete speech of a Member of the House, provided the report is printed with a certificate by a person authorised by the Presiding Officer, stating the date and context of the speech and stating that the speech is published under authority, and 20
- (c) proofs of such reports and copies of proofs of such reports, provided they are not known by the publisher to contain substantial printing or typographical errors or omissions and only while the official version of the reports has not become available, and 25
- (d) recordings, or transcripts of recordings, of the debates and proceedings of the House or any committee of that House (being recordings or transcripts made in connection with the preparation of such reports), but only while the official version of those reports has not become available. 30

- (2) There is a defence of absolute privilege for the publication by an authorised printer or under the authority of the Presiding Officers jointly of:
- (a) reports of debates and proceedings of a joint sitting or of a joint committee, and 5
 - (b) a report of an individual complete speech of a Member at a joint sitting, provided the report is printed with a certificate by a person authorised by the Presiding Officers, stating the date and context of the speech and stating that the speech is published under authority, and 10
 - (c) proofs of such reports and copies of proofs of such reports, provided they are not known by the publisher to contain substantial printing or typographical errors or omissions, and
 - (d) recordings, or transcripts of recordings, of the debates and proceedings of a joint sitting or of a joint committee (being recordings or transcripts made in connection with the preparation of such reports), but only while the official version of those reports has not become available. 15
- (3) There is a defence of absolute privilege for the publication of reports and proofs, previously published as mentioned in subclause (1) or (2), or a copy of reports and proofs so published. 20
- (4) In this clause:
- joint committee* means a joint committee of both Houses of Parliament. 25
- joint sitting* means a joint sitting of the Members of the Legislative Council and the Members of the Legislative Assembly.
- Presiding Officer* means the President of the Legislative Council or the Speaker of the Legislative Assembly. 30
- recordings* includes audio recordings and audio-visual recordings.
-

3 Proceedings of inquiry (cf 1974 Act s 18)

There is a defence of absolute privilege for a publication in the course of an inquiry made under the authority of an Act or Imperial Act or under the authority of Her Majesty, of the Governor, or of either House or both Houses of Parliament.

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4 Report of inquiry (cf 1974 Act s 19)

If a person is appointed under the authority of an Act or an Imperial Act or under the authority of Her Majesty, of the Governor or of either House or both Houses of Parliament to hold an inquiry, there is a defence of absolute privilege for a publication by the person in an official report of the result of the inquiry.

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Part 2 Specific defences

5 Anti-Discrimination Act 1977 (cf 1974 Act s 17D)

(1) There is a defence of absolute privilege for:

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(a) a publication to or by:

(i) a member or the Registrar of the Equal Opportunity Tribunal constituted under the *Anti-Discrimination Act 1977*, or

(ii) a member of the Anti-Discrimination Board constituted under that Act, or

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(iii) the President of the Board, or

(iv) any officer of the President of that Board, or

(b) a publication to any officer of the Public Service appointed or employed to assist in the execution or administration of that Act, or

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(c) a publication to or by the Director of Equal Opportunity in Public Employment appointed under that Act,

if the publication is made for the purpose of the execution or administration of the Act.

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APPENDIX D

**Parliamentary Privilege Resolutions Agreed to by the
Senate on 25 February 1988, from Odgers'
Australian Senate Practice**

PARLIAMENTARY PRIVILEGE

RESOLUTIONS AGREED TO BY THE SENATE ON 25 FEBRUARY 1988

1. **Procedures to be observed by Senate committees for the protection of witnesses**

That, in their dealings with witnesses, all committees of the Senate shall observe the following procedures:

- (1) A witness shall be invited to attend a committee meeting to give evidence. A witness shall be summoned to appear (whether or not the witness was previously invited to appear) only where the committee has made a decision that the circumstances warrant the issue of a summons.
- (2) Where a committee desires that a witness produce documents relevant to the committee's inquiry, the witness shall be invited to do so, and an order that documents be produced shall be made (whether or not an invitation to produce documents has previously been made) only where the committee has made a decision that the circumstances warrant such an order.
- (3) A witness shall be given reasonable notice of a meeting at which the witness is to appear, and shall be supplied with a copy of the committee's order of reference, a statement of the matters expected to be dealt with during the witness's appearance, and a copy of these procedures. Where appropriate a witness shall be supplied with a transcript of relevant evidence already taken.
- (4) A witness shall be given opportunity to make a submission in writing before appearing to give oral evidence.
- (5) Where appropriate, reasonable opportunity shall be given for a witness to raise any matters of concern to the witness relating to the witness's submission or the evidence the witness is to give before the witness appears at a meeting.
- (6) A witness shall be given reasonable access to any documents that the witness has produced to a committee.
- (7) A witness shall be offered, before giving evidence, the opportunity to make application, before or during the hearing of the witness's evidence, for any or all of the witness's evidence to be heard in private

session, and shall be invited to give reasons for any such application. If the application is not granted, the witness shall be notified of reasons for that decision.

- (8) Before giving any evidence in private session a witness shall be informed whether it is the intention of the committee to publish or present to the Senate all or part of that evidence, that it is within the power of the committee to do so, and that the Senate has the authority to order the production and publication of undisclosed evidence.
- (9) A chairman of a committee shall take care to ensure that all questions put to witnesses are relevant to the committee's inquiry and that the information sought by those questions is necessary for the purpose of that inquiry. Where a member of a committee requests discussion of a ruling of the chairman on this matter, the committee shall deliberate in private session and determine whether any question which is the subject of the ruling is to be permitted.
- (10) Where a witness objects to answering any question put to the witness on any ground, including the ground that the question is not relevant or that the answer may incriminate the witness, the witness shall be invited to state the ground upon which objection to answering the question is taken. Unless the committee determines immediately that the question should not be pressed, the committee shall then consider in private session whether it will insist upon an answer to the question, having regard to the relevance of the question to the committee's inquiry and the importance to the inquiry of the information sought by the question. If the committee determines that it requires an answer to the question, the witness shall be informed of that determination and the reasons for the determination, and shall be required to answer to the question only in private session unless the committee determines that it is essential to the committee's inquiry that the question be answered in public session. Where a witness declines to answer a question to which a committee has required an answer, the committee shall report the facts to the Senate.
- (11) Where a committee has reason to believe that evidence about to be given may reflect adversely on a person, the committee shall give consideration to hearing that evidence in private session.
- (12) Where a witness gives evidence reflecting adversely on a person and the committee is not satisfied that that evidence is relevant to the committee's inquiry, the committee shall give consideration to expunging that evidence from the transcript of evidence, and to forbidding the publication of that evidence.
- (13) Where evidence is given which reflects adversely on a person and action of the kind referred to in paragraph (12) is not taken in respect

of the evidence, the committee shall provide reasonable opportunity for that person to have access to that evidence and to respond to that evidence by written submission and appearance before the committee.

- (14) A witness may make application to be accompanied by counsel and to consult counsel in the course of a meeting at which the witness appears. In considering such an application, a committee shall have regard to the need for the witness to be accompanied by counsel to ensure the proper protection of the witness. If an application is not granted, the witness shall be notified of reasons for that decision.
- (15) A witness accompanied by counsel shall be given reasonable opportunity to consult counsel during a meeting at which the witness appears.
- (16) An officer of a department of the Commonwealth or of a State shall not be asked to give opinions on matters of policy, and shall be given reasonable opportunity to refer questions asked of the officer to superior officers or to a Minister.
- (17) Reasonable opportunity shall be afforded to witnesses to make corrections of errors of transcription in the transcript of their evidence and to put before a committee additional material supplementary to their evidence.
- (18) Where a committee has any reason to believe that any person has been improperly influenced in respect of evidence which may be given before the committee, or has been subjected to or threatened with any penalty or injury in respect of any evidence given, the committee shall take all reasonable steps to ascertain the facts of the matter. Where the committee considers that the facts disclose that a person may have been improperly influenced or subjected to or threatened with penalty or injury in respect of evidence which may be or has been given before the committee, the committee shall report the facts and its conclusions to the Senate.

2. Procedures for the protection of witnesses before the Privileges Committee

That, in considering any matter referred to it which may involve, or gives rise to any allegation of, a contempt, the Committee of Privileges shall observe the procedures set out in this resolution, in addition to the procedures required by the Senate for the protection of witnesses before committees. Where this resolution is inconsistent with the procedures required by the Senate for the protection of witnesses, this resolution shall prevail to the extent of the inconsistency.

- (1) A person shall, as soon as practicable, be informed, in writing, of the nature of any allegations, known to the Committee and relevant to the Committee's inquiry, against the person, and of the particulars of any evidence which has been given in respect of the person.
- (2) The Committee shall extend to that person all reasonable opportunity to respond to such allegations and evidence by:
 - (a) making written submission to the Committee;
 - (b) giving evidence before the Committee;
 - (c) having other evidence placed before the Committee; and
 - (d) having witnesses examined before the Committee.
- (3) Where oral evidence is given containing any allegation against, or reflecting adversely on, a person, the Committee shall ensure as far as possible that that person is present during the hearing of that evidence, and shall afford all reasonable opportunity for that person, by counsel or personally, to examine witnesses in relation to that evidence.
- (4) A person appearing before the Committee may be accompanied by counsel, and shall be given all reasonable opportunity to consult counsel during that appearance.
- (5) A witness shall not be required to answer in public session any question where the Committee has reason to believe that the answer may incriminate the witness.
- (6) Witnesses shall be heard by the Committee on oath or affirmation.
- (7) Hearing of evidence by the Committee shall be conducted in public session, except where:
 - (a) the Committee accedes to a request by a witness that the evidence of that witness be heard in private session;
 - (b) the Committee determines that the interests of a witness would best be protected by hearing evidence in private session; or
 - (c) the Committee considers that circumstances are otherwise such as to warrant the hearing of evidence in private session.
- (8) The Committee may appoint, on terms and conditions approved by the President, counsel to assist it.

- (9) The Committee may authorise, subject to rules determined by the Committee, the examination by counsel of witnesses before the Committee.
- (10) As soon as practicable after the Committee has determined findings to be included in the Committee's report to the Senate, and prior to the presentation of the report, a person affected by those findings shall be acquainted with the findings and afforded all reasonable opportunity to make submissions to the Committee, in writing and orally, on those findings. The Committee shall take such submissions into account before making its report to the Senate.
- (11) The Committee may recommend to the President the reimbursement of costs of representation of witnesses before the Committee. Where the President is satisfied that a person would suffer substantial hardship due to liability to pay the costs of representation of the person before the Committee, the President may make reimbursement of all or part of such costs as the President considers reasonable.
- (12) Before appearing before the Committee a witness shall be given a copy of this resolution.

3. Criteria to be taken into account when determining matters relating to contempt

The Senate declares that it will take into account the following criteria when determining whether matters possibly involving contempt should be referred to the Committee of Privileges and whether a contempt has been committed, and requires the Committee of Privileges to take these criteria into account when inquiring into any matter referred to it:

- (a) the principle that the Senate's power to adjudge and deal with contempts should be used only where it is necessary to provide reasonable protection for the Senate and its committees and for Senators against improper acts tending substantially to obstruct them in the performance of their functions, and should not be used in respect of matters which appear to be of a trivial nature or unworthy of the attention of the Senate;
- (b) the existence of any remedy other than that power for any act which may be held to be a contempt; and
- (c) whether a person who committed any act which may be held to be a contempt:
 - (i) knowingly committed that act, or

- (ii) had any reasonable excuse for the commission of that act.

4. Criteria to be taken into account by the President in determining whether a motion arising from a matter of privilege should be given precedence of other business

Notwithstanding anything contained in the Standing Orders, in determining whether a motion arising from a matter of privilege should have precedence of other business, the President shall have regard only to the following criteria:

- (a) the principle that the Senate's power to adjudge and deal with contempts should be used only where it is necessary to provide reasonable protection for the Senate and its committees and for Senators against improper acts tending substantially to obstruct them in the performance of their functions, and should not be used in respect of matters which appear to be of a trivial nature or unworthy of the attention of the Senate; and
- (b) the existence of any remedy other than that power for any act which may be held to be a contempt.

5. Protection of persons referred to in the Senate

- (1) Where a person who has been referred to by name, or in such a way as to be readily identified, in the Senate, makes a submission in writing to the President:
 - (a) claiming that the person has been adversely affected in reputation or in respect of dealings or associations with others, or injured in occupation, trade, office or financial credit, or that the person's privacy has been unreasonably invaded, by reason of that reference to the person; and
 - (b) requesting that the person be able to incorporate an appropriate response in the parliamentary record,

if the President is satisfied:

- (c) that the subject of the submission is not so obviously trivial or the submission so frivolous, vexatious or offensive in character as to make it inappropriate that it be considered by the Committee of Privileges; and
- (d) that it is practicable for the Committee of Privileges to consider

the submission under this resolution,

the President shall refer the submission to that Committee.

- (2) The Committee may decide not to consider a submission referred to it under this resolution if the Committee considers that the subject of the submission is not sufficiently serious or the submission is frivolous, vexatious or offensive in character, and such a decision shall be reported to the Senate.
- (3) If the Committee decides to consider a submission under this resolution, the Committee may confer with the person who made the submission and any Senator who referred in the Senate to that person.
- (4) In considering a submission under this resolution, the Committee shall meet in private session.
- (5) The Committee shall not publish a submission referred to it under this resolution or its proceedings in relation to such a submission, but may present minutes of its proceedings and all or part of such submission to the Senate.
- (6) In considering a submission under this resolution and reporting to the Senate the Committee shall not consider or judge the truth or any statements made in the Senate or of the submission.
- (7) In its report to the Senate on a submission under this resolution, the Committee may make either of the following recommendations:
 - (a) that no further action be taken by the Senate or by the Committee in relation to the submission; or
 - (b) that a response by the person who made the submission, in terms specified in the report and agreed to by the person and the Committee, be published by the Senate or incorporated in Hansard,and shall not make any other recommendations.
- (8) A document presented to the Senate under paragraph (5) or (7):
 - (a) in the case of a response by a person who made a submission, shall be succinct and strictly relevant to the questions in issue and shall not contain anything offensive in character; and
 - (b) shall not contain any matter the publication of which would have the effect of:

- (i) unreasonably adversely affecting or injuring a person, or unreasonably invading a person's privacy, in the manner referred to in paragraph (1); or
- (ii) unreasonably adding to or aggravating any such adverse effect, injury or invasion of privacy suffered by a person.

6. Matters constituting contempts

That, without derogating from its power to determine that particular acts constitute contempts, the Senate declares, as a matter of general guidance, that breaches of the following prohibitions, and attempts or conspiracies to do the prohibited acts, may be treated by the Senate as contempts.

Interference with the Senate

- (1) A person shall not improperly interfere with the free exercise by the Senate or a committee of its authority, or with the free performance by a Senator of the Senator's duties as a Senator.

Improper influence of Senators

- (2) A person shall not, by fraud, intimidation, force or threat of any kind, by the offer or promise of any inducement or benefit of any kind, or by other improper means, influence a Senator in the Senator's conduct as a Senator or induce a Senator to be absent from the Senate or a committee.

Senators seeking benefits etc.

- (3) A Senator shall not ask for, receive or obtain, any property or benefit for the Senator, or another person, on any understanding that the Senator will be influenced in the discharge of the Senator's duties, or enter into any contract, understanding or arrangement having the effect, or which may have the effect, of controlling or limiting the Senator's independence or freedom of action as a Senator, or pursuant to which the Senator is in any way to act as the representative of any outside body in the discharge of the Senator's duties.

Molestation of Senators

- (4) A person shall not inflict any punishment, penalty or injury upon, or deprive of any benefit, a Senator on account of the Senator's conduct as a Senator.

Disturbance of the Senate

- (5) A person shall not wilfully disturb the Senate or a committee while it is meeting, or wilfully engage in any disorderly conduct in the precincts of the Senate or a committee tending to disturb its proceedings.

Service of writs etc.

- (6) A person shall not serve or execute any criminal or civil process in the precincts of the Senate on a day on which the Senate meets except with the consent of the Senate or of a person authorised by the Senate to give such consent.

False reports of proceedings

- (7) A person shall not wilfully publish any false or misleading report of the proceedings of the Senate or of a committee.

Disobedience of orders

- (8) A person shall not, without reasonable excuse, disobey a lawful order of the Senate or of a committee.

Obstruction of orders

- (9) A person shall not interfere with or obstruct another person who is carrying out a lawful order of the Senate or of a committee.

Interference with witnesses

- (10) A person shall not, by fraud, intimidation, force or threat of any kind, by the offer or promise of any inducement or benefit of any kind, or by other improper means, influence another person in respect of any evidence given or to be given before the Senate or a committee, or induce another person to refrain from giving such evidence.

Molestation of witnesses

- (11) A person shall not inflict any penalty or injury upon, or deprive of any benefit, another person on account of any evidence given or to be given before the Senate or a committee.

Offences by witnesses etc.

- (12) A witness before the Senate or a committee shall not:

- (a) without reasonable excuse, refuse to make an oath or affirmation or give some similar undertaking to tell the truth when required to do so;
- (b) without reasonable excuse, refuse to answer any relevant question put to the witness when required to do so; or
- (c) give any evidence which the witness knows to be false or misleading in a material particular, or which the witness does not believe on reasonable grounds to be true or substantially true in every material particular.

(13) A person shall not, without reasonable excuse:

- (a) refuse or fail to attend before the Senate or a committee when ordered to do so; or
- (b) refuse or fail to produce documents, or to allow the inspection of documents, in accordance with an order of the Senate or of a committee.

(14) A person shall not wilfully avoid service of an order of the Senate or of a committee.

(15) A person shall not destroy, damage, forge or falsify any document required to be produced by the Senate or by a committee.

Unauthorised disclosure of evidence etc.

(16) A person shall not, without the authority of the Senate or a committee, publish or disclose:

- (a) a document that has been prepared for the purpose of submission, and submitted, to the Senate or a committee and has been directed by the Senate or a committee to be treated as evidence taken in private session or as a document confidential to the Senate or the committee;
- (b) any oral evidence taken by the Senate or a committee in private session, or a report of any such oral evidence; or
- (c) any proceedings in private session of the Senate or a committee or any report of such proceedings,

unless the Senate or a committee has published, or authorised the publication of, that document, that oral evidence or a report of those proceedings.

7. Raising of matters of privilege

That, notwithstanding anything contained in the Standing Orders, a matter of privilege shall not be brought before the Senate except in accordance with the following procedures:

- (1) A Senator intending to raise a matter of privilege shall notify the President, in writing, of the matter.
- (2) The President shall consider the matter and determine, as soon as practicable, whether a motion relating to the matter should have precedence of other business, having regard to the criteria set out in any relevant resolution of the Senate. The President's decision shall be communicated to the Senator, and, if the President thinks it appropriate, or determines that a motion relating to the matter should have precedence, to the Senate.
- (3) A Senator shall not take any action in relation to, or refer to, in the Senate, a matter which is under consideration by the President in accordance with this resolution.
- (4) Where the President determines that a motion relating to a matter should be given precedence of other business, the Senator may, at any time when there is no other business before the Senate, give notice of a motion to refer the matter to the Committee of Privileges. Such notice shall take precedence of all other business on the day for which the notice is given.
- (5) A determination by the President that a motion relating to a matter should not have precedence of other business does not prevent a Senator in accordance with other procedures taking action in relation to, or referring to, that matter in the Senate, subject to the rules of the Senate.
- (6) Where notice of a motion is given under paragraph (4) and the Senate is not expected to meet within the period of one week occurring immediately after the day on which the notice is given, the motion may be moved on that day.

8. Motions relating to contempts

That, notwithstanding anything contained in the Standing Orders, a motion to:

- (a) determine that a person has committed a contempt; or

(b) impose a penalty upon a person for a contempt,
shall not be moved unless notice of the motion has been given not less than 7 days before the day for moving the motion.

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.

10. Reference to Senate proceedings in court proceedings

- (1) That, without derogating from the law relating to the use which may be made of proceedings in Parliament under section 49 of the Constitution, and subject to any law and any order of the Senate relating to the disclosure of proceedings of the Senate or a committee, the Senate declares that leave of the Senate is not required for the admission into evidence, or reference to, records or reports of proceedings in the Senate or in a committee of the Senate, or the admission of evidence relating to such proceedings, in proceedings before any court or tribunal.
- (2) That the practice whereby leave of the Senate is sought in relation to matters referred to in paragraph (1) be discontinued.

- (3) That the Senate should be notified of any admission of evidence or reference to proceedings of the kind referred to in paragraph (1), and the Attorneys-General of the Commonwealth and the States be requested to develop procedures whereby such notification may be given.

11. Consultation between Privileges Committees

That, in considering any matter referred to it, the Committee of Privileges may confer with the Committee of Privileges of the House of Representatives.

APPENDIX E

**Citizens Right of Reply, Motion Passed by the NSW
Legislative Assembly, 1996**

CITIZENS RIGHT OF REPLY

That:

- (1) Where a submission is made in writing to the Speaker by a person who has been referred to in the Legislative Assembly by name, or in such a way as to be readily identified:
 - (a) claiming that the person or corporation has been adversely affected in reputation or in respect of dealings or associations with others, or injured in occupation, trade, office or financial credit, or that the person's privacy has been unreasonably invaded, by reason of that reference to the person or corporation; and
 - (b) requesting that the person be able to incorporate an appropriate response in *Hansard*, and the Speaker is satisfied:
 - (c) that the subject of the submission is not so obviously trivial or the submission so frivolous, vexatious or offensive in character as to make it inappropriate that it be considered by the Standing Orders and Procedure Committee; and
 - (d) that it is practicable for the Committee to consider the submission under this resolution, the Speaker shall refer the submission to that Committee.
- (2) The Committee may decide not to consider a submission referred to it under this resolution if the Committee considers that the subject of the submission is not sufficiently serious or the submission is frivolous, vexatious or offensive in character, and such a decision shall be reported to the Legislative Assembly.
- (3) If the Committee decides to consider a submission under this resolution, the Committee may confer with the person who made the submission and any Member who referred in the Legislative Assembly to that person or corporation.
- (4) In considering a submission under this resolution, the Committee shall meet in private session.
- (5) The Committee shall not publish a submission referred to it under this resolution of its proceedings in relation to such a submission, but may present minutes of its proceedings and all or part of such submission to the Legislative Assembly.
- (6) In considering a submission under this resolution and reporting to the Legislative Assembly the Committee shall not consider or judge the truth of any statements made in the Legislative Assembly or the submission.
- (7) In its report to the Legislative Assembly on a submission under this resolution, the Committee may make either of the following recommendations:
 - (a) that no further action be taken by the Committee or the Legislative Assembly in relation to the submission; or
 - (b) that a response by the person who made the submission, in terms specified in the report and agreed to by the person or corporation and the Committee, be published by the Legislative Assembly or incorporated in *Hansard*, and shall not make any other recommendations.
- (8) A document presented to the Legislative Assembly under paragraph (5) or (7):
 - (a) in the case of a response by a person or corporation who made a submission, shall be succinct and strictly relevant to the questions in issue and shall not contain anything offensive in character; and
 - (b) shall not contain any matter the publication of which would have the effect of:
 - (i) unreasonably adversely affecting or injuring a person or corporation, or unreasonably invading a person's privacy, in the manner referred to in paragraph (1); or
 - (ii) unreasonably adding to or aggravating any such adverse effect, injury or invasion of privacy suffered by a person.
- (9) A corporation making a submission under this resolution is required to make it under their common seal.

APPENDIX F

Summary of the major cases regarding Parliamentary Privilege relevant to NSW.

From the Legislative Council's Standing Committee upon Parliamentary Privilege, *Report concerning the publication of an article appearing in The Sun Herald newspaper containing details of in-camera evidence*, October 1993.

**(I) SUMMARY OF THE MAJOR CASES REGARDING
PARLIAMENTARY PRIVILEGE RELEVANT TO NEW SOUTH WALES**

(a) *Kielley v Carson* (1842) 4 Moore PC 63

The Privy Council held that the House of Assembly of Newfoundland did not have the right to arrest a stranger and bring him before the House to be punished for using gross and threatening language to a member of the House.

It was held that "colonial" legislatures have no inherent right to the powers and privileges of the House of Commons, including no inherent right to punish for contempt. These legislatures have only such powers as are reasonably necessary to their existence and the proper exercise of their functions.

(b) *Fenton v Hampton* (1858) 11 Moore PC 347

The principles established in *Kielley v Carson* were upheld and followed. The Privy Council held that the Parliament of Tasmania did not have the power to arrest for contempt a person who failed to obey an order of the House to appear at the bar of the House to answer a charge of disobedience to a summons to appear before a select committee of the House.

(c) *Doyle v Falconer* (1866) LR 1 PC 328

The Legislative Assembly of Dominica had resolved that a Member who had committed a contempt be removed from the Chamber and taken to jail. The contempt was committed when the Member persisted in debating an objection after having been called to order by the Speaker. The Member then addressed insulting words to the Speaker.

The Privy Council stated that a power to remove a Member who is obstructing the deliberations of the House is necessary to the self-preservation of the House. However, a power to inflict a penal sentence is not.

(d) *Barton v Taylor* (1886) 11 AC 197

A Member of the Legislative Assembly of New South Wales entered the Chamber within a week after the House had passed a resolution that he be suspended from the service of the House. The Member was removed from the Chamber and prevented from re-entering it.

The Privy Council held that the powers inherent in a "colonial" legislature are such as are necessary to its existence and the proper exercise of its functions. For these purposes, protective and self-defensive powers only, and not punitive, are necessary. Their Lordships considered that a power to suspend during the continuance of any current sitting was reasonably necessary. However, a power of unconditional suspension for an indefinite time is more than the necessity of self-defence requires.

(e) *Harnett v Crick* [1908] AC 470

The case turned on the validity of a Standing Order of the Legislative Assembly of New South Wales which empowered the Assembly to suspend a Member until a verdict in a criminal trial affecting that Member was returned, or until otherwise ordered.

The Privy Council held that the Legislative Assembly had the power to pass the Standing Order. It stated that it was impossible, upon a fair view of all the circumstances, to say that the Standing Order did not relate to the orderly conduct of the Assembly.

(f) *Willis and Christie v Perry* (1912) CLR 592

A Member of the Legislative Assembly of New South Wales had been disorderly in the Chamber and had left the Chamber in a disorderly manner. The Speaker directed the Sergeant-at-Arms to arrest the Member and bring him back into the Chamber.

The High Court of Australia held that the Speaker had no power to arrest the Member and bring him back into the Chamber. The Legislative Assembly has only protective and self-defensive powers, and no punitive powers.

(g) *Chenard v Arissol* [1949] AC 127

The Privy Council upheld the validity of a provision of the Seychelles Penal Code which conferred immunity from suit for defamation on Members of the Legislative Council of Seychelles.

The Letters Patent which established the colony included the power to make laws for the peace order and good government of the colony. The Privy Council held that such a power authorises the enactment of rights, privileges and immunities for the Parliament.

(h) *Armstrong v Budd* (1969) 71 SR (NSW) 386

The Legislative Council of New South Wales had resolved that one of its Members was guilty of conduct unbecoming a Member, that he be expelled, and that his seat be declared vacant. The Member challenged the validity of the resolution.

The Supreme Court of New South Wales held that the resolution was within the powers of the Legislative Council. In a proper case, a power of expulsion for reasonable cause may be exercised, provided the circumstances are special and the its exercise is not a cloak for punishment of the offender.