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by

Gareth Griffith

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Parliamentary Privilege: Major Developments and Current Issues

by

Gareth Griffith

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NOTE

Parts 2, 3, 6.7 and 6.8 of this paper draw on work previously done by the author in preparation for the Legislative Council's forthcoming book on practice and procedure.

EXECUTIVE SUMMARY

This background paper, which reflects the law as at 1 March 2007, discusses questions and issues in parliamentary privilege that continue to be the subject of debate or uncertainty. These include the law relating to:

- the execution of search warrants, the issuing of subpoenas and orders for discovery in Parliament; [4.5]
- the ‘effective repetition’ of statements outside Parliament and other areas where parliamentary privilege impinges on the law of defamation; [6.3]
- the meaning of the words ‘place out of Parliament’ in Article 9 of the *Bill of Rights 1689*; [6.7] and
- the interpretation of statutory secrecy provisions and their effect on parliamentary privilege. [6.8]

Considered is the case for and against the statutory codification of the powers and privileges of the Houses of the NSW Parliament. [3.5]

Also discussed in this paper are continuing issues relevant to orders and addresses for papers, at the heart of which lies the struggle between Executive power and parliamentary scrutiny. [4.2]

Recent cases are analysed from NSW and comparable jurisdictions. These cases may not point in any discernible direction or reveal any definite trend, turning as most of them do on the particular facts at issue. What can be said by way of a general observation is that the 1999 report of the UK Joint Committee on Parliamentary Privilege, chaired by Lord Nicholls of Birkenhead, one of the Law Lords, has proved a landmark in thinking on this subject, one that clearly resonates with the courts in their attempts to apply the principle of non-intervention in contemporary circumstances. With NSW in mind, it might be said that the ‘test of necessity’ favoured by the Joint Committee is really only a restatement of the test of ‘reasonable necessity’ which has always applied in this jurisdiction. What is different perhaps is the new vigour with which the courts, in their capacity as the guardians of the rule of law, approach their task of determining the limits of Parliament’s jurisdiction. [8]

1. INTRODUCTION

This paper reviews current developments in the law of parliamentary privilege. When the NSW Parliamentary Library published in 1997 the briefing paper, *Parliamentary Privilege: Use, Misuse and Proposals for Reform*, relatively little had been written on this area of the law since the publication as far back as 1966 of Enid Campbell's *Parliamentary Privilege in Australia*. Since 1997, however, interest in parliamentary privilege has undergone a major revival, with new issues and cases spawning a new generation of analytical literature, including in 2000 Gerard Carney's *Members of Parliament: Law and Ethics* and, in 2003, Campbell's *Parliamentary Privilege*.

This current background paper does not seek to offer a comprehensive update of all developments since 1997. To do so would be to cover ground already dealt with more than adequately by others. It is also the case that the major litigation occurring in NSW has been considered in the 2004 briefing paper, *Principles, Personalities, Politics: Parliamentary Privilege Cases in NSW* and, of course, in Anne Twomey's *The Constitution of New South Wales*, also published in 2004. Rather than duplicate these and other works, this background paper seeks instead to review more recent cases in comparable jurisdictions, as well as to identify questions and issues in parliamentary privilege that continue to be the subject of debate.

By way of context, the paper begins with a general comment on parliamentary privilege, followed by a more detailed commentary on the position in NSW. A summary of the main developments in this jurisdiction since 1997 is also provided. This paper reflects the law as at 1 March 2007.

2. PARLIAMENTARY PRIVILEGE

2.1 Purpose

Parliamentary privilege concerns the powers, privileges and immunities from aspects of the general law conferred, as a matter of inherent right or under statute, on the Houses of Parliament, their Members, officers and committees. The justification for parliamentary privilege is that, if the Houses are to perform their constitutional functions - to inquire, debate and legislate - effectively, they must have the freedom to conduct their own proceedings without undue interference from outside bodies. Parliamentary privilege refers therefore to the bundle of powers, rights and immunities 'necessary' for the effective performance of parliamentary functions. It is 'necessary'

to protect legislators in the discharge of their legislative and deliberative functions, and the legislative assembly's work in holding the government to account for the conduct of the country's business.¹

Without the protection afforded by parliamentary privilege, Members would be handicapped in performing their parliamentary duties, and the authority of Parliament itself

¹ *Canada (House of Commons) v Vaid* [2005] 1 SCR 667 at para 41.

in confronting the executive and as a deliberative forum would be diminished.² As Griffith and Ryle state:

Parliamentary privilege, even though seldom mentioned in debates, underpins the status and authority of all Members of Parliament. Without this protection, individual Members would be severely handicapped in performing their parliamentary functions, and the authority of the House itself, in confronting the Executive and as a forum for expressing the anxieties of the citizen, would be correspondingly diminished.³

In essence, parliamentary privilege is essential to the conduct of Parliament's business, as it is to the maintenance of its authority and independence. At issue is the integrity and autonomy of the institution itself. While certain rights and immunities, notably those attached to the freedom of speech in parliamentary proceedings, are bestowed upon Members individually, they do not exist for their personal benefit. Parliamentary privilege exists rather to protect the Houses 'themselves collectively and their members when acting for the benefit of their House, against interference, attack or obstruction'.⁴

2.2 Definition

In 1966 Campbell defined parliamentary privilege as follows:

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.⁵

The classic definition of parliamentary privilege is found in *Erskine May's Treatise on the Law, Privileges, Proceedings and usage of Parliament*:

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

² Joint Committee on Parliamentary Privilege, *Report: Volume 1 – Report and Proceedings of the Committee*, UK Parliament, Session 1998-99, HL Paper 43 –1, HC 214-1, p 8.

³ R Blackburn and A Kennon eds, *Griffith and Ryle of Parliament: Functions, Practice and Procedures*, Sweet and Maxwell 2003, p 123.

⁴ CR Munro, *Studies in Constitutional Law*, Butterworths, London, 1987, p 136.

⁵ E Campbell, *Parliamentary Privilege in Australia*, Melbourne University Press 1966, p 1.

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.⁶

Not every aspect of this definition applies to the NSW Parliament. Unlike the United Kingdom Parliament, its NSW counterpart is not a court of record.⁷ The view is that the judicial functions and inherent penal jurisdiction of the Houses of the Westminster Parliament derive from their unique history and do not apply, by the same custom and ancient usage, to other Parliaments. At common law, the NSW Parliament has no power to punish for breaches of privilege or contempt. These qualifications underline the point that, while the law of parliamentary privilege is certainly comparable across the world of the Westminster Parliaments, its content does vary in detail from one jurisdiction to another.

2.3 Individual immunities and collective powers

As with any complex subject, various distinctions are drawn within the law of parliamentary privilege and practice. Most common is the distinction between 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.⁸

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 are immune from liability for anything they may say or write in the course of parliamentary proceedings.
- By extension there is *immunity for parliamentary witnesses* from being questioned or impeached by courts or tribunals about evidence given before either House of

⁶ *Erskine May's Treatise on the Law Privileges, Proceedings and Usage of Parliament*, 23rd ed, Lexis Nexis UK 2004, p 75.

⁷ *Kielly v Carson* (1842) 4 Moo PC 63 at 89; 13 ER 225 at 235; *Fenton v Hampton* (1858) 11 Moore 347; 14 ER 727, a case concerning the power of the Tasmanian Legislative Council to arrest for contempt, confirmed that no distinction was to be made in this regard between colonial Legislative Councils and Assemblies whose powers were derived by grant from the Crown, on one side, or those Houses of Parliament created under the authority of an Act of the Imperial Parliament, on the other.

⁸ The Queensland Members' Ethics and Parliamentary Privileges Committee has described the term 'parliamentary privilege' as 'largely a misnomer', stating that a more appropriate term to describe 'parliamentary privilege' is the 'powers, rights and immunities of Parliament, its committees and members' - Members' Ethics and Parliamentary Privileges Committee, *First Report on the Powers, Rights and Immunities of the Legislative Assembly, Its Committees and Members*, Report No 26, pp 3-4.

Parliament or any parliamentary committee.

- There is also *qualified immunity of members and officers from legal process*. For members there is exemption from compulsory attendance before a court or tribunal when Parliament is sitting. *Exemption from jury service* for members and officers of Parliament is another facet of this immunity.

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

- *The power to control publication of debates and proceedings*, which means there is a right to exclude strangers, to debate with closed doors, as well as to prohibit the publication of debates and proceedings.⁹
- *The power to regulate internal affairs and procedures*, which refers to the power of the House to control its own agenda and proceedings. This includes the inherent right to discipline members and, in NSW, extends to the power to expel those guilty of conduct unworthy of a member of Parliament.¹⁰
- *The power to conduct inquiries and order production of documents*, 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.

In most instances a clear connection exists between these individual immunities and collective powers.¹¹ For example, the right to freedom speech in Parliament is the basis of the power of the House to regulate its own proceedings, as well as to control the publication of its debates and proceedings.¹² In this respect there is also a connection between the common law and statutory sources of these powers, especially as Article 9 of the *Bill of Rights 1689* is a legislative confirmation of the common law.¹³

⁹ Erskine May, 23rd ed, n 6, p 84.

¹⁰ *Armstrong v Budd* (1969) 71 SR (NSW) 386.

¹¹ H Evans ed, *Odgers' Australian Senate Practice*, 11th edition, Department of the Senate 2004, pp 30-1. Attention is drawn to the difference between immunities and powers. Specifically, the argument is that the power of the House to deal with contempts is "not an offshoot of the immunities which are commonly called privileges, nor is it a 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".

¹² E Campbell, *Parliamentary Privilege in Australia*, n 5, pp 74-5.

¹³ *Egan v Willis* (1998) 195 CLR 424 at 462 (McHugh J).

2.4 Article 9 of the Bill of Rights 1689

Absolute protection for freedom of speech in Parliament finds statutory expression in Article 9 of the *Bill of Rights 1689* which provides:

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

In its 1999 Report the Joint Committee of the House of Lords and House of Commons on Parliament Privilege described this as ‘the single most important parliamentary privilege’, stating ‘Article 9 affords legal immunity (“ought not to be questioned”) to members for what they say or do in “proceedings in Parliament”. The immunity applies in “any court or place out of Parliament”’.¹⁴

The traditional view of Article 9 is that it provides a ‘blanket prohibition on examination of parliamentary proceedings in court’.¹⁵ The modern interpretation is that parliamentary proceedings are only to be admitted into evidence in limited circumstances. *Prebble v Television New Zealand Ltd* confirmed there is no objection to the use of *Hansard* to prove what was done or said in Parliament as a matter of historical fact; what is not permissible is for the courts to refer to *Hansard* for the purpose of questioning if the things said or done in the House were ‘inspired by improper motives or were untrue or misleading’.¹⁶ Reaffirming this rule, in *Kable v State of NSW & Anor*¹⁷ the Master of the NSW Supreme Court refused to allow *Hansard* extracts to be introduced to show that the *Community Protection Act 1994* had been introduced for ‘an improper purpose’, as to do so would offend Article 9.

A further consideration is the potential ‘chilling effect’ on free speech in Parliament. In the words of the Privy Council in *Prebble*, the basic concept underlying Article 9 is the ‘need to ensure so far as possible that a member of the legislature and witnesses before committees of the House can speak freely without fear that what they will say will later be held against them in the courts’.¹⁸

2.5 The courts and Parliament

As to the relationship between the courts and Parliament generally, the decision in *Prebble* further confirmed that the principle of non-intervention operates in this context. The Privy Council observed that

¹⁴ Joint Committee on Parliamentary Privilege, n 2, p 1.

¹⁵ Joint Committee on Parliamentary Privilege, n 2, p 1.

¹⁶ *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 337 (Lord Browne-Wilkinson).

¹⁷ [2000] NSWSC 1173 at paras 13-14. Reliance was not placed on *Prebble*, but on the approaches adopted in *R v Jackson* [1987] 8 NSWLR 116 and in *Munday v Askin* (1982) 2 NSWLR 369 at 373.

¹⁸ [1995] 1 AC 321 at 334 (Lord Browne-Wilkinson).

the courts and Parliament are both astute to recognize their respective constitutional roles. So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges.¹⁹

In *Hamilton v Al Fayed* Lord Woolf MR stated:

The principle is that the courts will not challenge or assault, by any order of their own, an assertion of authority issued by Parliament pursuant to Parliament's own procedures. Once it has identified the subject matter of a dispute as falling within such process, the court will not proceed.²⁰

This principle of non-intervention is qualified in a number of ways. One important qualification relates to the use of extrinsic materials as an aid to statutory interpretation. Formerly, the courts adopted an extremely cautious approach to the use of such materials. A somewhat less constrained approach is now defined by statute, in NSW under s 34 of the *Interpretation Act 1987*. It makes provision for the use of extrinsic materials for the aid of statutory interpretation, among them parliamentary committee reports, Second Reading speeches and any relevant material in *Hansard*. The use made of such extrinsic materials must be confined to the 'ascertainment of the meaning of the provision' and is restricted to such defined conditions as where the provision is 'ambiguous' or 'obscure'. A similar qualification to the exclusionary rule was admitted in the UK in *Pepper v Hart*,²¹ where a majority of the House of Lords ruled that it was permissible to have regard to ministerial statements, as recorded by *Hansard*, in order to interpret ambiguous or obscure legislation.

The broad rule is that the courts will inquire into the existence and extent of privilege, but not its exercise. In *Canada (House of Commons) v Vaid* the Canadian Supreme Court said it was necessary only to establish

the existence and scope of a *category* of privilege. Once the category (or sphere of activity) is established, it is for the Parliament, not the courts, to determine whether in a particular case the *exercise* of privilege is necessary or appropriate. In other words, within categories of privilege, Parliament is the judge of the occasion and manner of its exercise and such exercise is not reviewable by the courts.²²

In the NSW Court of Appeal, in *Egan v Willis*, Gleeson CJ summarized this qualification as

¹⁹ [1995] 1 AC 321 at 332 (Lord Browne-Wilkinson).

²⁰ [1999] 3 All ER 317 at 334.

²¹ [1993] AC 593. For recent comment on and application of the decision see – *R (Jackson) v Attorney General* [2005] QB 579 at paras 73-79.

²² [2005] 1 SCR 667 at para 29.9.

follows:

As the High Court observed in *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 162, after a long period of controversy in England, it was established that disputes as to the existence of a power, privilege or immunity of a House of Parliament are justiciable in a court of law. The same principle applies in Australia. However, whilst it is for the courts to judge the existence in a House of Parliament of a privilege, if a privilege exists it is for the House to determine the occasion and the manner of its exercise.²³

This rule was applied in the NSW case of *Armstrong v Budd*,²⁴ where the power of the Legislative Council to expel a sitting Member was at issue; it was also applied in *Egan v Willis*²⁵ which concerned the power of the Legislative Council to order the production of State papers.

Conversely, in *Halden v Marks*²⁶ the Full Court of the Supreme Court of Western Australia declined to act to restrain a royal commission from inquiring into the circumstances of the presentation of a petition to the Western Australian Legislative Council. Such an inquiry, it was held, would be in breach of Article 9. The Full Court pointed out that there are two main categories where a court will adjudicate on parliamentary privilege:

1. Where a question of parliamentary privilege is raised in a case before the court as, for example, where a party seeks to rely on something said or done in Parliament.
2. Where the court has been asked to review action by Parliament to enforce its proceedings, most commonly where Parliament sought to subject a citizen to restraint by arrest.²⁷

As a rule the courts are apt to pay closer attention to those claims to privilege which impact on non-parliamentarians than to those which involve matters entirely internal to the Parliament. This principle was affirmed in *Canada (House of Commons) v Vaid*, where the Canadian Supreme Court observed that ‘The role of the courts is to ensure that a claim of privilege does not immunize from the ordinary law the consequences of conduct by Parliament or its officers and employees that exceeds the necessary scope of the category of privilege’.²⁸ Quoted with approval was this statement from *Stockdale v Hansard*:²⁹

²³ [1996] 40 NSWLR 650 at 653. See also – *Egan v Willis* (1998) 195 CLR 424 at 446; *Halden v Marks* (1995) 17 WAR 447 at 462.

²⁴ (1969) 71 SR (NSW) 386 at 389 and 399.

²⁵ *Egan v Willis* (1998) 195 CLR 424 at 446.

²⁶ (1995) 17 WAR 447; A Twomey, *The Constitution of New South Wales*, Federation Press 2004, p 523; Campbell, n 12, p 24.

²⁷ (1995) 17 WAR 447 at 462.

²⁸ [2005] 1 SCR 667 at para 29.11.

All persons ought to be very tender in preserving to the Houses all privileges which may be necessary for their exercise, and to place the most implicit confidence in their representatives as to the due exercise of those privileges. But power, and especially the power of invading the rights of others, is a very different thing: it is to be regarded, not with tenderness, but with jealousy; and, unless the legality of it be clearly established, those who act under it must be answerable for the consequences.³⁰

²⁹ (1839) 9 Ad & E 1 (112 ER 1112)

³⁰ (1839) 9 Ad & E 1 (112 ER 1112 at 1192); *Canada (House of Commons) v Vaid* [2005] 1 SCR 667 at para 39.

3. PARLIAMENTARY PRIVILEGE IN NSW

3.1 Overview

In NSW there is no legislation comprehensively defining the powers and privileges of its Houses of Parliament. In all other Australian jurisdictions, with the limited exception of Tasmania, the privileges of Parliament are so defined either by reference to the British House of Commons or by specific statute, as in the case of the *Parliamentary Privileges Act 1987* (Cth). Certain legislation does operate in NSW in this area, including Article 9 of the *Bill of Rights 1689*. However, by none of these statutes, alone or in combination, does the Legislative Council or the Legislative Assembly possess the full range of powers and privileges enjoyed by the Houses of the Westminster Parliament.

Instead, the powers and privileges of the Houses of the NSW Parliament are founded largely upon the common law and, as such, are a reflection of Australia's colonial history. As expounded in a series of nineteenth-century cases, the fundamental principle is that, at common law, a formerly subordinate legislature such as the NSW Parliament – originally a 'colonial' legislature deriving its authority from Imperial statute – and each House in a bicameral legislature, has only such powers, privileges and immunities as are reasonably 'necessary for the existence of such a body and for the proper exercise of the functions which it is intended to execute'.³¹ In particular, it has been held that, in the absence of an express grant, the powers of the NSW Parliament are protective and self-defensive, not punitive, in nature. Further, what is 'reasonably necessary' is not fixed, but changes over time.³²

A summary of the law of parliamentary privilege in NSW is found in the decision of McLelland J in *Namoi Shire Council v AG (NSW)*:

The privileges of the respective House of the United Kingdom Parliament do not provide a valid measure of the privileges of the Legislative Assembly of New South Wales. The former are derived from (a) the historical status of the Parliament at Westminster as a court...; (b) the constitutional foundation of the authority of the United Kingdom Parliament, as being ancient usage and prescription, rather than some definitive instrument; and (c) the constitutional struggles in England culminating in the Revolution Settlement.

However, in the case of a legislature established by statute, as was the legislature of New South Wales, the privileges and immunities of the respective Houses and their members are limited to those either expressly conferred by or pursuant to statute; or necessarily incidental to the proper exercise of the functions vested in it.³³

³¹ *Kielly v Carson* (1842) 4 Moo PC 63 at 88; 13 ER 225 at 234; *Barton v Taylor* (1886) 11 App Cas 197; *Willis v Perry* (1912) 13 CLR 592.

³² *Armstrong v Budd* (1969) 71 SR (NSW) 386.

³³ [1980] 2 NSWLR 639 at 643.

3.2 Sources of parliamentary privilege

The NSW Parliament's powers and privileges derive from the following sources:

- the common law, as implied by reasonable necessity;
- imported by the adoption of the *Bill of Rights 1689*;
- conferred by the *Defamation Act 2005* (NSW); and
- conferred by other legislation.

3.3 The common law as a source of parliamentary privilege

The parliamentary privileges in NSW that derive from a common law source include:

- The right to freedom of speech;
- The power to conduct inquiries and order documents;
- The power of the House to regulate its own internal procedures and constitution;
- The power to control its own proceedings; and
- The right of the House to attendance and service of its members.

As noted, these privileges are founded on the common law principle of 'reasonable necessity'. Two steps are central to any common law inquiry into parliamentary privilege. First is the identification of the constitutional 'functions' of the Houses of the NSW Parliament. Second is a decision as to whether their powers and privileges are 'reasonably necessary' to the proper exercise of those functions under contemporary conditions. As to the first, both Houses exercise: (a) a constitutional function to make laws pursuant to s 5 of the *Constitution Act 1902*; and (b) a parliamentary function of review of executive conduct, in accordance with the principle of responsible government. In *Egan v Willis* Kirby J observed:

Where, as in the case of the Houses of the New South Wales Parliament, no external reference point has been provided to identify and define the limits of the applicable privileges, the inquiry is even more at large than otherwise it would be. It involves identifying the functions of the House in question and then specifying, by reference to the [Commonwealth] Constitution, statute law and the common law of Parliaments, those powers essential to the existence of the House as a chamber of Parliament, or at least reasonably necessary to the performance by that House of its functions as such. The powers which fit those criteria are not frozen in terms of the exposition of the powers of colonial legislatures, whether in Australia or elsewhere.³⁴

In essence, the common law test is whether any particular power or privilege is reasonably necessary today, in its present form, for the effective functioning of either House.³⁵ The

³⁴ (1998) 195 CLR 424 at 495-6 (Kirby J).

³⁵ Joint Committee on Parliamentary Privilege, n 2, p 8. The Committee recommends that it is this test that should apply to the privileges of the Houses of the UK Parliament.

same principle was expressed in a Canadian context in *Canada (House of Commons v Vaid*, where the Supreme Court stated:

When the existence of a category (or sphere of activity) for which inherent privilege is claimed...is put in issue, the court must not only look at the historical roots of the claim but also to determine whether the category of inherent privilege continues to be necessary to the functioning of the legislative body today. Parliamentary history, while highly relevant, is not conclusive.³⁶

3.4 Statutory sources of parliamentary privilege

3.4.1 *The Bill of Rights 1689*

Notable among the statutory privileges of the NSW Parliament are those imported by the adoption of the *Bill of Rights 1689*. This is effected by s. 6 of the *Imperial Acts Application Act 1969* (NSW) which declares, among other things, the *Bill of Rights 1689*, so far as it was in force in England on 25 July 1828, to have been in force in NSW on that day. Further, it declares that, except so far as affected by any Imperial or State Act, the Bill has remained in force and shall be in force in NSW.

Article 9 protects anything said or done by a Member of Parliament whilst they are taking part in the proceedings of the House, or anything that is incidental to such proceedings. The Privy Council in *Prebble* stated:

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.³⁷

The 1985 Joint Select Committee upon Parliamentary Privilege in NSW reported that, apart from absolute protection for statements made in the Parliament, other privileges which flow from the Bill of Rights include:

- Right to exclude strangers;
- Right to control publication of debates and proceedings;
- Protection of witnesses etc. before the Parliament and its committees.³⁸

³⁶ [2005] 1 SCR 667 at para 29.6.

³⁷ [1995] 1 AC 321 at 334 (Lord Browne-Wilkinson).

³⁸ Parliament of NSW, Joint Select Committee Upon Parliamentary Privilege in New South Wales, *Parliamentary Privilege in New South Wales*, 1984-85, p 10.

3.4.2 *Defamation Act 2005 (NSW)*

The privilege granted by parliamentary privilege is absolute. That is, it protects acts done and things said in parliamentary proceedings from legal action, be it in defamation or other proceedings. Lord Chief Justice Cockburn in the case of *Ex parte Watson* put it in these terms:

It is clear that statements made by Members of either House of Parliament in their places in the House, though they might be untrue to their knowledge, could not be made the foundation of civil or criminal proceedings, however injurious they might be to the interest of a third party.³⁹

The defence of absolute privilege: The *Defamation Act 2005* confirms that the defence of absolute privilege applies to publications that constitute parliamentary proceedings. By s 27 of the Act the statutory language is updated and the scope of the privilege more clearly defined. The provision is expressed to be non-exhaustive in nature. *Hansard* in all its forms is protected, as are committee reports, transcripts of evidence and submissions. Subsections 27(1) and (2) provide:

(1) It is a defence to the publication of defamatory matter if the defendant proves that it was published on an occasion of absolute privilege.

(2) Without limiting subsection (1), matter is published on an occasion of absolute privilege if:

(a) the matter is published in the course of the proceedings of a parliamentary body, including (but not limited to):

(i) the publication of a document by order, or under the authority, of the body, and

(ii) the publication of the debates and proceedings of the body by or under the authority of the body or any law, and

(iii) the publication of matter while giving evidence before the body, and

(iv) the publication of matter while presenting or submitting a document to the body....

Section 4 of the Act defines a ‘parliamentary body’ to include: (a) a Parliament or legislature of any country; (b) a House of a Parliament or legislature of any country; (c) a committee of a Parliament or legislature of any country; or (d) a committee of a House or Houses of any Parliament or legislature of any country. By reference to ‘any country’, the defence of absolute privilege is plainly intended to have extra-territorial effect.⁴⁰

The defence for publication of public documents: A further defence is found in s 28 of the

³⁹ (1869) QB 573 at 576.

⁴⁰ Note that the word ‘country’ is defined to include ‘an Australian jurisdiction’. Note, too, that by s 27(2)(c) absolute privilege is extended to the publication of matter where ‘the matter is published on an occasion that, if published in another Australian jurisdiction, would be an occasion of absolute privilege in that jurisdiction under a provision of a law of the jurisdiction corresponding to this section’.

2005 Act in respect to the publication of ‘public documents’. This applies where the defendant proves that the defamatory matter was contained in (a) ‘a public document or a fair copy of a public document’, or (b) a fair summary of, or a fair extract from, a public document’ (s 28 (1)). By s 28(4)(a) the phrase ‘public document’ is defined to include ‘any report or paper published by a parliamentary body, or a record of votes, debates or other proceedings relating to a parliamentary body published by or under the authority of the body or any law’. In addition, by cl 8 of Schedule 2 protection is provided to documents produced *in camera* to selected statutory committees of the NSW Parliament, where the document (or part of the document) has been disclosed under specified conditions. Included under this provision are those committees overseeing such bodies as the Independent Commission Against Corruption, the Ombudsman and the Police Integrity Commission, the Health Care Complaints Commission, the Commission for Children and Young People, and the Office of the Valuer-General, plus the Public Accounts Committee and the Legislation Review Committee.

The defence provided by s 28 is not absolute. By s 28(3), however, it is only defeated if the ‘plaintiff proves that the defamatory matter was not published honestly for the information of the public or the advancement of education’.

The defences of fair report of proceedings of public concern: Likewise, s 29 offers a ‘qualified’ defence which can only be defeated if it is proved that the defamatory matter ‘was not published honestly for the information of the public or the advancement of education’ (s 29(3)). The defence applies to ‘proceedings of public concern’, a term that is defined to include ‘any proceedings in public of a parliamentary body’ (s 29(4)(a)), a term that encompasses media reporting of extracts or accounts of parliamentary proceedings, conducted in a House of Parliament or in committee. Again, by cl 17 of Schedule 3 specific mention is made of proceedings relating to the same statutory committees as mentioned in cl 8 of Schedule 2, as discussed above.

The defence of qualified privilege: Whereas ‘parliamentary proceedings’, including statements made by members in either House, are subject to absolute privilege, those statements made by members outside the Houses of Parliament are, on the other hand, subject to the normal laws of defamation and breach of confidence, save where they are protected by qualified privilege.

Qualified privilege is therefore a separate branch of the law, relating specifically to defamation. Unlike absolute privilege, the specific defence of qualified privilege is defeated by proof of malice. Qualified privilege, at common law and under the NSW *Defamation Act 2005* (s 30) may serve to protect Members in those circumstances where parliamentary privilege does not apply, where what has been said or done is not a parliamentary proceeding. Specifically, under the Act qualified privilege applies where the recipient has an ‘interest or apparent interest’ in the subject matter of the information concerned, and where the conduct of the defendant in publishing the defamatory matter is proved to be ‘reasonable in the circumstances’ (s 30(1)).

In 2002 a statutory list of factors was inserted into the former defamation legislation for courts to consider when assessing reasonableness. This was to take account of the High

Court decision in *Lange v Australian Broadcasting Corporation*,⁴¹ the leading case on the implied freedom of political communication under the Commonwealth Constitution. Basically, to achieve ‘conformity’ with the implied freedom, the common law defence of qualified privilege was adjusted to include publications made by the media and other publishers to any wide audience ‘on government and political matters’.⁴² The criterion to be applied for the expanded common law defence was one of ‘reasonableness’, in the formulation of which the High Court drew upon s 22 of the NSW *Defamation Act 1974* (now repealed). While this was held to be in conformity with the implied constitutional freedom,⁴³ in 2002 a new s 22(2A) was inserted to provide a non-exhaustive statutory list to guide the courts in their deliberations on the ‘reasonableness’ of a publication. With some modifications, this list finds expression under s 30(3) of the *Defamation Act 2005*. For example, it provides that a court ‘may’ take into account ‘the extent to which the matter published is of public interest’ and ‘the extent to which the matter published relates to the performance of the public functions or activities of the person’ (s 30(3)(a) and (b)).

3.4.3 Other statutory sources

Parliamentary Papers Act 1975: Section 27 of the 2005 defamation legislation is to be read in conjunction with the *Parliamentary Papers (Supplementary Provisions) Act 1975* which extends immunity from civil and criminal proceedings (other than proceedings for defamation) to any authorised government printing service⁴⁴ for the publication of the parliamentary papers of a joint sitting of both Houses, plus any document received by, or evidence given to, a committee. The Act, which is said not to derogate from any power or privilege (s 8), is subject to two major limitations. One is that it is expressly stated not to relate to proceedings for defamation (s 7). The other is that it does not appear to cover those papers tabled in either House but not ordered to be published.

By s 58(9) of the *Public Finance and Audit Act 1983*, the disclosure of evidence taken in private by the NSW Public Accounts Committee is expressly protected under the *Parliamentary Papers (Supplementary Provisions) Act 1975*, and to be treated as an authorised publication of a parliamentary paper.

Constitution Act 1902: By s. 14A(7) of the NSW *Constitution Act*, read in combination with the *Parliamentary Papers (Supplementary Provisions) Act 1975*, absolute privilege is conferred upon the Register of Pecuniary Interests.

⁴¹ (1997) 189 CLR 250.

⁴² M Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant*, Ashgate 2000, p 96.

⁴³ (1997) 189 CLR 520 at 575.

⁴⁴ By s 21(1) of the *Interpretation Act 1987* the term ‘Government Printer’ means ‘the Government Printer of New South Wales, and includes any other person authorised by or on behalf of the Government to print any Act or instrument or other document’. The official NSW Government Printing Office was closed following an announcement in June 1989 – *NSWPD*, 3 April 1990, p 1551.

Parliamentary Evidence Act 1901: This Act sets out the powers of either House or a committee to call witnesses and for evidence to be given on oath or upon the making of a solemn declaration. Provision is made for certain punitive powers. For persons summonsed to attend, failure to do so without reasonable excuse can lead, upon a warrant issued by a Judge of the Supreme Court, to the person's apprehension for the purpose of bringing them before the House or committee to give evidence (ss 7-8). Witnesses refusing to answer a 'lawful question' are guilty of contempt and may be ordered by the House to be imprisoned for up to one month (s 11).⁴⁵ A witness willfully making a false statement may be liable to up to five years imprisonment (s 13). Immunity from actions in defamation is provided for any witness giving evidence under the Act (s 12). Provision is also made for the payment of the expenses of witnesses (s 6).

The only persons not covered by that section are Members of Parliament. By s. 5 their attendance is to be procured, as far as practicable, in conformity with the procedure observed in the British House of Commons (which is by invitation). Only an order of the House itself can require a Member to attend a committee.⁴⁶

Statutory power to order documents: No express power to order documents is provided under the *Parliamentary Evidence Act 1901*. Note, however, that the Parliamentary Joint Committee on the ICAC is provided with an express power to 'send for persons, papers and records' under s 69(1) of the *ICAC Act*. Section 31G of the *Ombudsman Act 1974*⁴⁷ provides the Joint Committee on the Ombudsman and the Police Integrity Commission with identical powers to those granted under s 69(1) of the *ICAC Act*. The same express powers are also provided to the Parliament's other 'oversight' committees, by the *Health Care Complaints Act 1993* (s 71), the *Commission for Children and Young People Act 1998* (Schedule 1. cl 5), the *Valuation of Land Act 1916* (s 91), and the *Legislation Review Act 1987* (s 11). In all these cases the production of documents is to be the same as for the production of documents to select committees of the Legislative Assembly.

Not all statutory committees have been given a statutory power to order the production of documents. No such power is conferred on the Public Accounts Committee under the *Public Finance and Audit Act 1983*.

Public Works Act 1912: Under the *Public Works Act 1912* the powers in respect of witnesses called before the Standing Committee on Public Works are specifically defined. These include the power of fine or imprisonment for, among other things, refusal to produce documents mentioned in the relevant summons, misbehaving before the Committee or interrupting its proceedings (s 22(1)). Again, provision is made for the

⁴⁵ An exception applies further to section 127 (Religious confessions) of the *Evidence Act 1995* (NSW).

⁴⁶ Legislative Assembly Standing Order no 368 states that if an Upper House committee requests the attendance of a Member of the Assembly, the House will authorize the attendance only if the Member agrees.

⁴⁷ Read with *Police Integrity Commission Act 1996*, s 95(3).

payment of expenses to witnesses (s 22(3)).⁴⁸

Parliamentary Precincts Act 1997: This legislation has four main features. First, it defines an area called the ‘Parliamentary precincts’ by reference to a lot in a deposited plan. Secondly, the control and management of those precincts is vested in the Presiding Officers (s 7). Thirdly, it sets out the powers of the Presiding Officers to exclude persons from the parliamentary precincts, in which case an ‘authorised officer’ may arrest a person who fails to comply with a direction (ss 18-19). A police officer may be an ‘authorised officer’ for this purpose, if acting under a memorandum of understanding between a Presiding Officer and the Commissioner of Police, or in conformity with a specific authorisation by a Presiding Officer. Fourthly, for security purposes the Act defines an area called the ‘parliamentary zone’ by reference to a deposited plan and provides for arrangements to be made with the police for this purpose (s 15). The premises defined to be included in the parliamentary precincts may be amended by resolution of both Houses (s 12), as may the premises to be included in the parliamentary zone (s 17).

The effect of the *Parliamentary Precincts Act 1997* is to enhance the power of the Houses of the NSW Parliament to control strangers. For example, s 18 empowers an ‘authorised officer’ to direct a stranger ‘to leave or not enter the Parliamentary precincts’, whereas s 20 similarly empowers an ‘authorised officer’ to remove strangers from the precincts of Parliament. Various offences are created under the Act, punishable by fine.

It is expressly stated that nothing in the Act derogates from the powers, privileges and immunities of Parliament, each House, their members and committees, and the Presiding Officers (s 26(1)). Note, too, that the Act does not purport to cover all other functions (if any) of police officers within the parliamentary precincts or parliamentary zone, matters the legislation contemplates will be subject to a memorandum of understanding (s 26(3)). Nor does the Act provide the Presiding Officers with powers to issue directions to Members within the parliamentary precincts or parliamentary zone (s 26(2) and s 25 respectively).

Immunities from legal process: Section 15(2) of the *Evidence Act 1995* (NSW) provides that no member of any House of an Australian Parliament can be compelled to give evidence if they would be prevented from attending a parliamentary sitting or a meeting of a committee of which they are a Member.⁴⁹

Immunity from jury service is provided to Members, as well as officers and other staff of the Houses, under the NSW *Jury Act 1977* (s 6 and Schedule 2).

⁴⁸ Note that the current Public Works Committee is a standing committee that is established by resolution of the House rather than under the *Public Works Act*. It has different functions to that specified in that Act and it does not follow the provisions of the Act in relation to witnesses but rather the Standing Orders and practice of the Legislative Assembly.

⁴⁹ Parliamentary privilege is preserved by s 10 of the *Evidence Act 1995*.

3.5 Parliamentary privilege legislation and/or guidelines

History: The question remains whether legislation comprehensively defining the powers and privileges of the Houses of the NSW Parliament should be introduced, similar to the Commonwealth's *Parliamentary Privileges Act 1987*? The case on behalf of such legislation has been made many times in NSW, at least as far back as the 1840s, when Robert Lowe successfully agitated for the old Legislative Council to establish a Select Committee on Privileges to clarify areas of doubt, notably as to whether the Council had the power to punish strangers for contempts or breaches of privilege. This followed a court case relating to an incident in which Lowe had been threatened and intimidated for remarks he had made in the Chamber about a man called Henry MacDermott.⁵⁰ In its report of 12 July 1844, the Select Committee, chaired by the lawyer Richard Windeyer, took account of the Privy Council's landmark decision in *Kielley v Carson*, where the powers of colonial legislatures were established in terms of those limited to self-protection, such as are 'reasonably necessary for the proper exercise of their functions and duties'.⁵¹ Windeyer thought that the case placed the powers and privileges of the Legislative Council in sufficient doubt 'to refrain from exercising the privileges of summary jurisdiction in the present case'. He recommended instead that a 'Bill be passed to confer upon the Council, such powers as may be considered necessary to its efficiency'.⁵²

Since responsible government several bills have been introduced to place the powers and privileges of the NSW Parliament on a statutory basis, the first of these in August 1856. There followed in 1878 the introduction of the Parliamentary Powers and Privileges Bill, which was rejected at the Second Reading stage in the Council. A second Bill from the same year also failed to negotiate its passage through the Upper House, where leading MLCs rejected those provisions providing the Houses of the NSW Parliament with the coercive power to prosecute non-Members for offences committed outside 'the precincts of Parliament', punishable by imprisonment for two years. There was to be some positive legislative outcome. The second 1878 bill was the model for the later *Parliamentary Evidence Act 1881* which, in turn, was the basis of the consolidated parliamentary evidence legislation that originated in the Council in August 1901. A Private Member's parliamentary privileges bill, containing effectively those provisions the Council had objected to in 1878, was introduced by RD Meagher into the Assembly on 31 October 1901. It was read a first time but interrupted by prorogation. Two further attempts were made in 1912. Both bills were introduced into the Assembly by the then Attorney General, WA Holman. One did not proceed beyond its First Reading. The other proposed to confer on the Houses of the NSW Parliament the power to prosecute persons who committed specific breaches, including 'sending a challenge to fight a member' or 'publishing any

⁵⁰ *R v MacDermott* (1844) 1 Legge 236. For the background to the case see – G Griffith, *Principles, Personalities, Politics: Parliamentary Privilege Cases in NSW*, NSW Parliamentary Library Briefing Paper No 1/2004, pp 5-7.

⁵¹ *Kielly v Carson* (1842) 4 Moo PC 63 at 88; 13 ER 225 at 234. It was decided that the Newfoundland House of Assembly did not possess the power to arrest a person for a breach of privilege committed outside the House.

⁵² Legislative Council, *Votes and Proceedings, Volume 2, 1844*, pp 115-116.

false or scandalous libel of any member touching his conduct as a member'. Again, the measure was interrupted by prorogation.⁵³

Legislation and/or guidelines: An intermittent and ongoing debate has continued since that time on the need for legislation comprehensively defining the powers and privileges of the Parliament. More recently, a supplementary debate has also occurred on the need for appropriate guidelines. As experience in the Australian Senate shows, these strategies are by no means mutually exclusive.

Joint Select Committee on Parliamentary Privilege in NSW, 1985: The first major review of parliamentary privilege in NSW occurred in the mid-1980s, undertaken by a joint select committee chaired by Rodney Cavalier. On one side, it acknowledged that the 'principal problems' in determining what privileges the NSW Parliament enjoys had arisen from the 'privileges implied by the doctrine of necessity'.⁵⁴ Nonetheless, it recommended against 'an extensive codification of privileges'. Instead, it recommended that the *NSW Constitution Act 1902* 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 1856.⁵⁵ The Committee stated:

The adoption of the privileges of the House of Commons, together with the body of precedent available with respect to those privileges, provides a more than adequate framework within which the New South Wales Parliament can deal with future matters of privilege which might arise. Your Committee recommends that no such codification occurs.⁵⁶

Recommendations of the Legislative Council Privileges Committee: Since then the ongoing debate in NSW is reflected in the relevant recommendations of the Legislative Council's Privileges Committee. In its 1993 *Report Concerning the Publication of an Article Appearing in the Sun Herald Newspaper Containing Details of In Camera Evidence*

⁵³ D Clune and G Griffith, *Decision and Deliberation: The Parliament of New South Wales 1856-2003*, The Federation Press 2006, pp 131-135.

⁵⁴ NSW Parliament, Joint Select Committee on Parliamentary Privilege in New South Wales, *Parliamentary Privilege in New South Wales*, 1984-85, p 16.

⁵⁵ 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' – NSW Attorney General's Department, *Discussion Paper – Parliamentary Privilege in NSW*, 1991, p 11. As discussed in section [5.2] of this paper, the dates specified in the relevant Queensland and Western Australian legislation are 1 January 1901 and 1 January 1989 respectively. Previously the privileges of the House of Commons were adopted on an ambulatory basis in both Queensland and Western Australia. This contrasted with the position South Australia and Victoria where those privileges were adopted as at 24 October 1856 (ss 9 and 38 *Constitution Act 1934* (SA)) and as at 21 July 1855 (s 19(1) *Constitution Act 1975* (Vic)) respectively.

⁵⁶ *Joint Select Committee on Parliamentary Privilege in New South Wales*, n 54, p 20.

the then Standing Committee Upon Parliamentary Privilege recommended:

That the Parliament enact legislation to define its powers and privileges and to specify its powers to deal with breach of privilege and contempt of Parliament.

In its 1996 *Report on Inquiry into Sanctions where a Minister Fails to Table Documents* the Standing Committee on Parliamentary Privilege and Ethics recommended:

Legislation should be introduced to clarify the powers and privileges of the House, including the power to require the production of documents and to deal with persons who are in contempt of the House's authority.

The same Committee in its 1999 *Report on Inquiry into Statements Made by Mr Gallacher and Mr Hannaford* resolved:

That the House's attention be again drawn to the fact that the Parliament of New South Wales has not given its privileges a statutory form or provided guidelines on their scope and operation.

In its 2001 report titled, *Possible Intimidation of Witnesses before General Purpose Standing Committee No. 3 and Unauthorised Disclosure of Committee Evidence*, the Committee recommended:

That the issue of unauthorised disclosure of debates, reports or proceedings of committees be referred by the House to this Committee for inquiry and report on appropriate guidelines for dealing with future unauthorised disclosures.

A follow-up *Report on Guidelines Concerning Unauthorised Disclosure of Committee Proceedings* recommending adoption of such guidelines was released in December 2002. To date, this recommendation has not been adopted by the House and no further action has been taken.

The debate in other jurisdictions: At the Commonwealth level the debate has moved on, with the codification of the law of privilege in *Parliamentary Privileges Act 1987*, passed pursuant to s 49 of the Commonwealth Constitution. As *Odgers* states, the 1987 Act

was enacted primarily to settle a disagreement between the Senate and the Supreme Court of New South Wales over the scope of freedom of speech in Parliament as provided by article 9 of the Bill of Rights of 1689.⁵⁷

The source of this disagreement was a narrow interpretation of the immunity against 'impeaching or questioning proceedings in Parliament' offered in the NSW case of *R v Murphy*.⁵⁸ Discussed later in this paper is the interpretation of key provisions of the

⁵⁷ *Odgers' Australian Senate Practice*, 11th ed, 2004, p 34.

⁵⁸ (1986) 5 NSWLR 18.

Commonwealth legislation,⁵⁹ notably subsections 16(2) and (3), the first providing a statutory definition of ‘proceedings in Parliament’, the second restricting the use made of such ‘proceedings’ in cases that come before courts and tribunals.

As *Odgers* explains, the Senate went a step further in February 1988 by passing what are known as Privilege Resolutions, designed to change the practices of the House in matters of privilege. These Resolutions cover such subjects as the procedures to be observed by Senate committees for the protection of witnesses and the articulation of criteria to be taken into account when determining matters relating to contempt.⁶⁰

It is the 1987 Act, the statutory codification of parliamentary freedom of speech, which has given rise to most comment, raising as it does the question whether this precedent is to be followed in other jurisdictions. Impressed by the Commonwealth precedent, in the UK the First Report of the Joint Committee on Parliamentary Privilege recommended, specifically, the statutory definition of the more contentious aspects of Article 9 of the Bill of Rights 1689 and, more generally, the codification of the law of parliamentary privilege. The Joint Committee concluded:

Overall statement as a code is the natural next step in a modern presentation of parliamentary privilege. A code would assist non-members as well as members, because it would enable the ordinary citizen to have access to the privileges of his member of Parliament. The Joint Committee recommends that Parliament should now take steps to enact such a code.⁶¹

Arguments for and against codification: It was argued in the Joint Committee’s First Report that the main advantages of codification are ‘clarity and accessibility’. The Committee pointed out that the law of parliamentary privilege has no ‘coherent framework or structure’ and that the case law is often old, obscure and complex.

To the ordinary lawyer, let alone non-lawyer, these cases are difficult, if not impossible, to understand. All this combines to make the subject obscure. A statutory code would be an enormous improvement.⁶²

As for the case against, the Joint Committee’s First Report noted that ‘The main fear of codification is that it will reduce flexibility for the future’. This consideration, it was said, ‘need not weigh heavily in the case of parliamentary privilege, provided the legislation is drafted in the form of statements of principle, followed by particular examples’. The First Report went on to say ‘Parliamentary privilege is complex in its detailed ramifications, but its underlying rationale and structure are straightforward’. A second objection was that

⁵⁹ At sections [5.1.1 and 5.1.2]

⁶⁰ *Odgers*, n 57, Appendix 2.

⁶¹ Joint Committee on Parliamentary Privilege, n 2, para 385. This report is discussed in section [5.4] of this paper. To date the recommendation has not been acted upon.

⁶² Joint Committee on Parliamentary Privilege, n 2, para 378.

codification will place the interpretation of parliamentary privilege ‘in the hands of the courts’, thereby disturbing in some way the balance of the constitutional relationship between the courts and Parliament. Again this argument did not impress the Joint Committee, citing *Erskine May* it commented that, in the modern era, it is accepted that the courts have a duty to ‘define the limits of parliamentary privilege’ when cases come before them.⁶³

Comment: The contemporary debate about codification would have been familiar enough to Richard Windeyer, writing in 1844, prior to responsible government. Basically, the same questions arise.

Central to the debate is whether reliance on the doctrine of ‘reasonable necessity’, as interpreted by the courts, has placed the powers and privileges of the Houses of the NSW Parliament in an unfortunate state of uncertainty? Are the powers and privileges of this Parliament less clear, and therefore less secure, than those of other Parliaments? This question applies equally to those Parliaments that define their powers and privileges by reference to those of the House of Commons at a particular date, or where the powers and privileges of Parliament have been codified, as in the case of the Commonwealth. Certainly, areas of uncertainty do exist in NSW. For example, in the absence of an express provision, do such laws as the State’s occupational health and safety and anti-discrimination legislation apply to Parliament House? The power of expulsion is another instance. In *Armstrong v Budd*⁶⁴ the NSW Supreme Court held that a House of Parliament possessing only those powers and privileges reasonably necessary for its self-protection and defence may expel one of its Members for something said or done outside the House – for ‘conduct involving want of probity and honesty’ – provided the circumstances and special and the expulsion is not a cloak for punishment of the offender. In effect, the principle of self-protection was held to support a limited power of expulsion.⁶⁵ However, the decision has not gone unchallenged, with Campbell commenting in this respect ‘It is by no means certain that the High Court would today agree with the views of the New South Wales Supreme Court’.⁶⁶ The issue is whether the matter should be put beyond doubt, one way or another, by legislative means?⁶⁷ But note that even if the power of expulsion was confirmed by statute, it may still be subject to judicial review where, for example, it is argued that its application is limited by the implied freedom of political communication in the Commonwealth Constitution.

The argument that codification would make the law of parliamentary privilege more accessible to lawyers and non-lawyers alike is sound as far as it goes. Whether it would

⁶³ Joint Committee on Parliamentary Privilege, n 2, paras 379-381.

⁶⁴ (1969) 71 SR (NSW) 386.

⁶⁵ G Griffith, ‘Armstrong v Budd and the power of expulsion’ in *State Constitutional Landmarks* edited by G Winterton, Federation Press 2006, p 239.

⁶⁶ E Campbell, *Parliamentary Privilege*, Federation Press 2003, p 216.

⁶⁷ Section 4 of the *Parliamentary Privileges Act 1987* (Cth) removed the power of expulsion from the Houses of the Commonwealth Parliament.

make the law clearer is another matter. The interpretation of section 16 of the Commonwealth legislation is by no means straightforward and may be thought every bit as convoluted as the older case law on Article 9 of the *Bill of Rights 1689*.

A further issue is whether the Houses of the NSW Parliament lack certain powers as a result of the decision in *Kielley v Carson*, thereby diminishing their status and undermining their effectiveness *vis a vis* other comparable Parliaments? The absence of a power to punish for contempt stands out in this respect. It is the case, however, that the Houses of the NSW Parliament have thrived for over 150 years without a general power of this kind and even where limited statutory arrangements exist, as in the *Parliamentary Evidence Act 1901*, these have not been used.⁶⁸ A broad power to punish for contempt might also be said to raise difficult issues of legal principle, to do with the separation of powers and the rule of law. Admittedly, unlike the Commonwealth, the separation of powers doctrine does not operate formally at the State level, which is not to say that the prospect of the Houses of a State Parliament exercising punitive powers of a judicial nature will not be a cause for some concern.

As for the argument that codification will place the interpretation of parliamentary privilege in the hands of the courts, the UK Joint Committee is surely right to say that this is merely a reflection of the status quo. As the leading cases of *Armstrong v Budd* and *Egan v Willis* show, under the present arrangements in NSW the courts are called upon to decide on the existence and scope of the Parliament's powers and privileges, by reference to the judicially conceived doctrine of reasonable necessity.

It comes down to whether legislation comprehensively defining the powers and privileges of the Houses of the NSW Parliament is needed. At the Commonwealth level, the perceived need for such an enactment arose from concerns about the interpretation of Article 9 of the *Bill of Rights 1689*. While those concerns were legitimate at the time, later judicial pronouncements tending to favour a more expansive interpretation of Article 9 suggest that they would not constitute a compelling basis for codification in contemporary circumstances. Which is not to say that a compelling case could not be made, both for reasons of accessibility of the law and clarity, and possibly as a reaction against other dubious judicial lines of reasoning that might arise in future. On the other side is the argument that the test of reasonable necessity is well adapted to contemporary needs. It is right in principle as well as practice, delivering sensible outcomes based on clear and readily articulated criteria. The case law does not make for easy reading, but then neither does that on the interpretation of the Commonwealth's parliamentary privilege legislation.

⁶⁸ It was decided in *Egan v Willis* that, at least in the case of the power to suspend a Member, the protective or self-defensive power may extend to a House taking action to 'coerce or induce compliance with its wish' – (1998) 195 CLR 424 at 455 (Gaudron, Gummow and Hayne JJ).

4. RECENT DEVELOPMENTS IN NSW

4.1 NSW cases

Since 1997 there have been three major NSW cases touching on issues relevant to parliamentary powers and privileges, all of which are considered in the 2004 briefing paper, *Principles, Personalities, Politics: Parliamentary Privilege Cases in NSW*.

Arena v Nader:⁶⁹ The central issue in the 1997 case, *Arena v Nader*, was the waiver of parliamentary privilege under the *Special Commission of Inquiry Amendment Act 1997* (NSW). It is accepted that, except where expressly authorised by legislation, neither an individual member nor a House of Parliament can waive the protection granted by Article 9. The *Special Commission of Inquiry Amendment Act 1997* inserted a new Part 4A (ss. 33A-33H) into the principal Act. Section 33B(1) provided that a House of Parliament may, by resolution, authorise an inquiry into a 'matter relating to parliamentary proceedings within or before the House or one of its committees...'. Section 33D(1) then provided that a House of Parliament that passes such a resolution may, 'by the same or any later resolution, declare that parliamentary privilege is waived in connection with the Special Commission to such extent as is specified in the declaration'. This waiving of privilege is qualified by s. 33D(3), which would permit a Member of Parliament to assert parliamentary privilege on their own behalf. Then s. 33G provides that Part 4A 'has effect despite any other Act, any Imperial Act or any other law'. The 1997 Act was intended, therefore, to operate despite any possible infringement of the freedom of parliamentary speech, as enshrined under Article 9. However, this new Part 4A was, by s. 33H, to expire at the end of the period of six months commencing from the date of enactment. In the event, the NSW Court of Appeal upheld the constitutional validity of the Act in question and special leave to appeal to the High Court was refused.

Egan v Willis:⁷⁰ At issue in *Egan v Willis* was the power at common law of the Legislative Council to order the production of state papers. The underlying principle behind that power is that, under the Westminster system of responsible government, the Executive remains accountable to Parliament. The power to order the production of state papers, therefore, can be defined as a reasonably necessary incident flowing from the legislative and scrutiny functions played by the Houses of the NSW Parliament, in particular their superintendence and review of Executive conduct. That power can be assumed at common law to extend from the Houses to their committees. More doubtful is whether it extends to a power to order papers generally, either from members of the other House of Parliament or from ordinary citizens. On this matter, the joint judgment of Gaudron, Gummow and Hayne JJ had this to say:

⁶⁹ *Arena v Nader* (1997) 42 NSWLR 427; *Arena v Nader* (1997) 71 ALJR 1604. For a commentary on these cases see – G Griffith and D Clune 'Arena v Nader and the waiver of parliamentary privilege' in Winterton, n 65, Chapter 12.

⁷⁰ (1998) 195 CLR 424. See G Carney, 'Egan v Willis and Egan v Chadwick: the triumph of responsible government' in Winterton, n 65, Chapter 11.

It is important to emphasise that no question arises in this case about what powers a House of the NSW Parliament may have to deal with persons who are not members of the House concerned. Altogether different considerations might arise in such a case.⁷¹

As to the facts of the case, the joint judgment commented:

Reduced to its essentials, what happened in the present case involved the determination by the Legislative Council to seek the provision to it by a member, who is a Minister and who 'represented' another Minister in the Legislative Assembly, of State papers which, as Gleeson CJ described them, related 'to matters of government business which the Council wished to debate'. The appellant had in his custody and control certain documents which fell within the description of those sought in the relevant resolution. The Minister chose not to produce the papers, claiming consistently with the position taken by the cabinet, that the Legislative Council had no power to call for them. He was then suspended for the balance of the day's sitting.⁷²

The power of the Houses to suspend a Member for a limited time was confirmed. It was further confirmed that each House may impose sanctions on a Member for the purpose of coercing that member to induce compliance with the wishes of the House, but not for the purpose of punishing a member.⁷³

Egan v Chadwick:⁷⁴ One issue left open by the Court of Appeal and the High Court in *Egan v Willis* was 'whether or not the power of the Legislative Council to call for documents extends to documents for which claims of legal professional privilege or of public interest immunity, could be made at common law'. In other words, does the principle of reasonable necessity, which defines the scope of the implied powers, extend to orders for the tabling of documents subject to claims of privilege or immunity recognised at common law?

In *Egan v Chadwick* all three members of the Court of Appeal (Spigelman CJ, Meagher JA and Priestly JA) found that it is reasonable necessary for the performance of the functions of the Legislative Council to compel the Executive to produce documents in respect of which a claim of legal professional privilege or public interest immunity is made, and that the power upheld by the High Court in 1998 extended to such documents. The majority (Spigelman CJ and Meagher JA) found that the power was limited in the case of cabinet documents, while Priestly JA found that there was no limitation to the power. Central to all three judgments were considerations relevant to responsible government, notably ministerial accountability in its collective and individual forms.

⁷¹ (1998) 195 CLR 424 at 456. McHugh J argued strongly against the power to order the production of documents from ordinary citizens (at 472).

⁷² (1998) 195 CLR 424 at 454-5.

⁷³ (1998) 195 CLR 424 at 455.

⁷⁴ [1999] 46 NSWLR 563.

4.2 Orders and addresses for papers in the Legislative Council

4.2.1 *Orders, privilege and exemption claims*

Since the decision in *Egan v Willis* orders and addresses for papers have been common in the Legislative Council, where its committee system generates a high level of scrutiny of the Executive. The Executive, in turn, only agrees to the provision of papers with the greatest reluctance:

One means by which the enthusiasm of Members for applying for papers can be dampened is by restricting access to Members only. It is a legitimate device in the case of more sensitive documentation. It is also a device by which towers of papers can be provided to a Member who may not have the time to sift through them all, or in some cases the legal or financial skills needed to adequately interpret the documentation.⁷⁵

Writing in October 2002 the Clerk of the Parliaments, John Evans, reported that of the 30 orders made, in 19 cases privilege was claimed by the Government on grounds of legal professional privilege, public interest immunity or 'commercial confidentiality'. In all but two of these cases the special procedures for managing such claims were invoked. On ten occasions the claims were not disputed and the documents remained accessible to Members only. In the other seven cases, where a Member objected to the claim, the dispute was referred to an independent legal arbiter for assessment. Evans writes:

In all cases, whether the documents have been made public or not, the House has first resolved to publish the arbiter's report. Wherever the arbiter has reported that a disputed claim is valid, the House has taken no further action in relation to the documents and the documents have remained accessible only to members of the House. However, wherever the arbiter has reported that a privilege claim is not valid, the House has ordered that the documents subject to the claim be made public.⁷⁶

In 2005 a record 40 orders for production of papers were passed under Standing Order 52, in addition to which there was one request for papers on the administration of justice under Standing Order 53 by way of an Address to the Governor.⁷⁷ Increasingly, the Government has sought to counter this trend by claiming that certain documents are Cabinet documents and therefore privileged and excluded from the return of papers.⁷⁸ One strategy developed

⁷⁵ D Clune and G Griffith, *Decision and Deliberation: The Parliament of New South Wales 1856-2003*, Federation Press 2006, p 655.

⁷⁶ J Evans, 'Order for Papers and Executive Privilege: Committee Inquiries and Statutory Secrecy Provisions' (2002) 17(2) *Australasian Parliamentary Review* 198-211.

⁷⁷ A total of 146 orders had been agreed to between 1999 and September 2006 - S Want, 'Telling the full story? Parliament, Government Information, the Media, and Committee Inquiries', *Paper presented at the Australasian Study of Parliament Group Annual Conference, 28-30 September 2006, Wellington, New Zealand*.

⁷⁸ Other arguments used by the Government to resist orders of the House are discussed by

by the Council to counter this reluctance on the part of the Government is to make supplementary orders for papers not included in the original return. Another is to require reasons why certain papers are to be treated as Cabinet documents, as occurred when two documents relating to the protection of grey nurse sharks were withheld in March 2005 on the ground that they formed part of a Cabinet minute.⁷⁹ Subsequently, on 1 December 2005, as part of a supplementary order for further papers to be produced on the Grey Nurse shark population, the Council resolved:

That, if any document falling within the scope of this order is not produced as part of the return to order on the grounds that it formed part of a Cabinet Minute, or was held for consideration as part of Cabinet deliberations, a return be prepared showing the date of creation of the document, a description of the document, the author of the document and the reasons why the production would ‘disclose the deliberations of Cabinet’ as discussed by the Court of Appeal in *Egan v Chadwick* [1999] NSWCA 176.⁸⁰

Documents were received from the Government on 15 December 2005, but not the two documents at issue. These related to studies undertaken by consultants concerning Grey Nurse shark populations, in respect to which it was asserted that they formed part of a Cabinet Minute. As for the papers that were provided, the Director General of the Premier’s Department identified those documents for which legal professional privilege and public interest immunity was claimed.⁸¹ On 9 March 2006 a ‘written dispute’ from a Member was received by the Clerk as to the validity of that claim of privilege. It was reported:

According to standing orders, Sir Laurence Street, being a retired Supreme Court Judge, was appointed as an independent arbiter to evaluate and report as to the validity of the claims of privilege. I inform the House that, according to the recommendation in the report of the Independent Legal Arbiter, the documents remain privileged. The report is available for inspection by members of the Legislative Council only.⁸²

For Harry Evans, the Clerk of the Senate, the Council’s exercise of its power to order the production of State papers has resulted in a ‘major shift in favour of the Parliament and against the executive’, a shift he views in a positive light.⁸³ From a different perspective,

Want, including the argument that disclosure would not be in the public interest – Want, n 77, pp 4-6.

⁷⁹ *NSWPD*, 22.3.2005, p 14672. The original resolution had been passed on 24 February 2005.

⁸⁰ *NSWPD*, 1.12.2005, p 20464.

⁸¹ *NSWPD*, 28.2.2006, p 20643.

⁸² *NSWPD*, 28.3.2006, pp 21462-3. Want notes that ‘The only occasion upon which the House has challenged an arbiter’s evaluation, was to order that documents upon which a claim of privilege was upheld in 2003, be reassessed’ – Want, n 77, p 5.

⁸³ H Evans, ‘Lively, analytical history of the NSW Parliament’ (2006) 9(1) *Constitutional Law*

the increase in orders for the production of papers in the Legislative Council has been criticised by the NSW Crown Solicitor, IV Knight, who contends that ‘the power is beginning to produce a distortion in the roles of the legislative and executive arms of government’. He argues that, instead of holding the Executive responsible for its policies, ‘particular non government members of the Legislative Council’, with support from others, are seeking ‘to formulate public policy and impose that upon the Executive’. According to Knight:

It is one thing for a House of the Parliament to scrutinize the Executive but quite another for a House to purport to, in effect administer the affairs of the State, turning the Executive into its servant or agent for that purpose.⁸⁴

He continues:

Not only may we be seeing a distortion in the respective roles, the use of the power now deflects the Executive from leading and governing the State. The process of producing State papers is time and resource consuming for the Executive.⁸⁵

Among the issues raised by the Crown Solicitor are the implications of the frequent use of the power to order the production of papers for the relationship between the two Houses, and the question whether it will result in less information being available to the public, as governments become reluctant to make ‘written records’.

In response, it is enough to make two observations. One is that the Council must ensure that the power at issue is exercised responsibly. The other is that, whatever happens, the Executive is likely to find cause for complaint, as it seeks to minimise the effectiveness of this and other accountability mechanisms. That is not a reflection on the disposition of any particular Executive; rather, it is a comment on the nature of executive power generally and the logic of the situation in which it operates.

4.2.2 Recent NSW case law on ‘Cabinet documents’

Egan v Chadwick leaves open precisely what is meant by ‘Cabinet documents’.⁸⁶ Meagher JA referred to Cabinet documents as a class for which ‘immunity from production is complete’.⁸⁷ Whereas Spigelman CJ adopted a more restrictive approach, saying only that documents which disclose the actual deliberations of Cabinet, ‘directly or indirectly’, are

and Policy Review 17 at 20. Evans argues that the Council is ‘a world leader in this area’.

⁸⁴ IV Knight, ‘Government lawyers, the Executive and the rule of law’, *Paper presented to the NSW Law Society’s Government Lawyers Conference*, 12 September 2006, p 4.

⁸⁵ IV Knight, n 84, p 5.

⁸⁶ This discussion draws on B Duffy, ‘Orders for papers and Cabinet confidentiality: post *Egan v Chadwick*’ (2006) 21(2) *Australasian Parliamentary Review* 93-107.

⁸⁷ [1999] 46 NSWLR 563 at para 88.

categorically beyond the Council's scrutiny power.⁸⁸ As for documents prepared outside Cabinet for submission to Cabinet, 'depending on their content', these 'may, or may not' also be exempt from parliamentary scrutiny.⁸⁹ In this way, a distinction was made between such documents as Cabinet Minutes disclosing the actual deliberations of Cabinet, on one side, and reports or submissions prepared for the assistance of Cabinet, the confidential status of which would have to be decided on a case-by-case basis.⁹⁰

In the contest between the Executive and the Council on the production of documents, some guidance may be found in the interpretation by NSW courts and tribunals of the term 'Cabinet documents' in the analogous field of freedom of information. A major purpose of freedom of information legislation is to make public sector decision-making processes more accessible to the public, thereby promoting and enhancing the operation of representative democracy and responsible government. Clause 1 of Schedule 1 to the *FOI Act 1989* deals with 'Cabinet documents' as exempt documents in the following terms:

- (1) A document is an exempt document:
 - (a) if it is a document that has been prepared for submission to Cabinet (whether or not it has been so submitted), or
 - (b) if it is a preliminary draft of a document referred to in paragraph (a), or
 - (c) if it is a document that is a copy of or of part of, or contains an extract from, a document referred to in paragraph (a) or (b), or
 - (d) if it is an official record of Cabinet, or
 - (e) if it contains matter the disclosure of which would disclose information concerning any deliberation or decision of Cabinet.
- (2) A document is not an exempt document by virtue of this clause:
 - (a) if it merely consists of factual or statistical material that does not disclose information concerning any deliberation or decision of Cabinet, or
 - (b) if 10 years have passed since the end of the calendar year in which the document came into existence.
- (3) Subclause (2) (b) does not apply to a document that came into existence before the commencement of this clause.
- (4) In this clause, a reference to Cabinet includes a reference to a committee of Cabinet and to a subcommittee of a committee of Cabinet.

In *National Parks Association of NSW Inc v Department of Lands*⁹¹ the Administrative Decisions Tribunal rejected two Cabinet document exemption claims based on cl 1(1)(a) (document that has been prepared for submission to Cabinet) and cl 1(1)(e) (matter the disclosure of which would disclose information concerning any deliberation or decision of Cabinet). As for cl 1(1)(a), the Tribunal held that there was insufficient evidence that a

⁸⁸ [1999] 46 NSWLR 563 at para 70.

⁸⁹ [1999] 46 NSWLR 563 at para 57.

⁹⁰ G Griffith, *Egan v Chadwick and Other Recent Developments in the Powers of Upper Houses*, NSW Parliamentary Library Briefing Paper No 15/1999, p 7.

⁹¹ [2005] NSWADT 124 (Hennessy DP)

report prepared by Pricewaterhouse Coopers was prepared for submission to Cabinet noting the absence of first-hand evidence from the report writer and absence of a disclaimer at the front of the paper. It was said the question had to be ‘determined as at the time the document was prepared’.⁹² As to cl 1(1)(e), the Tribunal held that the mere fact that a document, or part of a document, went before Cabinet or was considered by Cabinet or was considered by Cabinet when deliberating or reaching a decision did not make the information in the document information ‘concerning’ any deliberation or decision of Cabinet – only documents created contemporaneously with or subsequent to an active discussion and debate within Cabinet are capable of disclosing Cabinet deliberations. It was held by Hennessey DP that a broader interpretation would not be consistent with ‘the ordinary meaning of the words and would allow agencies to abuse the exemption by attaching documents to Cabinet submissions in an effort to avoid disclosure under the *FOI Act*’.⁹³

Among the authorities referred to in arriving at this restrictive interpretation was a decision of the Victorian Civil and Administrative Tribunal in *Asher MP v Department of Infrastructure (General)*.⁹⁴ The case involved an application by Louise Asher MP for access to the Lewinsky Report on funding arrangements for the controversial Federation Square Project. At issue were comparable provisions in the Victorian *FOI Act* (s 28(1) (b) and (d)), the first exempting documents ‘prepared’ for submission to Cabinet, the second exempting documents the disclosure of which would disclose ‘any deliberation or decision of the Cabinet’. In his summary of the findings, Hennessey DP stated:

Asher’s case concerned a report which the relevant agency said was to be used for the purpose of informing the Treasurer and a Minister in the preparation of a submission to Cabinet. Parts of the report were directly referred to in a Cabinet submission, and the entire report was attached to another Cabinet submission. The applicant argued that the report was to provide information which the Treasurer and Minister could decide whether to use for the purposes of preparing submissions to Cabinet. Judge Bowman VP held that the purpose of the report was to provide information to the Treasurer and relevant Minister and the requirements of s 28(1)(b) and (d) had not been satisfied.⁹⁵

As for the exemption claimed under s 28(1)(d), Judge Bowman said ‘Whilst this was not vigorously pursued, I fail to see how disclosure of the document would involve disclosure of any deliberation or decision of the Cabinet. As stated, there is not even any definite evidence that the Cabinet considered the Lewinsky Report’.⁹⁶

⁹² [2005] NSWADT 124 at paras 29-33.

⁹³ [2005] NSWADT 124 at para 43; ‘Stop Press!’, *Crown Solicitor’s Office Client Newsletter*, June 2005, p 4.

⁹⁴ [2005] VCAT 410.

⁹⁵ [2005] NSWADT 124 at para 31.

⁹⁶ [2005] VCAT 410 at para 16.

Against the more restrictive interpretation favoured by Hennessey DP of what constitute ‘Cabinet documents’ for the purposes of cl 1(1)(e) of the NSW *FOI Act 1989*, in ***Cianfrano v Director General, NSW Treasury***⁹⁷ O’Connor DCJ preferred a more inclusive interpretation. On this view, to gain the exemption for ‘matter the disclosure of which would disclose information concerning any deliberation or decision of Cabinet’, it is sufficient to ‘*show that the information related to a matter of concern to the Cabinet, even if neither the information nor the matter was ultimately the subject of discussion, careful consideration or decision-making*’ (emphasis added).⁹⁸ In arriving at this view, O’Connor DCJ considered the contrasting approaches in the case law of other jurisdictions, in particular Victoria and Queensland, in regard to which he stated:

The main difference in the two approaches has to do with the extent to which it is necessary to prove in order to establish the exemption that Cabinet actually deliberated or made a decision in relation to the information which is the subject of the claim for exemption.⁹⁹

In December 2005 O’Connor DCJ revisited this question in ***Cianfrano v Director General, Department of Commerce***¹⁰⁰, an unusual case where *inter alia* exemption was claimed for documents relating to a Taskforce comprised of high level public servants and created by a sub-committee of Cabinet in respect of the lease and sale of the Flemington Markets to Sydney Markets Limited. The main issue was the status of the above Taskforce, bearing in mind that, by Sch. 1. cl 1(4) of the *FOI Act*, ‘a reference to Cabinet includes a reference to a committee of Cabinet and to a sub-committee of a committee of Cabinet’. The question was whether this extended to cover the Taskforce? O’Connor DCJ held that it did not, arguing that the expressions ‘Committee of Cabinet’ and ‘sub-committee of Cabinet’ were confined to entities made up of Cabinet Ministers, or at least Ministers if there is a structure which differentiates Cabinet from the outer Ministry. He observed that the appointment of high level officers of the public service to assist Cabinet was a well-established practice and that Parliament would have been aware of this practice when it decided to confine the scope of the Cabinet documents exemption to Cabinet itself or its committees or sub-committees.¹⁰¹ The exemption, based solely on the claim that the document was written by the Taskforce or one of its members, did not apply therefore.¹⁰²

By refusing this specific claim for exemption O’Connor DCJ did not, however, adopt the

⁹⁷ [2005] NSWADT 7 (O’Connor DCJ).

⁹⁸ [2005] NSWADT 7 at para 46.

⁹⁹ [2005] NSWADT 7 at para 44. O’Connor DCJ said it was not necessary ‘to form a concluded view on the difference in the approaches found in the case law of other jurisdictions with exemptions equivalent to sub-category (e)’ (para 47).

¹⁰⁰ [2005] NSWADT 282 (O’Connor DCJ).

¹⁰¹ [2005] NSWADT 282 at para 80.

¹⁰² ‘Client News’. *Crown Solicitor’s Office Client Newsletter*, May 2006, p 6.

more restrictive interpretation of ‘Cabinet documents’ suggested in *National Parks Association of NSW Inc v Department of Lands*. He commented that the exemption in cl 1(1)(e), which is the most important in terms of the convention of collective ministerial responsibility, ‘goes beyond seeking simply to secure the protection of the formal documentation of Cabinet’. For O’Connor DCJ the focus of the exemptions ‘is the Cabinet discussion environment’, in which context the concept of ‘deliberations’ is a ‘wide one’. Adopted was this statement of Forgie DP in *Re Toomer and Department of Agriculture, Fisheries and Forestry*:

[Cabinet’s] deliberations are its thinking processes be they directed to gathering information, analyzing information or discussing strategies. They remain its deliberations whether or not a decision is reached. Its decisions are its conclusions as to the courses of action that it adopts be they conclusions as to its final strategy on a matter or its conclusions as to the manner in which a matter is to proceed.¹⁰³

Expressly rejected was the restrictive view that Cabinet documents refer only to documents ‘created contemporaneously with, or subsequent to active discussion and debate within Cabinet’, a view O’Connor DCJ associated with *Re Hudson and Department of the Premier, Economic and Trade Development*.¹⁰⁴ He said that view was criticized in *Re Toomer* because of its focus on ‘decisions’. Quoted with approval was this further statement by Forgie DP, which in substance may not be so different to the case-by-case approach suggested by Spigelman CJ for documents prepared outside Cabinet for submission to Cabinet:

...the principles to be applied in answering that question are the same in both [FOI legislation and public interest immunity claims]. The documents must be examined to determine whether they do in fact disclose deliberations or decisions of Cabinet. Whether they were prepared before or after the meeting of Cabinet at which they were discussed is not determinative of the issue. The whole of the evidence, of which the disclosures are only part, must be examined to make that determination.¹⁰⁵

This last evidentiary question was returned to by O’Connor DCJ in *Cianfrano v Director General, Attorney General’s Department*¹⁰⁶ where the ‘Cabinet documents’ exemption was relied upon in relation to two documents, one of these under cl 1(1)(e). By s 61 of the *FOI Act*, where an exemption is claimed, the burden of proof rests with the agency or Minister, a burden which, in the opinion of O’Connor DCJ, had not been met in this instance. He concluded:

¹⁰³ (2003) 78 ALD 645 at para 88.

¹⁰⁴ (1993) 1 QAR 124 at 141.

¹⁰⁵ [2005] NSWADT 282 at para 89; (2003) 78 ALD 645 at para 96.

¹⁰⁶ [2005] NSWADT 303 (O’Connor DCJ).

The evidence for this submission is found in the confidential statement, and involves in turn an assertion, without corroborating documentation or material, found in an email from an officer of another agency of government. In my view this is an insufficient basis to justify application of this exemption.¹⁰⁷

4.2.3 Limiting exemptions under Cabinet confidentiality

Obviously the statutory context provided by the FOI legislation is distinct from the situation confronting the Legislative Council in its attempts to ensure full compliance with orders for State papers. The circumstances are nonetheless analogous to some extent. For the Council to decide on a case-by-case whether a claim of Cabinet exemption is reasonable in any specific instance, it must be informed as to the document's history and reasons why its production would 'disclose the deliberations of Cabinet'. While the Council and the courts are not entirely comparable institutions, the mere assertion of an exemption on the part of the Executive in response to an order for papers cannot be adequate, at least from a parliamentary standpoint. Both the convention of collective ministerial responsibility, upon which the Cabinet confidentiality is based, and the function of the 'scrutiny' or 'superintendence' of the Executive by the Houses of the NSW Parliament can be characterised as 'incidents' of the doctrine of responsible government. If an appropriate balance is to be struck between these contending aspects of responsible government, a proper limitation on the Executive's power to deny 'the electors and their representatives information concerning the conduct of the executive branch of government' should be recognised.¹⁰⁸ This may be achieved, if not at law, then by means of the conventions informing relations between Parliament and the Executive. The role of the independent arbiter might be extended to adjudicate on exemption claims. Whatever mechanism is used, a limitation on the unrestrained and unexplained use of Cabinet confidentiality as a basis for claiming exemption from an order for the production of State papers is needed if the Parliament is to fulfil its scrutiny function under responsible government, the purpose of which is to bring 'the Executive to account'.¹⁰⁹ Following Forgie DP, for a meaningful appraisal of the validity of a claim for exemption to be made by the Council 'The documents must be examined to determine whether they do in fact disclose deliberations or decisions of Cabinet... The whole of the evidence, of which the disclosures are only part, must be examined to make that determination'.¹¹⁰

This issue was carried a step further in the Council when a motion was placed on the Notice Paper for 6 June 2006 by the Hon Catherine Cusack MLC (Liberal Party). The proposed motion set out those instances in which Cabinet exemption had been claimed on one basis or another. Cited in support of the claim for access to all state papers, the only

¹⁰⁷ [2005] NSWADT 303 at para 31.

¹⁰⁸ *Egan v Willis* (1998) 195 CLR 424 at para 42; quoting with approval *Lange v ABC* (1997) 189 CLR 520 at 561.

¹⁰⁹ *Egan v Willis* (1998) 195 CLR 424 at para 42.

¹¹⁰ [2005] NSWADT 282 at para 89; *Re Toomer and Department of Agriculture, Fisheries and Forestry* (2003) 78 ALD 645 at para 96.

exception being those documents that disclose the actual deliberations of Cabinet, was a statement by the Hon Terrence Cole QC, made in his capacity as an Independent Legal Arbiter to evaluate claims of privilege. In his report of 22 December 2005, he stated:

In assessing a claim for public interest immunity in relation to Cabinet documents, a distinction is to be drawn between: true Cabinet documents, that is, those documents which disclose the actual deliberations of Cabinet; and Cabinet documents, that is, reports or submissions prepared for the assistance of Cabinet... When privilege is claimed for other Cabinet documents, a judgment process is required to weigh the competing public interests.

Following on from this, Cusack's proposed motion argued that, for Cabinet exemption claims to be weighed and resolved, 'this House must be informed of the nature of the document and reasons why its production would "disclose the actual deliberations of Cabinet"'. The proposed motion, which argued for a limitation to be set on the 'unrestrained and unexplained' use Cabinet confidentiality, went on to say:

That the mere assertion that a document, prepared for a range of purposes, is exempt from production because 'formed part of the Cabinet process', 'formed part of a Cabinet Minute', 'was held in the Minister's Office where all documents were prepared for or related to preparation for Cabinet', or was 'prepared for the purpose of informing Cabinet', without further explanation or justification, is an arrogant and unacceptable abuse of the Cabinet process to avoid politically embarrassing or sensitive information being provided to this House.

Whether a case-by-case approach to Cabinet confidentiality can be informed by certain agreed tests or guidelines does not appear to have been decided at this stage. The inclusive formulation adopted provisionally by O'Connor DCJ in *Cianfrano v Director General, NSW Treasury*¹¹¹ was that, to gain the exemption for 'matter the disclosure of which would disclose information concerning any deliberation or decision of Cabinet', it is sufficient to 'show that the information *related to a matter of concern to the Cabinet*, even if neither the information nor the matter was ultimately the subject of discussion, careful consideration or decision-making' (emphasis added).¹¹² This seems very broad. Any 'matter' pertaining to the 'peace, welfare and good government' of the State might be characterised as 'a matter of concern to the Cabinet', a body which stands at the apex of Executive government in the Westminster system. It may be that the phrase 'a matter of concern' is to be associated with the conception of 'deliberation' as referring to the Cabinet's 'thinking processes', which in the words of Forgie DP can be '*directed to gathering information, analyzing information or discussing strategies*'. In other words, documents of an informative or analytical nature produced for Cabinet, whether actively considered or otherwise, or other material used by it to deliberate on alternative policies, might reasonably be classified as Cabinet documents, 'the disclosure of which would disclose information concerning any deliberation or decision of Cabinet'. These categories of documents would be in addition to those

¹¹¹ [2005] NSWADT 7 (O'Connor DCJ).

¹¹² [2005] NSWADT 7 at para 46.

documents ‘created contemporaneously with, or subsequent to active discussion and debate within Cabinet’. There are sure to be grey areas, in relation to which, as in the law relating to freedom of information, it might be argued that the onus should be on the Executive to demonstrate that documents for which a Cabinet exemption is sought fit into one or other of the above categories. If the Legislative Council’s power to order state papers is to be meaningful, such claims for exemption need to be supported by reasons not assertions.

One outstanding question is whether the courts would enforce a rule of this kind? The motion placed on the Notice Paper for 6 June 2006 stated that if a rule or limitation could not be ‘adopted on the basis of the conventions of respect and comity between the arms of government, it may ultimately be imposed by law’. A potential difficulty is that this statement pre-supposes that, in the circumstances foreshadowed, the courts are likely to set aside the principle of non-intervention. As Twomey observes, ‘The court will not intervene where a dispute is between the Executive and a House of Parliament. It is up to the House to assert its privileges’.¹¹³ Noted in this context was the fact that in *Egan v Willis* a common law action in trespass was the basis of the original legal proceedings. Against this, it is agreed that ‘disputes as to the existence of a power, privilege or immunity of a House of Parliament are justiciable in a court of law’.¹¹⁴ At issue in the circumstances under discussion, it can be argued, is the existence of a subsidiary or ancillary power to require reasons for the making of Cabinet exemption claims. In the words of the Canadian Supreme Court, it is the ‘scope of a category of privilege’ that is to be determined.¹¹⁵

Even if the initial hurdle of justiciability is overcome, there is the further question of the enforcement of the conventions of responsible government by the courts, an issue that was discussed in Briefing Paper No 15/1999.¹¹⁶ The conclusion arrived at in that paper was that ‘Logically...the argument appears to be that a constitutional convention [of responsible government] is indirectly enforced when a legal power [of the Council to order the production of state papers] is derived, by implication, as a matter of reasonable necessity from it’. Whether an enforceable requirement to provide reasons for the non-production of State papers can be said to derive, by implication, as a matter of reasonable necessity from the conventions of responsible government remains to be seen. The courts may yet decide that the matter is non-justiciable and best left to be resolved by the political process. Alternatively, it could be said that the power to order the production of State papers may be (and is in fact) subverted without a subsidiary power to require reasons for the making of Cabinet exemption claims. One possible conclusion is that the ‘reasonable necessity’ for one power, may be found to imply a reasonable necessity for the other subsidiary or ancillary power, the purpose of which is to ensure that the accountability of the Executive to the Houses of the NSW Parliament and, through them, to the people, is to have sufficient application in practice as well as theory.

¹¹³ A Twomey, *The Constitution of New South Wales*, Federation Press 2004, p 524.

¹¹⁴ *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 162.

¹¹⁵ *Canada (House of Commons) v Vaid* [2005] 1 SCR 667 at para 29.9.

¹¹⁶ G Griffith, n 90, pp 16-18.

4.3 Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics

The Legislative Council first established a Standing Committee on Parliamentary Privilege and Ethics by resolution of the House on 9 November 1988. This followed a recommendation of the Joint Committee on Parliamentary Privilege that had reported three years earlier. The Legislative Assembly, however, did not establish an equivalent Committee at this time. In a 2001 report ICAC noted in this respect:

The NSW Legislative Assembly historically prefers to deal with questions of privilege on the floor of the House and contempt issues would be dealt with in the same way. In dealing with a contempt matter the Legislative Assembly may resolve to appoint a select committee (as a quasi-privileges committee) to investigate and report back to the House.¹¹⁷

This situation changed in December 2003 when the Legislative Assembly established a Standing Committee on Parliamentary Privilege and Ethics. The Committee's first report was on the Regulation of Secondary Employment for Members of the Legislative Assembly, tabled on 23 September 2004.

4.4 Citizen's Right of Reply

A Citizen's Right of Reply was adopted by the Legislative Assembly on 27 November 1996 and has been re-adopted since that time by resolution of the House.¹¹⁸ The resolution providing for a citizen's right of reply for the first session of the 53rd Parliament was adopted on 29 April 2003. To date, 21 requests have been received and acted upon by the Speaker, one of which has been forwarded on to the Standing Orders and Procedure Committee.¹¹⁹ The reasons for the disallowance of the other 20 requests are as follows: in 11 cases a formal claim was not made in the terms required by the resolution; in 3 cases the relevant speech by the Member in the House predated the original resolution of 27 November 1996; in 4 cases insufficient evidence was provided to support the claim; in one case the Member's comments were misrepresented by the claimant; and in one other case the Member's comments did not cross the threshold 'that the person or corporation had been adversely affected in reputation or in respect of dealings or associations with others, or injured in occupation'.

The Legislative Council adopted by resolution a Citizen's Right of Reply on 13 November 1997. It followed the explosive speech made by Franca Arena in the House on 17 September 1997 during the debate on the Final Report of the Royal Commission into the NSW Police Service. The speech suggested that certain prominent persons, including the

¹¹⁷ Committee on the ICAC, *Report on alleged contempt in relation to the draft report of Bron McKillop on inquisitorial systems*, Parliament of NSW, 2001, p 6.

¹¹⁸ The resolution for the right of reply procedure for the Second Session of the 53rd Parliament was adopted on 22 May 2006.

¹¹⁹ The right to reply was not granted by the Committee.

Premier, the Leader of the Opposition and the Royal Commissioner, had been involved in meetings or agreements concerning an alleged ‘cover-up’ of names of high-profile paedophiles. In the Council, the first person to take advantage of the right to reply was Justice Sheahan, one of those named by Arena, when a statement by him responding to Arena’s allegations were incorporated into *Hansard* and the *Minutes of Proceedings*.¹²⁰ To date, a total of 17 submissions have been referred to the Privileges Committee for inquiry and report. Since May 2004 the procedures relevant to the right to reply have been set out in the Legislative Council Standing Orders (SOs 202 and 203).

In substance, the rules and procedures for the right to reply are the same between the Assembly and the Council. In both instances the Presiding Officers act as gatekeepers before a submission is referred to the relevant committee. Both committees must meet in private and both are barred from considering or judging the truth of any statements made in the House or in the submission. The committees can recommend ‘that no further action be taken’ either by the House or the committee, or that a response by the person making the submissions be published in the Minutes of Proceedings or incorporated in *Hansard*. The response is to be in a form of words agreed to by the person and the committee, as specified in the committee’s report. A minor difference is that, whereas the Assembly resolution refers to ‘a person or a corporation’, the Council’s Standing Order 203(6) defines ‘person’ inclusively to include ‘an unincorporated association, a corporation and a body corporate’.

4.5 Proposed protocol for execution of search warrants on Members’ offices

As in several other jurisdictions, in NSW in recent years the relationship between parliamentary privilege and the execution of search warrants has arisen. Specifically, on 3 October 2003 officers of the ICAC were granted a search warrant authorising entry and search of the Parliament House office of the Hon Peter Breen MLC.¹²¹ The search warrant was granted in the course of an investigation into Mr Breen’s use of parliamentary entitlements. A laptop, documents and two computer hard drives were seized. Information from Mr Breen’s personal drive on the Parliament’s IT network was also downloaded on the understanding that this, and other material, would ‘not be accessed and examined except in the presence of Mr Breen, at a later date’.¹²² During the search the Deputy Clerk reminded the officers of the potential application of parliamentary privilege to the material seized. For their part, the officers advised that they had no intention of violating parliamentary privilege. Section 122 of the *ICAC Act* preserves parliamentary privilege in relation to the freedom of speech, debates, and proceedings in Parliament.

Mr Breen, who was not present during the search, later claimed parliamentary privilege¹²³

¹²⁰ D Clune and G Griffith, n 75, pp 665-668.

¹²¹ In late 2000 the ICAC’s powers of entry and inspection were used to gain access into the parliamentary office of the Council Member Malcolm Jones.

¹²² LC Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary Privilege and Seizure of Documents by ICAC*, Report 25, December 2003, p 23.

¹²³ *NSWPD*, 14.10.2003, p 3719.

and on the next day the Legislative Council resolved that the Standing Committee on Parliamentary Privilege and Ethics report on whether any breaches of the immunities enjoyed by the Council, or contempts, had occurred, in addition to what procedure should be adopted to determine whether any of the material seized was subject to parliamentary privilege. In the event, in its report of December 2003 the Privileges Committee found that a breach of immunity had taken place, on the ground that at least one of the documents seized under the warrant fell within the scope of ‘proceedings in Parliament’, and that the seizure of that document constituted a breach of Article 9 of the *Bill of Rights 1689*. The mere seizure of such material, it was said, amounted to an ‘impeaching or questioning’ of parliamentary proceedings. The Privileges Committee did not, however, find that a contempt had taken place, on the grounds that ICAC had neither acted with improper intent nor with reckless disregard to the effect of its actions. But it was found that any subsequent attempt by the ICAC to ‘use documents which fall within the scope of proceedings in Parliament in their investigations would amount to a contempt of Parliament’. The Committee’s first recommendation established a procedure for the resolution of the claim of parliamentary privilege made by Mr Breen.¹²⁴ Its second recommendation was for a further report on the development of protocols for the execution of search warrants on Members’ offices.

The report of December 2003 was to be the first of three reports by the Council’s Privilege Committee on issues arising from the original search. Under the procedure the Committee had recommended for the resolution of Mr Breen’s claim of parliamentary privilege, provision was made for the House to consider any cases where a dispute arose between the ICAC and Mr Breen as to whether a document did in fact constitute a proceeding in Parliament. Subsequently, on 20 January 2004 the claim of privilege on certain documents was disputed by the ICAC. Those documents related to a motor vehicle accident compensation claim with which Mr Breen had originally become involved in his capacity as a lawyer before his election to Parliament. In support of his claim for privilege, the Member had written that he had used a number of the documents in connection with contributions he had made, as a Member, to various proceedings in a committee of the House and in the House itself. On 25 February 2004 the House resolved to refer the disputed documents to the Privileges Committee to decide whether they fell within the scope of ‘proceedings in Parliament’.

This was the subject of the second report of March 2004 – *Parliamentary privilege and seizure of documents by ICAC No 2*. Discussed were the conflicting authorities on what constitute ‘proceedings in Parliament’, with particular reliance being placed on the decision in *O’Chee v Rowley*.¹²⁵ In that case McPherson JA stated that, by s 16(2) of the 1987 Commonwealth *Parliamentary Privileges Act*.

¹²⁴ These interim procedures were adopted by the Legislative Council on 4 December 2003, with some modification. Later that day an amendment was agreed to whereby any documents deemed to be subject to parliamentary privilege, rather than being returned immediately to the Member concerned, were to be retained by the Clerk until the House otherwise decides, with a copy only being made available to the Member.

¹²⁵ (1997) 150 ALR 199. Leave to appeal against the decision to the High Court was refused. The *O’Chee* case and its implications are discussed further in section 5.1.1 of this paper.

proceedings in Parliament include the preparation of a document for purposes of or incidental to the transacting of any business of a House. More generally, such proceedings include all acts done for such purposes, together with any acts that are incidental to them. Bringing documents into existence for such purpose; or, for those purposes, collecting or assembling them; or coming into possession of them, are therefore capable of amounting to “proceedings in Parliament”.¹²⁶

It was held that the words ‘acts done...for purposes of or incidental to, the transacting of the business of a House or of a committee’ cover documents sent by strangers to Federal MPs but only if the Member chooses to retain the documents and uses them for the purpose of transacting parliamentary business.¹²⁷ As Martin Hinton states, in the Breen case ‘The determining factor was the use that the Member intended to make of the document’.¹²⁸ At the Commonwealth level, the Australian Federal Police National Guideline acknowledges that ‘In some cases the question will turn on what has been done with a document, or what a Member intends to do with it, rather than what is contained in the document or where it was found’.¹²⁹ Based on *O’Chee v Rowley*, the following three-step test was formulated by the Privileges Committee to decide if a disputed document constitutes a proceeding in Parliament:

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

YES → falls within ‘proceedings in Parliament’

NO → move to question 2

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

YES → falls within ‘proceedings in Parliament’

NO → move to question 3

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

YES → falls within ‘proceedings in Parliament’

NO → does not fall within ‘proceedings in Parliament’.¹³⁰

¹²⁶ (1997) 150 ALR 199 at 215.

¹²⁷ (1997) 150 ALR 199 at 209.

¹²⁸ M Hinton, ‘Parliamentary privilege and police powers in South Australia’ (2005) 16 *Public Law Review* 99 at 114.

¹²⁹ The Guideline also notes that ‘It is possible that a document held by a Member will attract public interest immunity even if it is not covered by parliamentary privilege. The High Court has held that a document which attracts public interest immunity cannot be seized under a search warrant (*Jacobsen v Rogers* (1995) 127 ALR 159) - <http://www.aph.gov.au/house/committee/Priv/complete.pdf>

¹³⁰ Legislative Council Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC No 2*, Report 28, March 2004, p

Applying this test to the documents at issue in the Breen case, the claim of privilege was upheld. Summarising the Committee's findings at this second stage, the Clerk, John Evans, commented:

In its analysis of the documents and the application of parliamentary privilege in this case, the Committee noted that the documents in question had not been *created* for the purpose of parliamentary proceedings... However, the Committee found that the documents had been retained by the member for purposes incidental to the transaction of parliamentary proceedings. It further found that, as the documents had been retained for such a purpose, they fell within the scope of 'proceedings in Parliament' within the meaning of Article 9. In light of these findings, the Committee recommended that the House uphold the claim of privilege made by the member in this case.¹³¹

The third report, published in February 2006, returned to the long-term issue of the development of protocols for the execution of search warrants on Members' offices. The catalyst for the inquiry was the receipt in March 2005 by both the President and the Speaker of correspondence from the ICAC Commissioner proposing that a protocol be developed for the exercise of the ICAC's powers with respect to Members of Parliament. In June 2005 the Council's Privileges Committee adopted an Issues Paper which included a draft protocol for the execution of search warrants in Members' offices, a draft that drew upon protocols and procedures in place in other jurisdictions, notably the Commonwealth Parliament.¹³² This Issues Paper was sent to 11 agencies for comment, including the ICAC and NSW Police, following which a revised protocol was agreed to by the Committee for recommendation for adoption to the House. Consistent with the inquiry's terms of reference, the recommended protocol set out procedures to be followed:

- (a) in obtaining a search warrant;
- (b) prior to executing a search warrant;
- (c) in executing a search warrant;
- (d) if privilege or immunity is claimed; and
- (e) for the resolution of disputed claims of privilege.

8.

¹³¹ J Evans, 'Seizure of a Member's Documents under Search Warrants' (2004) 72 *Table* 58 at 64.

¹³² In early 2005, the Attorney General, the Minister for Justice and Customs, the Speaker of the House of Representatives and the President of the Senate signed a memorandum of understanding on the processes to be followed where the Australian Federal Police propose to execute a search warrant on the premises occupied by a Member of the Commonwealth Parliament. Office includes the Parliament House office, the electorate office and the residence of the Member. The full texts of the *Memorandum of Understanding on the Execution of Search Warrants In the Premises of Members of Parliament* and the *Australian Federal Police Guideline for the Execution of Search Warrants where Parliamentary Privilege May Be Involved* are set out at - <http://www.aph.gov.au/house/committee/Priv/complete.pdf>

In respect to disputed claims of privilege, the three-step test set out in the second report of March 2004 – *Parliamentary privilege and seizure of documents by ICAC No 2* was adopted by the Committee. In addition, a definition of ‘parliamentary proceedings’ was adopted in identical terms to s 16(2) of the Commonwealth *Parliamentary Privileges Act 1987*. One point of dispute that arose between the Committee on one side and ICAC on the other referred to the application of the three-step test. The Committee insisted that it was for the Clerk and the Member concerned to determine at first instance whether the documents in question were ‘proceedings in Parliament’ for the purposes of the test, and leaving it to the House to make a final determination. For its part, the ICAC rejected the three-step test,

suggesting instead that an independent arbiter (such as a Senior Counsel or retired Supreme Court judge) should be used to resolve any dispute over contested documents. This independent person is to provide a recommendation to the House in relation to each disputed document, which is also to be made available to the member and the Commission. Ultimately the House is to determine whether or not to uphold the claim, but must table its reasons for the decision.¹³³

The NSW Police expressed a preference for items in dispute to be held by the nearest or issuing court, rather than with the Clerk, while the issue of privilege is being determined. The NSW Police position was that

documents may be withheld from production only when in the public interest, and that the protection of confidentiality (as opposed to privilege) of documents must be balanced against the interests of justice, including the impact on law enforcement agencies investigations of serious criminal offences.¹³⁴

In response, the Privileges Committee said that neither the ICAC nor the NSW Police had ‘demonstrated an adequate understanding of the import of parliamentary privilege in relation to the seizure of documents’, adding it was ‘not willing to compromise on the important protection provided by the procedures in the draft protocol’. According to the Committee: ‘The Parliament alone is the proper authority to determine whether or not documents are privileged’.¹³⁵ In the event, to facilitate the expeditious handling of privilege claims, the Committee did agree to amend the Draft Protocol by providing that in cases where the House has been prorogued, or where the House is in recess and the integrity of the investigation is likely to be compromised, an independent arbiter should be appointed to verify the claim of privilege. The full text of the protocol, as recommended by the

¹³³ Legislative Council Standing Committee on Parliamentary Privilege and Ethics, *Protocol for execution of search warrants on members’ offices*, Report 33, February 2006, p 27.

¹³⁴ *Protocol for execution of search warrants on members’ offices*, Report 33, n 133, p 28.

¹³⁵ *Protocol for execution of search warrants on members’ offices*, Report 33, n 133, p 28. The Committee added: ‘If this becomes a point on which agreement cannot be reached with the respective Agencies, the House could resolve the issue by passing a resolution giving authority to the procedures to be followed’.

Privileges Committee, is set out in Chapter 5 of Report 33 of February 2006. To date, the proposed Protocol has not been adopted by the House. Nor has the suggestion of a common approach by the Council and Assembly been acted upon.¹³⁶

4.6 Search warrants, subpoenas and orders for discovery

The main question of principle to emerge from these events is whether it is only the subsequent use of seized material that may amount to an impeaching or questioning of parliamentary proceedings? Alternatively, does the mere seizure of such material constitute a breach of parliamentary privilege or immunity? As Twomey comments, the Crown Solicitor and the Solicitor General took the view that the mere seizure of documents does not of itself breach Article 9 ‘because it does not involve impeaching or questioning parliamentary proceedings in any court or place out of Parliament’. Based on advice from the Clerk of the Legislative Council and others, this interpretation was rejected by the Privileges Committee which concluded in its first report of 2003 that Article 9 ‘applies so as to prevent the seizure of a document under a search warrant, where, as a natural consequence of the seizure, a questioning or impeaching of proceedings in Parliament within the meaning of Article 9 necessarily results’.¹³⁷ Twomey went on to observe: ‘It is unclear, however, how such a questioning or impeaching of parliamentary proceedings “necessarily results” from the seizure of documents’.¹³⁸

Comparable issues arise in respect to subpoenas to produce documents and orders for discovery. Here again there is no clear line of authority. In *R v Saffron*¹³⁹ the NSW District Court permitted *in camera* evidence of a select committee of the Legislative Assembly to be produced on subpoena and made available for use by the defence, specifically to impeach the credit of a witness at a trial. Conversely, it was held in *O’Chee v Rowley* that parliamentary privilege prevented the production of documents in discovery. In her commentary Twomey adds, ‘although no clear reason was given why this was the case’.¹⁴⁰ However, McPherson JA did state:

Proceedings in Parliament will inevitably be hindered, impeded or impaired if members realise that acts of the kind done here for purposes of parliamentary

¹³⁶ The Assembly referred the matter to its Parliamentary Privilege and Ethics Committee on 9 June 2005.

¹³⁷ LC Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary Privilege and Seizure of Documents by ICAC*, Report 25, December 2003, p 36.

¹³⁸ Twomey, n 26, p 503.

¹³⁹ Unreported, NSWDC, 21 August 1987. Loveday J relied on the now disputed judgment of Hunt J in *R v Murphy* (1986) 5 NSWLR 18, preferring his restricted interpretation of the immunity afforded by Article 9 to the broader interpretation favoured in *Munday v Askin* [1982] 2 NSWLR 369 and *R v Jackson* (1987) 8 NSWLR 116. These conflicting interpretations are discussed in G Griffith, *Principles, Personalities, Politics: Parliamentary Privilege Cases in NSW*, NSW Parliamentary Library Background Paper No 1/2004, pp 36-48.

¹⁴⁰ Twomey, n 26, p 503.

debates or question time are vulnerable to compulsory court process of that kind. That is a state of affairs which, I am persuaded, both the Bill of Rights and the Act of 1987 are intended to prevent.¹⁴¹

An important distinction is that, while subpoenas and orders for discovery are associated with the judicial arm of government, it has been ruled that the issuing and execution of search warrants are administrative or executive acts in aid of an executive investigation. This was the finding in *Crane v Gething*, a case concerning documents relating to a Senator's travel arrangements, where French J concluded that it is 'not, in the ordinary course, for the courts to decide questions of privilege as between the executive and the Parliament in litigation between the subject and the executive'.¹⁴² *Odgers' Australian Senate Practice* comments that the 'finding was contrary to a submission made by the Senate, to the effect that parliamentary privilege protected from seizure only documents closely connected with proceedings in the Senate, and that the court could determine whether particular documents were so protected'. It added. 'This aspect of the judgment was not appealed and is *unlikely* to be regarded as authoritative' (emphasis added).¹⁴³

In effect, the execution of search warrants, the issuing of subpoenas and orders for discovery process remain areas of uncertainty in the law of parliamentary privilege.

¹⁴¹ (1997) 150 ALR 199 at 215.

¹⁴² (2000) 169 ALR 727 at 747.

¹⁴³ H Evans ed, *Odgers' Australian Senate Practice*, 11th ed, Department of the Senate 2004, p 46.

5. RECENT DEVELOPMENTS IN OTHER JURISDICTIONS

5.1 Commonwealth of Australia

At the Commonwealth level, parliamentary privilege is defined by statute under the *Parliamentary Privileges Act 1987*. The most contentious aspects of that Act concern s 16 which is headed ‘Parliamentary privilege in court proceedings’,¹⁴⁴ in particular subsections 16(2) and (3), the first providing a statutory definition of ‘proceedings in Parliament’, the second restricting the use made of such ‘proceedings’ in cases that come before courts and tribunals.¹⁴⁵

5.1.1 *Proceedings of Parliament – the interpretation of s 16(2)*

‘Proceedings of Parliament’ is defined under s 16(2) of the Commonwealth Act as follows:

(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.

Several issues arise, including whether s 16(2) is an exhaustive definition of Article 9? Alternatively, does s 16(2) extend the meaning of the term ‘proceedings in Parliament’, either by reference to ‘acts done...for the purposes of or incidental to, the transaction of the business of a House or of a committee’ and/or by the reference in s 16(2)(c) to ‘the preparation of a document for purposes of or incidental to the transacting of any such business’? In *O’Chee v Rowley* this alternative view was adopted by McPherson JA (with

¹⁴⁴ By s 16(1), the application of the Bill of Rights to the Commonwealth Parliament is affirmed. By s 16(4) a specific restriction is placed on the admission into evidence of submissions presented to a House or committee, as well as on the admission of oral evidence that has not in this case been published by a House or committee. As noted, the Commonwealth Act was enacted to counteract the ruling in *R v Murphy* (1986) 5 NSWLR 18 where Hunt J permitted cross-examination of witnesses on their prior statements made to a parliamentary committee. Subsections 16(5) and (6) make exceptions to the general rules in s 16(3), for example, in the case of s 57 of the Commonwealth Constitution and statutory interpretation.

¹⁴⁵ For what is meant by ‘courts or tribunals’ see section [6.7] of this paper.

whom Moynihan J agreed),¹⁴⁶ who said that in this statutory form Article 9 can be reproduced in either of the following ‘extended’ forms:

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

Or

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

The issue is of more than academic interest for NSW. As the previous discussion on the execution of search warrants in Members’ offices showed, in its report of March 2004 – *Parliamentary privilege and seizure of documents by ICAC No 2* – the Privileges Committee of the NSW Legislative Council, following *O’Chee v Rowley*, based its interpretation of the term ‘proceedings in Parliament’ on the first limb of the supposedly ‘extended’ meaning of Article 9. The potential difficulty is that, if s 16(2) extends the meaning of the term beyond Article 9, then its application to NSW may be doubtful. That is not to say that the documents of concern to the Privileges Committee would not have been privileged. Article 9 itself is wide enough to cover documents Members themselves have generated for the purpose of transacting parliamentary business.¹⁴⁷ At issue, however, were documents that, while they had not been brought into existence for this purpose, had been subsequently used to transact parliamentary business.

In *O’Chee v Rowley* a Senator was sued for remarks made outside Parliament about a matter he had previously raised in the House. At first instance, the Queensland Supreme Court had ordered that he produce for inspection documents for which the Senator claimed the protection of parliamentary privilege (including communications from constituents, none of which had been tabled in the House or submitted to any parliamentary committee). That decision was overturned by the Queensland Court of Appeal which held that s 16(2) covers all documents supplied to Members by non-members ‘but only if members have chosen to keep the documents for the purpose of transacting parliamentary business’.

The exact scope of the protection remains to be determined. In a previous briefing paper on copyright and parliamentary privilege it was stated:

This indicates that any document that comes into the possession of a Federal MP at this preparatory stage, which the Member then chooses to keep for the purpose of transacting parliamentary business, would be protected by the doctrine of parliamentary privilege. Moreover, anything copied or reproduced for this purpose

¹⁴⁶ (1997) 150 ALR 199 at 207-208.

¹⁴⁷ E Campbell, *Parliamentary Privilege*, The Federation Press 2003, p 15; (1997) 150 ALR 199 at 206.

would be protected in the same way and therefore shielded from the operation of the copyright law.¹⁴⁸

After noting this observation with approval, in the ACT case of *Szwarcbord v Gallop*¹⁴⁹ Crispin J went on to say:

if a member obtains a document that has been prepared for some reason unrelated to the business of the Assembly but elects to retain it for such purpose, s 16(3) would prevent the admission of any evidence of that retention or any subsequent use for such a purpose...it would also apply to any copies brought into existence for such a purpose.¹⁵⁰

Certain limits need to be recognised. As McPherson JA observed in *O'Chee v Rowley*:

It is not, I think, possible for an outsider to manufacture parliamentary privilege for a document by the artifice of planting the document upon a parliamentarian...The privilege is not attracted to a document by s 16(2) until at earliest the parliamentary member or his or her agents does some act with respect to it for purposes of transacting business in the House. Junk mail does not, merely by its being delivered, attract privilege of Parliament.¹⁵¹

Hard and fast lines are difficult to draw, for the reason that much will depend on the circumstances of a particular case. As discussed later in this paper the provision of information to Members by non-members remains a disputed area in the law of parliamentary privilege.¹⁵² Difficulties of interpretation can also arise in other circumstances where it must be decided whether particular documents or acts fall within 'proceedings of Parliament'. For example, Campbell noted that, in *Crane v Gething*,¹⁵³ a judge of the Federal Court held that certain documents relating to a Senator's travel arrangements, held by the Senator in his electorate and parliamentary offices, were not proceedings in Parliament.¹⁵⁴ French J observed:

I would not have regarded the itineraries as falling within the protected class. The fact that they would include names of constituents who have made representations or have had meetings with the Senator and which neither they nor the Senator

¹⁴⁸ G Griffith, *Copyright, Privilege and Members of Parliament*, NSW Parliamentary Library Briefing Paper No 13/2000, p 7.

¹⁴⁹ (2002) 167 FLR 262. This case is discussed further in a later section of this paper.

¹⁵⁰ (2002) 167 FLR 262 at para 22.

¹⁵¹ (1997) 150 ALR 199 at 209.

¹⁵² In section [6.5] of this paper.

¹⁵³ (2000) 169 ALR 727.

¹⁵⁴ Campbell, n 147, p 15.

would want to make public does not of itself raise an issue of parliamentary privilege. The documents do not otherwise answer the description of s 16.¹⁵⁵

If a rule is to be found, it is in the submission the Senate made in this case, to the effect that parliamentary privilege extends only to documents ‘closely connected’ with proceedings in the Parliament.¹⁵⁶

5.1.2 *The use of ‘parliamentary proceedings’ as evidence – the interpretation of s 16(3)*

In the 1980s a narrow interpretation of the immunity against ‘impeaching or questioning proceedings in Parliament’ was offered in the NSW case of *R v Murphy*,¹⁵⁷ in reaction to which the Commonwealth enacted a provision reflecting the opposing, broad construction of the immunity. Section 16 (3) of the *Parliamentary Privileges Act 1987* provides:

- (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.

Reflecting on s 16(3), Campbell writes:

In *Prebble’s* case the Judicial Commission of the Privy Council described the provision as declaratory of one of the effects of Article 9 of the *Bill of Rights 1689*. Some Australian judges have taken the same view,¹⁵⁸ but others have suggested that it extends the operation of Article 9.¹⁵⁹ The subsection is certainly cast in wide terms and one which can present difficulties for courts and tribunals.¹⁶⁰

¹⁵⁵ (2000) 169 ALR 727 at para 43.

¹⁵⁶ Odgers, n 143, p 46.

¹⁵⁷ (1986) 5 NSWLR 18.

¹⁵⁸ *Amann Aviation Pty Ltd v Commonwealth* (1988) 81 ALR 710; *Laurence and Katter* (1996) 141 ALR 447 at 481 (Fitzgerald P); *Rann v Olsen* (2000) 76 SASR 450 at paras 225 and 229 (Prior J).

¹⁵⁹ *Laurence and Katter* (1996) 141 ALR 447 at 484 (Pincus JA); *Rann v Olsen* (2000) 76 SASR 450 at paras 237, 244 and 245 (Perry J).

¹⁶⁰ Campbell, *Parliamentary Privilege*, n 147, p 93.

Federally, the three leading cases are *Laurence v Katter*,¹⁶¹ *Rann v Olsen*¹⁶² and *R v Theophanous*,¹⁶³ all of which grappled with the question of the construction of s 16(3). From her review of this case law, Campbell concluded that in *Theophanous* a broad construction was favoured by the Victorian Court of Appeal, basically in line with that adopted by the Supreme Court of South Australia in *Rann v Olsen*. The court agreed that s 16(3) should not be read down in the manner suggested by Davies JA in *Laurence v Katter*.¹⁶⁴ In particular, consistent with the views expressed by Doyle CJ, s 16(3) should not be read as subject to the proviso that

something apparently made unlawful by the provision of 16(3) is not to be unlawful unless, in the opinion of the court in which the matter arises, the apparently prohibited activity in fact impairs freedom of speech in Parliament of the person whose statements are to be challenged.¹⁶⁵

Thus, if a report, statement or other activity is defined to be a ‘proceeding in Parliament’, it is not for the courts to decide on the facts of a particular case if freedom of speech would indeed be impaired by its admission into evidence. Once under the protective umbrella of parliamentary proceedings, the material in question is to stay there.

¹⁶¹ (1996) 141 ALR 447. In *Laurence v Katter* the plaintiff sought to sue a federal politician, Mr Katter, over allegations of impropriety the Senator had made in the Commonwealth Parliament and later adhering to but not repeating these statements in interviews on the radio and television. The plaintiff could only establish his cause of action by proving that what the Senator had said in Parliament was false and defamatory. By majority, the Court of Appeal held that s 16(3) would not preclude admission of evidence of what had been said in Parliament. However, Pincus and Davies JJA differed as to their reasons. For Pincus J, s 16(3) had to be read subject to the implied constitutional freedom of political communication. For Davies JA, s 16(3) did not preclude reception of *Hansard* solely to prove, as a historical fact, what is incorporated in statements made by a Member outside Parliament – Campbell, n 12, p 95. The issue is discussed further in section [6.3.1] of this paper.

¹⁶² (2000) 76 SASR 450. *Rann v Olsen* concerned a plaintiff (Rann) who had made statements before a committee of the Commonwealth Parliament and then complained about what had been said outside Parliament when Olsen alleged that Rann had lied to the committee. In evidence before the committee Rann had claimed that Olsen was the source of leaked Cabinet information. The Supreme Court ruled that s 16(3) would preclude admission of evidence of what Rann had said before the parliamentary committee in order to prove that he had lied. A stay of proceedings was granted on the grounds that the defendant (Olsen) would be precluded by virtue of 16(3) from relying on the defence of truth.

¹⁶³ [2003] VSCA 78. Dr Andrew Theophanous, a former Member of the House of Representatives, appealed against his conviction *inter alia* on the ground that, at the trial, evidence had been received of statements he had made in the course of debate in Parliament and his answers to questions about those statements in cross-examination. The Court of Appeal held that, while the impugned evidence was introduced in breach of s 16(3), its introduction in the circumstances ‘caused no substantial miscarriage in the trial’ (at para 72).

¹⁶⁴ (1996) 141 ALR 447 at 489-490.

¹⁶⁵ [2003] VSCA 78 at para 69; *Rann v Olsen* (2000) 76 SASR 450 at para 113; Campbell, n 2, p 97.

However, the scope for uncertainty remains. In *Rann v Olsen*, Doyle CJ went on to say the principle of non-intervention ‘cannot be pressed too far’, stating that a

court is not precluded from making a finding on a matter simply because Parliament has considered or debated the matter, or by some means made a finding upon it. It is only when the Court is invited to challenge the parliamentary consideration of the matter that the principle of non-intervention operates.¹⁶⁶

Doyle CJ relied in this instance on the decision of the English Court of Appeal in *Hamilton v Al Fayed*.¹⁶⁷ Suggesting the complexities involved in applying a test of this kind, the House of Lords later disagreed with the Court of Appeal’s decision to admit two parliamentary reports into evidence.¹⁶⁸

The interpretation of s 16(3) awaits authoritative interpretation. *Laurence v Katter* was in fact the subject of special leave to appeal to the High Court, but the matter was settled before the appeal could be heard. As it was observed in *Theophanous*, ‘the scope and validity of s 16(3) of the Act have yet to be determined by the High Court’.¹⁶⁹

5.1.3 Constitutional issues - the implied freedom of political communication

At least two constitutional questions are posed in respect to s 16(3) of the *Parliamentary Privileges Act 1987* (Cth). One is whether, if afforded a broad interpretation, it is a law that unduly impedes or interferes with the exercise by the courts of the judicial power of the Commonwealth? The second is whether s 16(3) unduly burdens the freedom of speech in respect of government and political matters, as provided by the implied constitutional freedom of political communication?¹⁷⁰

¹⁶⁶ (2000) 76 SASR 450 at para 122. This comment was cited with approval by Debelle J in the South Australian case of *Rowan v Cornwall (No 5)* [2002] SASC 160. There it was suggested that ‘There may...be room at least for allowing questions which seek to do no more than clarify what a member meant when using a certain expression and for allowing inferences to be drawn when an action is brought in respect of something done or said outside the Parliament’ (at para 113). In this defamation case Dr Cornwall had been questioned on the statements he had made in the Legislative Council, which was clearly inappropriate. In the circumstances, Debelle J ruled that the answers to these questions would be disregarded. They were few in number and of no probative value (at para 106).

¹⁶⁷ [1999] 3 All ER 317. The case is discussed at section **[5.4.2]** of this paper.

¹⁶⁸ *Hamilton v Al Fayed* [2001] 1 AC 395.

¹⁶⁹ [2003] VSCA 78 at para 67.

¹⁷⁰ [2003] VSCA 78 at para 67. For the High Court formulation of the implied freedom see – *Lange v ABC* (1997) 189 CLR 520. *Lange* is authority for the proposition that the implied freedom is grounded in the ‘text and structure’ of the Commonwealth Constitution. Specifically, the implied freedom is an indispensable incident of the system of representative government created by ss 7 and 24 and related provisions. While it guarantees free elections for the Commonwealth Parliament, the implied freedom is not restricted to election times but extends to all ‘government and political matters’. Moreover, the implied freedom does not confer private rights on individuals; rather it operates to limit

The constitutional validity of s 16(3) was at issue in *Laurence v Katter*¹⁷¹ and *Rann v Olsen*.¹⁷² Both cases recognised that parliamentary privilege may indeed burden the implied constitutional freedom, in particular the freedom to criticise parliamentary proceedings by preventing a defendant in defamation proceedings from establishing certain defences, notably the defence of truth.¹⁷³ In *Laurence v Katter* Pincus J, based on concerns about the implied constitutional freedom, argued that s 16(3) did not even apply in suits for defamation. His view was that the scope of the protection afforded by subsection 16(3)(c), preventing the drawing of inferences or conclusions from anything forming part of proceedings in Parliament, interfered with the freedom to attack or analyse what happened in Parliament by distorting to the point of absurdity the way in which defamation suits relating to federal politicians were to be conducted.¹⁷⁴ The potential of parliamentary privilege to burden the implied constitutional freedom was also recognised in *Rann v Olsen*. However, Doyle CJ observed:

On the other hand, the burden should not be overstated. It is difficult to say how often it will arise. And it needs to be remembered that a burden is imposed only when the defence to an action for libel or slander involves directly challenging or relying on the truth of something said in the course of proceedings in Parliament.¹⁷⁵

For Doyle CJ, with whom the rest of the court agreed, the burden was in any event reasonably appropriate and adapted to serve the legitimate ends of freedom of speech in Parliament and the ‘principle of non-intervention’ – that ‘in certain respects the courts regard Parliament as the exclusive judge of what transpires in the course of its proceedings...’.¹⁷⁶ In light of this, Campbell concluded that the balance of judicial opinion is that s 16(3)

legislative power and does so for all Australian Parliaments.

¹⁷¹ (1996) 141 ALR 447.

¹⁷² [2000] 76 SASR 450.

¹⁷³ The NSW *Defamation Act 2005* was introduced as part of a uniform defamation regime under which, by s 25, the ‘defence of justification’ reflects the position at general law where truth alone is a defence to the publication of a defamatory matter. Under s 25, the defendant must prove that the defamatory imputations carried by the matter of which the plaintiff complains are ‘substantially true’, a term defined in s 4 to mean true in substance or not materially different from the truth. Prior to the passing of the 2005 Act, in NSW the defendant had to prove that the matter was true and that it was in the public interest for it to be published.

¹⁷⁴ (1996) 141 ALR 447 at 486.

¹⁷⁵ [2000] 76 SASR 450 at 478.

¹⁷⁶ [2000] 76 SASR 450 at 481.

does not violate the implied constitutional freedom of political communication and does not have to be read down in light of that freedom. This important constitutional issue does, however, await final determination by the High Court.¹⁷⁷

The same might be said of the potential impact of the implied constitutional freedom on Article 9 of the *Bill of Rights 1689*, both to limit the immunity it grants and to protect parliamentary privilege from statutory abrogation or derogation. This last potential was recognised by the NSW Court of Appeal in *Arena v Nader*,¹⁷⁸ where it was accepted that the implied freedom ‘controls the power of the State Parliament to enact legislation modifying Article 9...in its application to that Parliament’.¹⁷⁹

5.2 Queensland

5.2.1 *Parliament of Queensland Act 2001 and Constitution of Queensland Act 2001*

The passing of the *Parliament of Queensland Act 2001* and the *Constitution of Queensland 2001* were the result of a lengthy and thorough review of the Queensland Constitution, with a view to consolidating and modernising existing constitutional provisions.¹⁸⁰ One alteration is that the powers, rights and immunities of the Queensland Legislative Assembly are now defined to be those under a specific Act or, until so defined, as those of the UK House of Commons at 1 January 1901 ‘at the establishment of the Commonwealth’ of Australia.¹⁸¹ This replaces s 40A of the *Constitution Act 1867* (Qld) which defined the powers, rights and immunities as those exercised ‘for the time being’ by the UK House of

¹⁷⁷ Campbell, *Parliamentary Privilege*, n 147, p 103. Campbell comments in relation to *Rann v Olsen* that it was held that ‘s 16(3) would preclude admission of evidence of what Mr Rann had said before the federal parliamentary committee in order to prove that he had lied. The court was not, however, persuaded that s 16(3) would necessarily preclude admission of evidence of what Mr Rann had said under parliamentary privilege in support of Mr Olsen’s defence of qualified privilege’ (page 96).

¹⁷⁸ [1997] 42 NSWLR 427.

¹⁷⁹ E Campbell, ‘Parliamentary privilege and admissibility of evidence’ (1999) 27 *Federal Law Review* 367 at 383. In that case it was decided that the *Special Commissions of Inquiry Amendment Act 1997* (NSW) did not violate the freedom.

¹⁸⁰ For an overview see – K Newton, ‘Recent constitutional developments in Queensland’, (2005) 20(1) *Australasian Parliamentary Review* 144.

¹⁸¹ *Constitution of Queensland 2001*, s 9. Note that in 2004 the *Western Australian Parliamentary Privileges Act 1891* was amended to specify that the privileges, immunities and powers of the Western Australian Parliament are those of ‘Commons House of Parliament of the United Kingdom and its members and committees as at 1 January 1989’. A consequential amendment was also made to the *Constitution Act 1889* (WA) – see *Constitution (Parliamentary Privileges) Amendment Act 2004* (WA). These amendments were consistent with recommendations made in May 2004 by the Legislative Assembly’s Procedure and Privileges Committee. Since 1890 any change made to the law of privilege in the UK House of Commons had applied immediately and automatically to both Houses of the Parliament of Western Australia. For a commentary see – A Young, ‘Pegging parliamentary privilege in Western Australia’ (2006) 21(2) *Australasian Parliamentary Review* 61-77.

Commons. The concern was that the phrase ‘for the time being’ might have unintended consequences for the Queensland Legislative Assembly, which would have to automatically adopt any changes made by the House of Commons to its parliamentary privileges. In effect, the 2001 amendment brings Queensland into line with the Commonwealth.¹⁸²

For present purposes, the key provisions of the *Parliament of Queensland Act 2001* are ss 8, 9 and 25-36. Section 8 restates Article 9 of the *Bill of Rights 1689*; s 9 defines ‘proceedings in the Assembly’ in similar terms to s 16(2) of the Commonwealth legislation. By s 9(3), an exception is made to the protection afforded to documents tabled in, or presented or submitted to, the Assembly or parliamentary committees under s 9(2)(d). Section 9(3) states that parliamentary privilege does not apply to a document of this type:

- (a) in relation to a purpose for which it was brought into existence other than for the purpose of being tabled in, or presented or submitted to, the Assembly or a committee or an inquiry; and
- (b) if the document has been authorised by the Assembly or the committee to be published.

The example provided is:

A document evidencing fraud in a department tabled at a Public Accounts Committee inquiry can be used in a criminal prosecution for fraud if the document was not created for the committee’s inquiry and the committee has authorised the document to be published.

Applying this approach to the three-step test for the execution of search warrants, as recommended by the NSW Legislative Council Privileges Committee, it would mean that ‘subsequent use’ in a parliamentary context and ‘retention’ of a document by a Member would not be sufficient to grant protection: (a) if that document had not in the first instance been ‘brought into existence’ for a parliamentary purpose; and (b) if it had not afterwards been published under the authority of the House or a committee.

Sections 25 to 35 set out the powers of the House or a parliamentary committee to order the production of papers, to attend before the Assembly or one its committees and to answer questions. By s 34 two grounds for objecting to answering a question or producing a document are provided, as follows: (a) if the answer or document is of a private nature and does not affect the subject of the inquiry; and (b) if giving the answer or providing the document would tend to breach the privilege against self-incrimination.

Section 36(1) then deals with the inadmissibility of evidence given before or provided to a parliamentary committee. By s 36(2) three exceptions are made to this rule of inadmissibility, so that evidence given before or provided to a parliamentary committee is admissible in: (a) in proceedings in the Assembly or before a committee; (b) in criminal proceedings dealing with such matters as the giving of false evidence before Parliament

¹⁸²

Constitution of the Commonwealth of Australia, s 49.

(the Criminal Code s 57); and (c) in criminal proceedings where a witness has refused to answer a question or produce a document to the Assembly or a committee (as in Criminal Code s 58).

5.3 South Australia

By virtue of sections 9 and 38 of the *Constitution Act 1934* (SA), the Houses of the South Australian Parliament and their members have the same privileges as those enjoyed by the House of Commons as at 24 October 1856.

5.3.1 *Parliamentary Privilege (Special Temporary Abrogation) Bill 2005*

On 4 April 2005 the Attorney General, MJ Atkinson, introduced a bill with radical implications for parliamentary privilege. This was the Parliamentary Privilege (Special Temporary Abrogation) Bill. In the event, in the face of a national outcry, the Government did not proceed with the bill which lapsed on the prorogation of the House of Assembly. Nonetheless, its radical character and the fact that it was a Government measure makes it worthy of consideration.

The bill arose from claims made by the Speaker and Member for Hammond, Peter Lewis, that documentary material in his possession or in the possession of his assistants evidenced, or might evidence, criminal sexual misconduct on the part of another MP and others. It was further asserted by Mr Lewis that parliamentary privilege prevented police officers from exercising their usual investigatory powers over the alleged documents. All this was explained in the Preamble to the Bill, which went on to say

The Parliament intends by this measure to protect the public interest by ensuring that the exercise of powers under a search warrant in relation to such documentary material, and the subsequent use in criminal proceedings of any documentary material obtained through the exercise of such powers, does not constitute a breach of Parliamentary privilege....

The Parliament also intends by this measure to guard against serious harm to personal reputations and the dignity and integrity of the Parliament by ensuring that similar allegations cannot be made in the course of Parliamentary proceedings or in a published report of Parliamentary proceedings with the protection of Parliamentary privilege.

To this end, cl 4 of the Bill required the removal of any reference to a named person who was alleged to have been involved in criminal sexual misconduct or related criminal misconduct from *Hansard*, or from any draft of the record of proceedings. The proposed section was to come into effect at 2 pm on 4 April 2005. Prior to the Bill's introduction, Mr Lewis had in fact resigned from the Speakership, but not before giving his own account of events. No serving MPs were actually mentioned, but he did claim that paedophiles were active in 'high public office – that is, the judiciary, the senior ranks of human services portfolios, some police, and MPs across the nation, especially within the ranks of the Labor Party'.¹⁸³

¹⁸³

SA House of Assembly, 4.4.2005, p 2091.

Responding to the Bill, the *Sydney Morning Herald* said that legislation should not be used like a ‘tap’ to turn off privilege ‘each time a Parliament (and here, read “government”) wants to silence a troublesome MP’.¹⁸⁴ Likewise, while Professor George Williams accepted that parliamentary privilege has been abused for political and other reasons, he went on to say:

I don't think that detracts from the fact that it's vital and necessary to our democracy, and that's because there are so few places in our society that important points can be raised without fear of prosecution in the courts. It is a privilege, not a right, and as a privilege I think that Parliament ought to do more to make sure that its members use it in a responsible way.¹⁸⁵

While the Bill did not succeed, it does highlight the controversies that have surrounded the use of parliamentary privilege in recent years. Most prominent at the Commonwealth level was the allegation by Senator Bill Heffernan in March 2002 suggesting that Justice Michael Kirby was not ‘fit and proper to sit in judgment of people charged with sexual offences against children’. The Law Society of NSW commented:

Parliamentary privilege carries with it substantial attendant responsibilities. An abuse of those responsibilities potentially damages the community’s faith in the judicial system and undermines parliamentary process. It is time for protocols to be out in place in relation to the proper use of parliamentary privilege.¹⁸⁶

5.4 United Kingdom

5.4.1 ‘The test of necessity’ - First Report of the Joint Committee on Parliamentary Privilege, 1999

It is not often that a parliamentary committee report occupies a landmark position in its field of inquiry. A rare example is the First Report of the Joint Committee of the Lords and Commons on Parliamentary Privilege, analysed assiduously as it is in the academic literature and referred to with approval by the courts in *Buchanan v Jennings*,¹⁸⁷ *Canada (House of Commons) v Vaid*¹⁸⁸ and elsewhere. The fact that its recommendations have

¹⁸⁴ Editorial, ‘A privilege doing MPs business’, *Sydney Morning Herald*, 12.4.2005.

¹⁸⁵ ‘Concern over SA move to restrict parliamentary privilege’, 5.4.2005, <http://www.abc.net.au/pm/content/2005/s1338846.htm> (accessed 24.5.2006)

¹⁸⁶ ‘Senator Heffernan unfairly attacks Australia’s judiciary’, 14.3.2005 - <http://www.lawsociety.com.au/page.asp?PartID=435> (accessed 24.5.2006). For a detailed account see – E Campbell and M Groves, ‘Attacks on judges under parliamentary privilege: a sorry Australian episode’ [2002] *Public Law* 626.

¹⁸⁷ [2005] 1 AC 115.

¹⁸⁸ [2005] 1 SCR 667. The Court is said to have ‘relied on a British parliamentary report for its understanding of how privilege should be understood and applied’ – S Joyal, ‘The Vaid case and the protection of parliamentary employees against human rights discrimination’ (Winter

largely not been acted upon is another matter.

This is not the place to deal with the Joint Committee's recommendations in detail. It is enough to note the general approach adopted in the report, where the emphasis is on a 'fair and reasonable' statement of parliamentary privilege that meets 'the current needs of Parliament'.¹⁸⁹ Recognised as a starting point is the justification for the existence of parliamentary privilege, as essential to the effective exercise by Members of Parliament of their parliamentary functions of inquiry, scrutiny and review. It is also recognised that the scope of the immunities and rights provided by parliamentary privilege are not to be overstated. The report states:

We have asked ourselves, across the field of parliamentary privilege, whether each particular right or immunity currently existing is necessary today, in its present form, for the effective functioning of Parliament.¹⁹⁰

It is this 'test of necessity' which is central to the report's tenor and which has met with judicial approval.¹⁹¹ Overall, it might be said to lead away from a 'fundamentalist' interpretation of parliamentary privilege, towards a restricted view in which the rights and immunities afforded by privilege must be supported by reasoned argument. The mere repetition of hard and fast rules, based on Blackstone and other authorities, of 'non-intervention' by the courts on one side and the 'exclusive cognisance' of Parliament over its internal affairs on the other will not suffice. The report continues:

Parliament should be vigilant to retain rights and immunities which pass this test, so that it keeps the protection it needs. Parliament should be equally vigorous in discarding rights and immunities not strictly necessary for its effective functioning in today's conditions.¹⁹²

Of Article 9 of the *Bill of Rights 1689*, the report describes this as 'the single most important parliamentary privilege', providing legal immunity that is both 'comprehensive and absolute'. To this it adds, 'Article 9 should therefore be confined to activities justifying such a high degree of protection, and its boundaries should be clear'.¹⁹³ The term 'proceedings in Parliament' should not, in the Joint Committee's view, cover constituency correspondence; nor should it be extended to include correspondence between Members and Ministers. The Joint Committee argued that, in principle, the 'exceptional' protection provided by Article 9 'should remain confined to the core activities of Parliament, unless a

2005-06) *Canadian Parliamentary Review* 2.

¹⁸⁹ Joint Committee on Parliamentary Privilege, n 2, p 1.

¹⁹⁰ Joint Committee on Parliamentary Privilege, n 2, p 8.

¹⁹¹ *Canada (House of Commons) v Vaid* [2005] SCC 30 at para 41.

¹⁹² Joint Committee on Parliamentary Privilege, n 2, p 8.

¹⁹³ Joint Committee on Parliamentary Privilege, n 2, p 1.

pressing need is shown for an extension'.¹⁹⁴ Similarly, it was argued that

The right of each House to administer its internal affairs within its precincts would be confined to activities directly or closely related to proceedings in Parliament. Parliament should no longer be a statute-free zone in respect of Acts of Parliament relating to matters such as health and safety and data protection. In future, when Parliament is to be exempt, a reasoned case should be made out and debated as the legislation proceeds through Parliament.¹⁹⁵

Among the recommendations of the First Report were that the term 'proceedings in Parliament' should be defined in statute, based on s 16(2) of the *Parliamentary Privilege Act 1987* (Cth). Likewise, the term 'place out of Parliament' should be defined in statute to include 'any tribunal having power to examine witnesses on oath'.¹⁹⁶ This was to be part of an Act 'codifying parliamentary privilege as a whole'.

A further recommendation was that the procedure committee of each House should examine and report on the desirability in today's circumstances of the convention that one House does not compel the attendance of a Member of the other House before its committees. The work of parliamentary committees was said to be 'an essential element of Parliament's scrutiny of the executive', requiring attendance by Ministers and former Ministers 'to answer questions relating to their periods in office'.¹⁹⁷

5.4.2 Waiver of privilege – s 13 of the *Defamation Act (UK)*

The case of *Hamilton v Al Fayed*¹⁹⁸ arose out of the 'cash for questions' scandal of the 1990s. In January 1997, the defendant (Al Fayed) alleged on a TV program that the plaintiff, the MP Neil Hamilton, had sought and accepted cash from him for asking questions on his behalf in the House of Commons. Two parliamentary investigations and reports followed, one by the Parliamentary Commissioner for Standards which concluded that Hamilton had received cash payments from Al Fayed, the other by the Committee on Standards and Privileges, whose report was approved by the House of Commons in November 1997. In January 1998, Hamilton commenced proceedings against Al Fayed for defamation in respect to the allegations made by him on the TV program. In doing so, Hamilton waived his parliamentary privilege, pursuant to s 13 of the *Defamation Act*, as amended in 1996.¹⁹⁹ This provision enables an MP (or any other participant in

¹⁹⁴ Joint Committee on Parliamentary Privilege, n 2, p 34.

¹⁹⁵ Joint Committee on Parliamentary Privilege, n 2, pp 2-3.

¹⁹⁶ Joint Committee on Parliamentary Privilege, n 2, p 30. This was to be 'coupled with a provision that article 9 shall not apply to a tribunal appointed under the Tribunals of Inquiry (Evidence) Act 1921 when both House so resolve at the time the tribunal is established'.

¹⁹⁷ Joint Committee on Parliamentary Privilege, n 2, p 64.

¹⁹⁸ [2001] 1 AC 395.

¹⁹⁹ For the background to s 13 see – Joint Committee on Parliamentary Privilege, n 2, p 23. For a commentary on s 13 and 'waiver of privilege' generally see – Campbell, *Parliamentary*

parliamentary proceedings) who considers he has been defamed to waive parliamentary privilege and bring proceedings for defamation even though such proceedings would otherwise amount to a breach of parliamentary privilege. On his side, Al Fayed sought to strike out Hamilton's claim on the grounds that the hearing of the action: (a) would contravene Article 9's prohibition against questioning 'proceedings in Parliament'; and (b) would constitute a collateral attack on Parliament's own investigation into the MP's conduct.

The final ruling on the 'parliamentary privilege' aspect to the case was delivered by the House of Lords, in a unanimous judgment delivered by Lord Browne-Wilkinson. Curiously, it was only at this stage that the determining influence of the waiver of privilege under s 13 was given its full weight. At first instance, Popplewell J had not even referred directly to s 13.²⁰⁰ Subsequently, the Court of Appeal had indeed concluded that s 13 'trumped' parliamentary privilege, but only after a lengthy discussion as to whether the two parliamentary investigations were 'proceedings in Parliament'.²⁰¹

In summary, the Court of Appeal held that the report of the Parliamentary Commissioner for Standards and that of the Committee on Standards and Privileges were 'proceedings in Parliament' and that Popplewell J had been in error and had himself breached parliamentary privilege by criticizing the procedures adopted by the Parliamentary Commissioner for Standards. To this point the Court of Appeal and the House of Lords were in agreement. However, the Court of Appeal had then ruled that parliamentary privilege would not have been infringed if the action had gone forward. On the facts of the case, the House of Lords could not accept this argument, saying that it would have been 'impossible for Mr Al Fayed to have had a fair trial in this action if he had been precluded from challenging the evidence produced to the parliamentary committees on behalf of Mr Hamilton'. Lord Browne-Wilkinson concluded: 'Had it not been for section 13, the court should, in my judgment, have stayed the libel action brought by Mr Hamilton...'.²⁰²

Lord Browne-Wilkinson made it clear that he had only dealt with this question in order to avoid confusion in the law of parliamentary privilege.²⁰³ As he said at the outset, 'section 13 affects all the issues in this case'.²⁰⁴ In effect, since Hamilton had chosen to rely on s 13, the trial of the action could proceed, notwithstanding the infringement of parliamentary privilege that would result.

In its First Report of 1999, the Joint Committee on Parliamentary Privilege recommended that s 13 be repealed, arguing that it had 'created indefensible anomalies of its own which

Privilege, n 147, Ch 8.

²⁰⁰ [2001] 1 AC 395 at 405-406.

²⁰¹ *Hamilton v Al Fayed* [1999] 3 All ER 317.

²⁰² [2001] 1 AC 395 at 408.

²⁰³ [2001] 1 AC 395 at 407.

²⁰⁴ [2001] 1 AC 395 at 398.

should not be allowed to continue'. The cure s 13 sought to achieve was to rectify the situation where an individual MP (or a witness before a parliamentary committee) is precluded by parliamentary privilege from taking action to clear their name when it is alleged that what they have said in a parliamentary context is untrue. For the Joint Committee, the cure was worse than the disease:

A fundamental flaw is that it undermines the basis of privilege: freedom of speech is the privilege of the House as a whole and not of the individual member in his own right, although an individual member can assert and rely on it. Application of the new provision could also be impracticable in complicated cases; for example, where two members, or a member and a non-member, are closely involved in the same action and one waives privilege and the other does not. Section 13 is also anomalous: it is available only in defamation proceedings. No similar waiver is available for any criminal action, or any other form of civil action.²⁰⁵

²⁰⁵

Joint Committee on Parliamentary Privilege, n 2, pp 24-25.

6. ISSUES

6.1 Parliamentary proceedings and party Caucus meetings

In *Rata v Attorney-General*, a High Court of New Zealand case from 1997, Master Thompson held that, as Caucus is integral to the parliamentary system, in the interest of ‘robust debate’ what is said there must be absolutely privileged. He concluded:

(a) As a matter of principle the caucus system as it has developed in New Zealand is an integral part of the parliamentary process and that all matters transacted in caucus are inextricably linked to Parliament...

(b) If that general proposition is wrong then any discussion and related papers will be privileged when they relate to the passage of legislation (present or future) or any matter which is before the House...²⁰⁶

This is contrary to the traditional view that party caucuses are not regarded as proceedings in Parliament even though they occur within its precincts.²⁰⁷ The decision in *Rata* has been criticised by David McGee, Clerk of the New Zealand House of Representatives who called it a ‘perverse interpretation’.²⁰⁸ Equally critical of the approach taken in *Rata* is PA Joseph, for whom the decision was ‘without precedent or support’. According to Joseph:

Caucus meetings do not qualify as ‘proceedings in Parliament’. Caucus does not transact the business of the House but is a party-political meeting for coordinating strategies that may or may not relate to proceedings in Parliament.... The correct view is that political meetings are not proceedings in Parliament and lack protection of parliamentary privilege.²⁰⁹

In *Huata v Prebble & Anor*²¹⁰ this traditional view was affirmed by the New Zealand Court of Appeal. At issue in *Huata* was the judicial review of provisions of the disqualification legislation which placed this process in the hands of the political party caucus to be operated by its leader with the agreement of two-thirds of the caucus members. The question for the Court of Appeal was whether the Parliament should have

²⁰⁶ *Rata v A-G* (1997) 10 PRNZ 304 at 313.

²⁰⁷ Explanatory Note, *Parliamentary Privilege Bill 1994 (NZ)*, p 9; *R v Turnbull* [1958] Tas SR 80 at 84.

²⁰⁸ D, McGee, ‘Parliament and Caucus’, *New Zealand Law Journal*, April 1997, p 138. According to McGee, ‘The Master’s conclusion that caucus is now legally an integral part of Parliament in New Zealand is a radical one indeed. As he acknowledges, this is not the view of textbook writers in New Zealand who have commented on the meaning of proceedings in Parliament (McGee, *Parliamentary Practice in New Zealand* (2nd ed., 1994), pp 69-70 and Joseph, *Constitutional and Administrative Law in New Zealand* (1993), p 363). Nor is it the view in Canada (Maginot, *Parliamentary Privilege in Canada* (1982), p 87)’.

²⁰⁹ PA Joseph, *Constitutional and Administrative Law in New Zealand*, 2nd ed, Brookers, Wellington, 2001, pp 402-3.

²¹⁰ [2004] NZCA 147.

exclusive cognisance of the ‘reasonableness’ of this process, or was this a justiciable matter? In support of judicial review, the joint judgment noted that

the general position is that proceedings of a party’s caucus are not proceedings of Parliament. In our view, the judgment of the High Court in *Rata v A-G*... was not correctly decided.²¹¹

Having reviewed the objections of Joseph and McGee to the High Court’s decision, the Court of Appeal noted:

Importantly, Mr McGee goes on to say that even where caucus discussed legislation before the House privilege would not attach to the discussions. The concept of proceedings in Parliament was limited to ‘essential steps to parliamentary action’ and caucus discussions could not be viewed in that light... For these reasons we agree that *Rata* was wrongly decided on the privilege point.²¹²

6.2 Parliamentary proceedings and parliamentary committees, commissioners and independent commissions

With the proliferation of integrity watchdogs and advisers questions arise as to the relationship of some or all of their activities to Parliament. This is especially the case where these bodies assist Parliament in an investigatory capacity. Often the relationship between Parliament and these bodies is complex and intimate. The connections are obvious in relation to those officers established to oversight parliamentary standards or ethics. In other cases parliamentary committees may be established to oversight independent integrity commissions, as in the case of the ICAC or the Ombudsman in NSW. Further, the ICAC is an example of an integrity watchdog whose brief includes inquiring into the conduct of parliamentarians. As the debate on search warrants in Parliament showed, the potential for issues relevant to parliamentary privilege to arise is considerable.

It is, however, in other jurisdictions, notably the UK and Queensland, that the case law has developed. At issue are two related questions: does the disputed evidence constitute parliamentary proceedings? if the proceedings are internal to Parliament do they lie outside the jurisdiction of the courts?

In the UK case of *R v Parliamentary Commissioner for Standards, ex parte Al Fayed*²¹³ the Court of Appeal refused an application for judicial review of the report of the Parliamentary Commissioner which had rejected Al Fayed’s claim that an MP (Neil Hamilton) had received a corrupt payment. It was confirmed that the Commissioner’s inquiry and report were ‘proceedings in Parliament’. It is therefore the House of Commons, not the courts, that are responsible for the activities of the Parliamentary Commissioner for

²¹¹ [2004] NZCA 147 at para 63 (McGrath, Glazebrook and O’Regan JJ).

²¹² [2004] NZCA 147 at para 64 (McGrath, Glazebrook and O’Regan JJ).

²¹³ [1998] 1 ALL ER 93.

Standards. A contrast was drawn in this respect between the Parliamentary Commissioner for Standards and the Parliamentary Commissioner for Administration (the Ombudsman). The former is one of the means by which the Select Committee of Standards and Privileges carries out its functions, which are accepted to be part of the proceedings of the House, whereas the Ombudsman is concerned with the proper functioning of the public service outside Parliament.²¹⁴

Several relevant cases have been decided in Queensland in recent years. By way of background, in the fight against major crime and official misconduct in Queensland a complex multi-tiered system has been established, comprising a parliamentary committee, a parliamentary commissioner and an independent crime fighting commission. Originally, these bodies were established under the *Criminal Justice Act 1989* (Qld), following the Fitzgerald inquiry and its aftermath. Under that scheme the statutory Parliamentary Criminal Justice Committee (PCJC) was Parliament's watchdog committee over the Criminal Justice Commission (CJC). The Parliamentary Criminal Justice Commissioner (the Parliamentary Commissioner), an officer of Parliament appointed by the Speaker, was the independent agent of the PCJC. While the scheme remains unchanged in essence, it is now constituted under the *Crime and Misconduct Act 2001* (Qld) and the names of the various bodies have been changed accordingly.²¹⁵

Between 1994 and 2001 at least three Queensland cases dealt with the meaning of the term 'parliamentary proceedings' in relation to decisions, investigations or reports of the former PCJC, the Parliamentary Commissioner and the CJC.²¹⁶

- In *Criminal Justice Commission v Nationwide News Pty Ltd*²¹⁷ an injunction was sought to restrain publication by a newspaper of a confidential report the independent commission had prepared for the Parliamentary Criminal Justice Committee. The Speaker, who intervened in the case, raised two questions: a 'procedural'²¹⁸ question as to whether the process of arriving at a conclusion in the case involved a breach of the prohibition in Article 9 of the Bill of Rights against impeaching or questioning proceedings in Parliament; and a 'substantive' question as to whether the matter was one within the exclusive jurisdiction of Parliament and

²¹⁴ That both the inquiry and report of the Parliamentary Commissioner for Standards constituted parliamentary proceedings was confirmed by the House of Lords in *Hamilton v Al Fayed* [2001] 1 AC 395 – as discussed in section [5.4.2] of this paper.

²¹⁵ Under the *Crime and Misconduct Act 2001* (Qld), the PCJC is replaced by the Parliamentary Crime and Misconduct Committee, the Parliamentary Commissioner is now the Parliamentary Crime and Misconduct Commissioner and the CJC is the Crime and Misconduct Commission.

²¹⁶ N Laurie, 'Parliamentary committees, commissioners, independent commissions – parliamentary privilege and judicial review of decisions, investigations or reports' (Spring 2002) 17(2) *Australasian Parliamentary Review* 212.

²¹⁷ [1996] 2 Qd R 444.

²¹⁸ [1996] 2 Qd R 444 at 455 (Pincus JA).

that the unauthorised publication of the report was for the Assembly to deal with. The Queensland Supreme Court agreed with the Speaker on the first ‘procedural’ argument, thereby confirming that the report was a parliamentary proceeding. However, it did not accept the ‘substantive’ argument, concluding that the Court had jurisdiction to restrain unlawful disclosure of a confidential CJC report in circumstances where the CJC had a statutory right under s 26(6) of the *Criminal Justice Act 1989* (Qld) to protect against disclosure of such reports.

- In *Corrigan v PCJC*²¹⁹ the issue was whether a decision of a statutory parliamentary committee – the Parliamentary Criminal Justice Committee (PCJC) – was reviewable by the courts. A person had complained to the PCJC about the Criminal Justice Commission (CJC) and requested that the PCJC refer the matter to the Parliamentary Criminal Justice Commissioner (the Parliamentary Commissioner) for investigation. It was the PCJC’s decision not to refer the matter for investigation that the Supreme Court was asked to review. While recognising a distinction between ‘parliamentary’ and ‘executive’ functions of the committee,²²⁰ Dutney J ruled that the ‘act’ in question was of a parliamentary nature. He could ‘see no reason to distinguish the PCJC from any other committee of the Legislative Assembly merely because it is set up under statute, at least in areas of internal decision making where there is no allegation of breach of any statutory duty or prohibition’.²²¹
- In *Criminal Justice Commission v Parliamentary Criminal Justice Commissioner*²²² the question was whether a report of the Parliamentary Commissioner constituted a ‘proceeding in Parliament’. The report at issue was into an unauthorised disclosure by the CJC concerning an inquiry into a Member of Parliament. The investigation undertaken by the Parliamentary Commissioner was at the request of the PCJC. In the event, the Parliamentary Commissioner found in her report to the PCJC that the CJC was the source of the unlawful disclosure. For its part, the CJC sought orders declaring that: (a) the report of the Parliamentary Commissioner was *ultra vires*; (b) that in the circumstances the Parliamentary Commissioner could not make findings of guilt; and (c) that the Parliamentary Commissioner had not observed the requirements of procedural fairness. The Speaker intervened, arguing that to grant the first declaration – that the report was *ultra vires* – would be to directly impeach and question the report contrary to Article 9. That view was upheld, both at first instance²²³ and on appeal. The request

²¹⁹ [2001] 2 Qd R 23.

²²⁰ [2001] 2 Qd R 23 at 24. This followed the comments on Pincus JA in *Criminal Justice Commission v Nationwide News Pty Ltd* (at 457). Dutney J suggested that the committee’s ‘executive’ functions might include ‘participating in the constitution of the CJC and, possibly, the role of issuing guidelines and directions to the CJC as provided under the Act’.

²²¹ [2001] 2 Qd R 23 at 25.

²²² [2002] 2 Qd R 8.

²²³ *CJC & Ors v Dick* [2000] QSC 272 (Helman J).

by the PCJC that an investigation be undertaken by the Parliamentary Commissioner was held to constitute a proceeding in Parliament,²²⁴ as was the investigation and subsequent report. McPherson JA concluded: ‘It follows that this Court, like others in Queensland, is precluded by art. 9 of the Bill of Rights from questioning the validity or propriety of the [Parliamentary] Commissioner’s investigation and report’.²²⁵

Bringing these cases together, Neil Laurie, Clerk of the Queensland Legislative Assembly, comments that the determinative factor for the courts when deciding if a report, decision or investigation constitutes a parliamentary proceeding is ‘the nature of the role of the body in each case, the particular function being discharged and their relationship with the Parliament or committee of the Parliament’. Irrespective of whether a committee, commission or commissioner is created by statute, the issue is whether its work, in the circumstances in question, is fundamentally an extension of the Parliament’s proceedings:

What is important is to determine whether the functions of the investigation are primarily directed to assisting the Parliament discharge its functions or, more particularly, whether the investigation, decision or report itself is a proceeding of the Parliament.²²⁶

6.3 Parliamentary proceedings used to support legal proceedings – ‘effective repetition’

6.3.1 *Three New Zealand defamation cases*

From Article 9 there arises an inhibition on using speeches or proceedings in Parliament for the purpose of supporting a cause of action, even though that cause of action itself arose outside the House.²²⁷ While this rule may seem straightforward, different factual situations can give rise to complex issues of interpretation, especially where a reference outside Parliament to the defamed person must be implied from what was said inside Parliament. What is clear is that parliamentary privilege does not extend to protect a Member who directly repeats outside Parliament allegations made about a named person in the course of parliamentary debates.²²⁸ More problematic are those instances of ‘effective repetition’

²²⁴ At that time defined by s 3 of the now repealed *Parliamentary Paper Act 1992* (Qld).

²²⁵ [2002] 2 Qd R 8 at 22. Campbell notes that the Court did consider whether the report was *ultra vires* and whether the Commissioner had failed to observe the requirements of procedural justice. Campbell comments, ‘Arguably they should not have been considered at all once the court was satisfied that the matters in which the plaintiffs (CJC) sought declarations were proceedings in Parliament’ – Campbell, n 147, p 92.

²²⁶ N Laurie, n 216, pp 228-229.

²²⁷ *Church of Scientology v Johnson-Smith* [1972] 1 QB 522 (attempt to show Member’s parliamentary speech evidence of malice in a comment made by Member on television); D McGee, *Parliamentary Practice in New Zealand*, 3rd edition, Dunmore Publishing Ltd 2005, p 627.

²²⁸ While there are no decided cases in NSW, the rule has been confirmed by several out of court settlements in this State. Most recent is the reported settlement of the defamation

where a Member merely affirms a statement made in Parliament.

In recent years three major New Zealand cases have considered the issues relevant to the use that may or may not be made of parliamentary proceedings in actions for defamation, all of which are distinguishable on the facts.

The first is *Prebble v Television New Zealand*²²⁹ where the defendants (TVNZ) sought to rely on statements in Parliament, from which adverse inferences were to be drawn. 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 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.

In the first cause of action in *Peters v Cushing*²³⁰ the defamatory statement at issue was first made outside Parliament and only later confirmed in a parliamentary context. The question, therefore, was whether parliamentary proceedings could be used to establish a cause of action in defamation where the extra-parliamentary confirmation *preceded* the parliamentary publication? This evidence was ruled to be inadmissible, with Grieg J stating that the parliamentary statement was 'not to be admitted merely to prove what had occurred in Parliament but to support, indeed found the cause of action against Mr Peters'.²³¹ Commenting on the case, the Privy Council said:

In *Peters v Cushing*...the defendant defamed the plaintiff, but without naming or identifying him, in television interviews broadcast on 1 and 3 June 1992. His

case brought by the Hon John Della Bosca against former MLC, Franca Arena for repeating, during a Labor Party caucus meeting and in radio and TV interviews, claims first made in the Council of a 'high level pedophile cover up' - 'Arena to pay Della Bosca \$25,000', *The Sydney Morning Herald*, 7 February 2001. At a preliminary stage, in *Della Bosca v Arena* the plaintiff pleaded that during a meeting of the NSW Parliamentary Labor Caucus, while not naming specific persons, Mrs Arena said '*I stand by the comments that I made over this matter* and I believe that there has been a massive cover up to protect certain paedophiles organised through the Wood Royal Commission involving meetings with various parties'. The relevant issues were considered, though not decided upon, by Justice Levine who was not persuaded that the proceedings should be stayed at that point on the ground that the particular cause of action would 'canvass *Hansard*' - *Della Bosca v Arena* [1999] NSWSC 1057 (unreported, 27 October 1999) at para 31.

²²⁹ [1995] 1 AC 321.

²³⁰ [1999] NZAR 241.

²³¹ [1999] NZAR 241 at 255.

remarks excited considerable public interest and on 10 June 1992 he named the plaintiff in the House of Representatives. For his first cause of action based on these defamatory remarks the plaintiff could not succeed without relying on the naming of him in the House. This was held, rightly in the opinion of the Board, to be impermissible.²³²

The Privy Council continued:

For the purposes of the action it must be assumed that the defendant's conduct was proper: if it was not, it was a matter for the House, not the court; and privilege is conferred for the benefit of Parliament as an institution, and of the nation as a whole, not for the benefit of any individual member. Thus the defendant had to be free to name the plaintiff in Parliament if he judged it right to do so, without fear of adverse civil consequences.²³³

On the other hand, the speech in Parliament was admissible to support the second cause of action in *Peters v Cushing*. This arose from the effective repetition of the defamatory statement in a subsequent television interview on 10 October 1993. In this context it was ruled that *Hansard* could be relied on, not to support the cause of action or as a foundation for it, but to prove what occurred in Parliament as an historical fact.²³⁴

The third case, *Buchanan v Jennings*, was one of the affirmation or 'effective repetition' outside Parliament of what was said inside Parliament. As formulated by the Privy Council, the principle in issue was:

whether a Member of Parliament may be liable in defamation if the member makes a defamatory statement in the House of Representatives – a statement which is protected by absolute privilege under article 9 of the Bill of Rights 1688 – and later affirms the statement (but without repeating it) on an occasion which is not protected by privilege.²³⁵

Affirmation or 'effective repetition' has been found to amount to no more than a Member confirming that they 'stand by'²³⁶ what they said in Parliament or, as in *Buchanan v Jennings*, that they 'do not resile' from what they said in the House. The facts of the case were that, in December 1997 the MP, Jennings, alleged abuse of expenditure and an illicit relationship on the part of officials involved in the sponsorship of a sporting tour. He was

²³² *Buchanan v Jennings* [2005] 1 AC 115 at para 19.

²³³ [2005] 1 AC 115 at para 19.

²³⁴ [1999] NZAR 241 at 249 (Ellis J) and 255 (Grieg J).

²³⁵ [2005] 1 AC 115 at para 1.

²³⁶ *Beitzel v Crabb* [1992] 2 VR 121. The plaintiff was able to base his proceedings on a radio interview in which the defendant member of Parliament refused to apologise to the plaintiff for what he had earlier said in the Victorian Parliament and said that he stood by what he has said there.

subsequently interviewed by a journalist who then published an article recording that Jennings withdrew some of his financial allegations, and reported him as saying that he ‘did not resile’ from his claim about the illicit relationship between the officials and the sponsors. The affirmation or ‘effective repetition’ was admitted into evidence and damages were awarded against Jennings in both the New Zealand High Court and the Court of Appeal. From there it went to the Privy Council, which upheld the earlier rulings. There was no doubt that what Jennings said in the House was protected by absolute privilege. However, that privilege did not extend to cover his republication of that statement by reference outside the House.

Discussed in the case were several Australian ‘repetition’ decisions, notably *Beitzel v Crabb*²³⁷ and *Rann v Olsen*.²³⁸ Approved was this statement of principle made by Davies JA in *Laurence v Katter*:

No impropriety is alleged against the first defendant in respect of what he said in Parliament. What is alleged against him in the statement of claim is that what he said outside Parliament was false and defamatory of the plaintiff. It is true that proof that what the first defendant said outside Parliament was false will prove that what he said in Parliament was false. But that is because he incorporated the latter in his statements outside Parliament. The privilege of Article 9 applies to statements in Parliament but not to statements made out of Parliament even though they incorporated by reference the statements made in Parliament.²³⁹

Rejected by the Privy Council in *Buchanan v Jennings* was the dissenting argument of Tipping J in the New Zealand Court of Appeal to the effect that:

the parliamentary words appeared to be required to establish both identity and defamatory meaning. He looked at the purpose and policy behind parliamentary privilege viewed as a whole and concluded that use of parliamentary words as a necessary step in establishing a cause of action should be regarded as inconsistent with parliamentary privilege. He argued that since it was only the statement in the House that was defamatory, the plaintiff must necessarily be contending that it was false...and therefore be impeaching or questioning what the member said in the House.²⁴⁰

According to the Privy Council, Tipping J was ‘oppressed’ by the problems that would face parliamentarians if his views were not adopted. The Board did not share his apprehension, stating:

²³⁷ [1992] 2 VR 121.

²³⁸ (2000) 76 SASR 450.

²³⁹ (1996) 141 ALR 447 at 490; approved [2005] 1 AC 115 at para 15.

²⁴⁰ A Bracegirdle, ‘Members of Parliament and Defamation: The Courts raise the Bar’ (2002) 17(2) *Australasian Parliamentary Review* 140 at 160.

A statement made out of Parliament may enjoy qualified privilege but will not enjoy absolute privilege, even if reference is made to the earlier privileged statement. A degree of circumspection is accordingly called for when a Member of Parliament is moved or pressed to repeat out of Parliament a potentially defamatory statement previously made in Parliament. The Board conceives that this rule is well understood, as evidenced by the infrequency of cases on the point.²⁴¹

Whereas Tipping J was concerned to draw ‘a bright line’, the majority judgment was apt to emphasise the difficulty involved in arriving at any clear rule of admissibility, stating:

One conclusion to be drawn from the above account is the difficulty, if not impossibility, for the Courts to state, in a consistent way, generally applicable rules in this area of the law. General statements may operate satisfactorily in the circumstances of the particular case in which they are stated but be problematic at best and misleading at worst in other circumstances.²⁴²

6.3.2 *Buchanan v Jennings – a controversial decision*

Buchanan v Jennings has proved a controversial decision. In May 2005 the Privileges Committee of the New Zealand House of Representatives published its report on the case in which it recommended that the *Legislature Act 1908* be amended to provide that no person may incur criminal or civil liability for making any statement that affirms, adopts or endorses words written or spoken in proceedings in Parliament where the statement would not, but for the proceedings in Parliament, give rise to criminal or civil liability.²⁴³

The Privileges Committee expressed four main concerns. The first concerned the principle of non-intervention between the courts and Parliament in cases of ‘effective repetition’. This was not an issue where a Member directly repeated a statement outside Parliament. Where a statement was only affirmed or ‘effectively repeated’ however, this involves the parliamentary statement being put directly to the court as it is the main evidence for the proceedings. Secondly, the Committee considered the potential effects on free speech, in circumstances where a minimal response to a question posed by the media could result in civil liability. Thirdly, this may have a ‘chilling’ effect on public debate, whereby Members and committee witnesses are reluctant to submit themselves to subsequent interview for fear of losing their parliamentary immunity. Fourthly, the Privilege Committee was concerned that the *Buchanan v Jennings* doctrine would have an effect beyond defamation in a parliamentary context. Could it apply, for example, to a breach of statutory incitement laws in a parliamentary context? Might the doctrine also be applied to court proceedings, in

²⁴¹ [2005] 1 AC 115 at para 20.

²⁴² [2002] 3 NZLR 145 at 163 (Richardson P, Gault, Keith and Blanchard JJ).

²⁴³ Privileges Committee, *Final Report on the question of privilege referred 21 July 1998 concerning Buchanan v Jennings*, 1.17G, May 2005, p 9. For a commentary see – A Geddis, ‘Parliamentary privilege: *quis custodiet ipsos custodes?* [Winter 2005] *Public Law* 696.

which context absolute privilege also applies?

In April 2006 these concerns were endorsed by the Procedure and Privileges Committee of the Western Australian Legislative Assembly.²⁴⁴ It recommended: (a) that the *Parliamentary Privilege Act 1891* be amended to include a provision which ensures that parliamentary proceedings cannot be used to establish what was ‘effectively’ but not actually said outside Parliament; and (b) that a uniform national approach be adopted through the auspices of the Standing Committee of Attorneys General.

By reference to the ruling of the New Zealand Court of Appeal, *Odgers Australian Senate Practice* declared that *Buchanan v Jennings* was ‘wrongly’ decided.²⁴⁵

6.4 Parliamentary proceedings, judicial review and the legislative process

By reference to what is sometimes called the doctrine of ‘exclusive cognizance’ it is agreed that ‘What is said or done within the walls of a parliamentary chamber cannot be examined in a court of law’.²⁴⁶ Central to this doctrine is the notion that the Houses of Parliament retain the right to be sole judges of the lawfulness of their own proceedings, a doctrine that extends to procedural and other activities.²⁴⁷

Further to the doctrine of ‘exclusive cognizance’, the courts are precluded from intervening in the legislative process on several grounds. These include considerations arising from the separation of powers that require a policy of non-intervention, added to considerations arising from Article 9 that preclude judicial questioning of parliamentary proceedings. Added to this, in *Criminal Justice Commission v Nationwide News Pty Ltd*²⁴⁸ Davies JA observed that the reluctance of the courts to intervene in the legislative process stems from ‘the mutual respect which each branch of government should accord the performance of its functions by the other’. Likewise, *British Railway Board v Pickin*²⁴⁹ is authority for the proposition that a court is barred by the principle of comity from investigating the manner in which Parliament exercises its legislative function.

The NSW case of *Trethowan v Peden*²⁵⁰ is of continuing interest as a rare instance of

²⁴⁴ Western Australia, Legislative Assembly, Procedure and Privileges Committee, *Effective Repetition: Decision in Buchanan v Jennings*, Report No 3, 2006.

²⁴⁵ Odgers, n 143, p 44.

²⁴⁶ *Egan v Willis* (1998) 195 CLR 424 at 462 (McHugh J).

²⁴⁷ Erskine May 23rd ed, n 6, pp 102-106.

²⁴⁸ [1996] 2 QdR 444 at 460.

²⁴⁹ [1974] AC 765.

²⁵⁰ (1930) 31 SR (NSW) 183. This account is based on G Griffith, *Principles, Personalities, Politics: Parliamentary Privilege Cases in NSW*, NSW Parliamentary Library Background Paper No 1/2004, pp 29-35. Other relevant NSW cases are discussed, including *Clayton v Heffron* (1961) WN (NSW) 767. See generally Campbell, *Parliamentary Privilege*, n 147, Ch 7; J Goldsworthy, ‘Trethowan’s Case’ in Winterton, n 65, Chapter 4; and A Twomey,

where the courts have intervened in the parliamentary process by the grant of an injunction preventing the presentation of two Bills to the Governor for royal assent. This was on the ground that their presentation would be in contravention of s 7A of the NSW *Constitution Act 1902* and therefore unlawful. The effect of s 7A was that it doubly entrenched the Council – requiring a referendum for the Council to be abolished or its powers altered, and for s 7A itself to be repealed or amended (the words ‘expressly or impliedly’ were inserted later). In respect to the Bill for the abolition of the Council, it was also said that the rights of its Members would be ‘injuriously affected’. According to Street CJ (Ferguson and James JJ concurring):

Dr Evatt’s submission is that the judiciary cannot interfere between Parliament and the King... The plaintiffs’ on the other hand point out, with truth, that it is the duty of the Crown, and of every branch of the Executive, as well as of every citizen, to abide by and obey the law, and they say that all that they are asking is that they may be protected against a threatened breach of a statutory mandate by which they will be injuriously affected. Under the law as it stands today, as now declared by this Court, there is a valid statutory prohibition against the presentation to the Governor of a Bill to repeal s. 7A until it has been approved by the electors. To grant the relief asked for will not in my opinion amount to an interference with the internal affairs of either House of Parliament or with any of the privileges of Parliament, and I think, therefore, upon the whole, that the suit is one which will lie at the instance of a proper plaintiff having a sufficient interest to maintain it.²⁵¹

In granting special leave to appeal, the High Court confined the issue to whether section 7A was a valid ‘manner and form’ provision. By a majority of three to two, it held in *A-G (NSW) v Trethowan* that the section was valid. In May 1932 that decision was confirmed by the Privy Council. Section 7A was held to be valid and in force and, because of it, the bills to abolish the Council and repeal s 7A itself could not be presented for assent ‘unless and until a majority of electors voting had approved of them’.²⁵²

When the High Court next considered the question of manner and form provisions, in *Clayton v Heffron*,²⁵³ another case concerning a Bill to abolish the NSW Legislative Council, the joint judgment of Dixon CJ, McTiernan, Taylor and Windeyer JJ expressed doubt about the correctness of the action taken by the NSW Supreme Court in *Trethowan v Peden*.

In 2002 review of this area of the law was undertaken by the Supreme Court of Western Australia in *Marquet v A-G (WA)*. A manner and form provision was at issue in that case and declarations had been sought from the Clerk of the Parliaments whether it would be lawful for him to present two Bills for the Governor’s assent that had not complied with the

‘Clayton v Heffron’ in Winterton, n 65, Chapter 6.

²⁵¹ (1930) 31 SR (NSW) 183 at 205.

²⁵² *Attorney General (NSW) v Trethowan* (1932) 47 CLR 97 at 106.

²⁵³ (1960) 105 CLR 214 at 255.

absolute majority requirements.²⁵⁴ On the question of jurisdiction, Steytler and Parker JJ concluded (the other members of the Court agreeing):

In the case of legislation...which provides that presentation of a Bill [for the royal assent] ‘shall not be lawful’ unless particular circumstances have been satisfied, the Court has jurisdiction to intervene in order to make a declaration of the kind sought, after the deliberative process in the Houses of Parliament has been completed, but before the Bill is presented to the Governor for Royal Assent.²⁵⁵

It was further held that the Court should, as a matter of discretion, exercise its jurisdiction. On appeal to the High Court the question of justiciability was not considered. Rather, it was the validity of the manner and form provision that was the point at issue.²⁵⁶

This area of the law was again reviewed by the UK Court of Appeal²⁵⁷ and subsequently, if less extensively, by the House of Lords in *R (Jackson) v Attorney General*²⁵⁸ in which supporters of fox hunting argued that the *Hunting Act 2004* was not a valid Act, on the ground that the 1949 amendments to the *Parliament Act 1911* were invalid and the procedures used to pass the *Hunting Act* were also invalid. The 2004 legislation banning fox hunting was passed without the consent of the House of Lords, pursuant to s 2 of the *Parliament Act 1911*, as amended in 1949 when the period before the Lords’ consent could be dispensed with was reduced by a year. As amended, the procedure only required the passage and rejection of a Bill in two successive sessions (instead of three) over a period of one year (instead of two).²⁵⁹ As explained by Michael Plaxton:

The nub of the Appellants’ claim is that s 2(1) of the 1911 Act could not be amended without the formal consent of the House of Lords; that the bypassing procedure could not be used to amend itself. The Appellants chiefly rested their argument on the claim that the 1911 Act merely delegated power to the House of Commons that would ordinarily be shared by both Houses. If that were the case, they argued, the House of Commons would be unable to use the powers granted by the 1911 Act to expand them, unless such authority was explicitly granted.²⁶⁰

²⁵⁴ For a detailed background to and commentary on the case see – Campbell, *Parliamentary Privilege*, n 147, pp 116-118; P Johnston, ‘Method or madness: constitutional perturbations and Marquet’s case’ (August 2004) 7(2) *Constitutional Law and Policy Review* 25.

²⁵⁵ [2002] 26 WAR 201 at 160.

²⁵⁶ *Attorney General (WA) v Marquet* (2003) 217 CLR 545.

²⁵⁷ *Regina (Jackson and others) v Attorney General* [2005] QB 579.

²⁵⁸ [2005] 3 WLR 733.

²⁵⁹ A Twomey, ‘Implied limitations on legislative power in the United Kingdom’ (2006) 80 *Australian Law Journal* 40.

²⁶⁰ M Plaxton, ‘The concept of legislation: *Jackson v Her Majesty’s Attorney General*’ (2006) 69(2) *Modern Law Review* 249 at 250.

In the event, both the Court of Appeal and the House of Lords ruled that the 1949 amending Act and therefore the *Hunting Act 2004* were valid. In arriving at this decision the Court of Appeal, in a unanimous judgment delivered by Lord Woolf, held that the case turned on more than statutory interpretation and that regard should be had to the parliamentary debates to ascertain the meaning of s 2(1) of the *Parliament Act 1911* and ‘subsequent understanding of Parliament as to the nature of the constitutional change effected’ by the Act.²⁶¹ As to the threshold question of justiciability, the Court of Appeal held that this was a rare occasion when it was appropriate for the courts to rule on the validity of legislation that had received the Royal Assent, on grounds that the courts were ‘seeking to assist Parliament and the public by clarifying the legal position when such clarification is obviously necessary’. Further explaining the Court’s *modus operandi*, Lord Woolf stated:

While we will refer to what has happened in debates in Parliament concerning the issue before us, we will not be adjudicating upon the propriety of what occurred in Parliament.²⁶²

Whether that argument would have applied if the Court of Appeal had found the 1949 amending Act invalid is another matter. For its part, the House of Lords upheld the validity of that legislation on very different grounds. In doing so, it avoided the potential pitfalls the Court of Appeal might have set for itself in respect to the review of parliamentary proceedings. For the House of Lords, judicial review was held to be constitutionally legitimate in this instance, since the courts were not investigating the internal workings of Parliament but were determining whether the 1949 and 2004 Acts were enacted law.²⁶³ In essence, the case was reducible to a question of statutory interpretation, about which Lord Nicholls of Birkenhead stated:

On this issue the court’s jurisdiction cannot be doubted. This question of statutory interpretation is properly cognisable by a court of law even though it relates to the legislative process. Statutes create law. The proper interpretation of a statute is a matter for the courts, not Parliament. This principle is as fundamental in this country’s constitution as the principle that Parliament has exclusive cognisance (jurisdiction) over its own affairs.²⁶⁴

That s 2(2) of the 1911 Act, providing for the Speaker to certify that the requirements of the Act had been duly complied with, was not in dispute. At issue was s 2(1) of the 1911 Act which laid down the circumstances in which, save for stated exceptions, ‘any public Bill’ could be enacted without the consent of the House of Lords. The term ‘any’ was given a broad meaning and it was held to refer in this context to primary, not secondary, legislation.

²⁶¹ [2005] QB 579 at para 77.

²⁶² [2005] QB 579 at para 13.

²⁶³ [2005] 3 WLR 733 at para 27 (Lord Bingham of Cornhill).

²⁶⁴ [2005] 3 WLR 733 at para 51.

6.5 Parliamentary proceedings and the provision of information to Members of Parliament

The granting of absolute privilege to all communications between Members and non-members has not found general favour, largely because of the wide ranging circumstances in which information may be provided to a Member. That correspondence that is retained for use by a Member to transact parliamentary business will attract privilege is probable enough, especially in the light of the decision in *O'Chee v Rowley*. As discussed,²⁶⁵ that case concerned the interpretation of s 16(2) of the Commonwealth *Parliamentary Privileges Act 1987*, in respect to which McPherson JA stated that

proceedings in Parliament include the preparation of a document for purposes of or incidental to the transacting of any business of a House. More generally, such proceedings include all acts done for such purposes, together with any acts that are incidental to them. Bringing documents into existence for such purpose; or, for those purposes, collecting or assembling them; or coming into possession of them, are therefore capable of amounting to 'proceedings in Parliament'.²⁶⁶

The interpretation favoured by McPherson JA has not met with universal approval. Federally, the decision in *O'Chee v Rowley* can be contrasted with that in *Rowley v Armstrong*²⁶⁷ where a single judge of the Queensland Supreme Court held that, in making an oral communication to a Member of the Australian Senate and a Member of the Queensland Legislative Assembly, the informant was protected by qualified privilege only. Jones J did not ask whether an act had been done with respect to the relevant documents, but declared that an informant in making a communication to a Member is not regarded as participating in 'proceedings in Parliament'. As noted by Campbell, the decision in *Rowley v Armstrong* has met with criticism from the Clerk of the Senate and others.²⁶⁸

Similar issues have been encountered in recent Queensland cases, where the statutory regime for parliamentary privilege is comparable to that in force federally.²⁶⁹ In *Thomson v Broadley*²⁷⁰ a defamation action and cross actions were instituted after the plaintiff

²⁶⁵ In section [5.1.1] of this paper.

²⁶⁶ (1997) 150 ALR 199 at 215.

²⁶⁷ (2000) QSC 88.

²⁶⁸ Campbell, *Parliamentary Privilege*, n 147, p 239. For a critical commentary on the decision see – The Senate Committee of Privileges, *92nd Report - Matters Arising from 67th Report of the Committee of Privileges*, The Parliament of the Commonwealth of Australia, 2000.

²⁶⁹ The Queensland legislation is discussed in section [5.2] of this paper.

²⁷⁰ [2000] QSC 100 (Jones J). But note that in this instance the defendants sought to rely on the statements in Parliament, not as constituting the cause of action, but as relevant to the question of damages. The publication in Parliament, it was ruled, was a foreseeable outcome of the original communication and was therefore relevant to damages claimed against the MP's informant. Jones J commented that if 'the purpose of identifying the republications was limited to the scope of damages then there is clear authority for these

(Thomson) complained to the Queensland Department of Consumer Affairs about illegal practices in the defendant's business. The issue became public when a Member of the Legislative Assembly, Peter Purcell, raised the matter in the House, relying on information supplied to him by Thomson. It was the status of this communication that a single judge of the Queensland Supreme Court considered in May 2000. Again, it was Jones J who decided the matter, concluding that the communication from Thomson to Purcell could only be the subject of qualified privilege. Relying on the 21st edition of *Erskine May*, as he had in *Rowley's* case, Jones J stated:

The question of the level of protection afforded to an informant to a member of Parliament who uses that information in parliamentary proceedings has been considered in a number of cases... In my view such a communication does not attract absolute privilege since the conveying of information in the manner alleged here cannot be characterised as a 'proceeding in Parliament'.²⁷¹

The interpretation preferred by Jones J was not accepted by Helman J of the Queensland Supreme Court in *Erglis v Buckley*²⁷², a ruling that was subsequently upheld by the Court of Appeal.²⁷³ This was in the context of long-running defamation proceedings, where the then Minister for Health had read a letter in Parliament from a group of nurses, contradicting claims made by the plaintiff (Erglis) about work practices in Ward 9D of the Royal Brisbane Hospital. Mrs Erglis claimed she had been defamed in this letter and the questions for the Court of Appeal were: (a) whether the letter was protected by parliamentary privilege up to the time it was used by the Minister in Parliament? (b) whether republication outside Parliament was similarly protected?²⁷⁴ The answer to the first

matters to be pleaded' (at para 22). The 'clear authorities' were not identified and the reasoning of Jones J seemed to be more relevant to a wider question of admissibility. The specific question of admissibility for the award of greater damages is considered later in section [7.8] of this paper in relation to *Erglis v Buckley* [2004] 2 Od R 599; [2004] QCA 223.

²⁷¹ [2000] QSC 100 at para 20.

²⁷² [2005] QSC 025 at para 40.

²⁷³ [2005] QCA 404.

²⁷⁴ One defendant placed a copy of the letter, which had previously been published in Parliament, on a notice board in Ward 9D. It was held that this act of republication was not protected by parliamentary privilege and the Court of Appeal upheld an award of \$15,000 damages. The extent to which republication of this kind is analogous to the 'effective repetition' by a Member of Parliament of what was said in the House will depend on the circumstances of the case. Campbell and Groves comment that Members 'are often placed in the same position as the defendants in the *Erglis* case, when they are called to repeat or affirm a possibly defamatory statement made during the course of proceedings in Parliament' – E Campbell and M Groves, 'Correspondence with Members of Parliament' (2006) 11(3) *Media and Arts Law Review* 227 at 249. In effect, only qualified privilege may apply in such cases for both the public and MPs alike. However, it is important to add that the analogy between the two situations can be overstated. As discussed in section [6.3] of this paper, the key issue in dispute in respect to republication and 'effective repetition' by Members is that parliamentary proceedings are used in support of a cause of action that arose outside the House. In the *Erglis* case, on the other hand, a cause of action in respect

question was ‘yes’; to the second, it was ‘no’. In providing absolute protection up to the time of republication of the letter in Parliament, both Helman J at first instance and the Court of Appeal affirmed the decision in *O’Chee v Rowley*. Adopted by the Court of Appeal was Helman J’s view that

For the privilege to be attached to a document, a member, or his or her agent, must in some way appropriate the document to proceedings in Parliament by doing some act with respect to the document for purposes of, or incidental to, transacting parliamentary business.²⁷⁵

In this case, the Minister for Health offered to assist the defendant nurses, who suggested a statement by them be read in Parliament. By agreeing to this course of action, on conditions, the Minister ‘appropriated the document and its preparation to proceedings in the Assembly’.²⁷⁶ For McPherson JA (Dutney J agreeing), the Minister’s offer of assistance to the nurses extended the absolute protection afforded by parliamentary privilege to ‘persons who are not themselves members of Parliament’. This extension was said to be ‘necessarily implicit’ in ss 8 and 9 of the *Parliament of Queensland Act 2001* which presuppose that parliamentary privilege belongs not to individual Members but to Parliament as a whole.²⁷⁷ Specifically, s 9(2)(e) of the Queensland Act corresponds to s 16(2)(c) of the Commonwealth legislation. Mcpherson JA commented in this respect that the protection provided by s 9(2)(e) ‘must be intended to cover those who prepare and provide the document’ for the Member to use in transacting business in Parliament. He continued:

Unless therefore the statutory protection is designed to benefit only members who have unusually retentive memories, other persons will inevitably be drawn into and become involved on the member’s behalf in the act of preparing the document for presentation to the Assembly, or in other acts incidental to that business of the Assembly.²⁷⁸

Referring back to *O’Chee v Rowley*, it was clear on the facts in *Erglis v Buckley* that parliamentary privilege had not been manufactured by the artifice of planting the document

to the publication of the letter in the hospital ward – where it was published widely to staff and others - could be established without reference to the earlier parliamentary proceedings. In these circumstances, it seems, the letter itself was defamatory in and of itself, irrespective of any additional prior parliamentary publication. This differs from a circumstance where a Member affirms what was said in Parliament, saying ‘I stand by what I said’, or words to that effect, where a defamatory cause of action cannot be established without reference the earlier parliamentary statement.

²⁷⁵ [2005] QCA 404 at para 30 (McPherson JA, Dutney J concurring) and at para 99 (Jerrard JA).

²⁷⁶ [2005] QCA 404 at para 100.

²⁷⁷ [2005] QCA 404 at paras 31 and 101.

²⁷⁸ [2005] QCA 404 at para 31.

on a parliamentarian. In *Erglis v Buckley* the document had been created on the invitation of the Minister, directly for use in the Assembly. For Jerrard JA it was the fact that the Minister had herself solicited the letter that attracted the protection of parliamentary privilege. He noted that in earlier proceedings he had expressed his preference ‘for a qualified privilege only for those giving information to Parliamentarians’.²⁷⁹ On the facts of the case, Jerrard JA was satisfied that *R v Grassby*²⁸⁰, where a Member was in receipt of unsolicited material, could be distinguished.²⁸¹ For McPherson JA, on the other hand, it would seem that ‘appropriation’ by a Member, as defined by Helman J, would be sufficient to make a document a proceeding in Parliament.

At this stage, the balance of judicial and other opinion in Australia appears to favour this last interpretation. Conversely, in its First Report from 1999 the Joint Committee of the UK Parliament on Parliamentary Privilege argued that term ‘proceedings in Parliament’ should not cover constituency correspondence; nor should it be extended to include correspondence between Members and Ministers. The Joint Committee argued that, in principle, the ‘exceptional’ protection provided by Article 9 ‘should remain confined to the core activities of Parliament, unless a pressing need is shown for an extension’.²⁸²

6.5.1 Statutory protection for whistleblowers

It is possible that information provided voluntarily to a Member, concerned with government or political matters, but not in fact used for parliamentary purposes by the Member, may attract either the constitutional defence of implied freedom of political communication, or the defence of public interest immunity. The common law or statutory defences of qualified privilege may also apply.

²⁷⁹ [2005] QCA 404 at para 101.

²⁸⁰ (1991) 55 A Crim R 419. Allen J held that absolute privilege did not attach to communications between informants and Members, even if the information is subsequently used in proceedings in Parliament and irrespective of whether the information was actively sought by the Member or otherwise. Allen J said: ‘Thus it is appropriate that a parliamentarian has absolute immunity in respect of what he does in the exercise of his duties in the course of proceedings in the House. There is no warrant to give such an absolute immunity to any person who seeks to persuade him to say something in the House. To the extent that immunity to such person is appropriate and recognized by the law it is one of qualified privilege – that is privilege defeasible by malice’ (at 428).

²⁸¹ [2005] QCA 404 at para 102. In the earlier proceedings - *Erglis v Buckley* [2004] 2 Od R 599; [2004] QCA 223 – Jerrard JA (dissenting) had in *obiter dicta* expressly affirmed the decision in *Grassby* (at para 30). McPherson JA had noted the decisions in *Grassby* and *Rowley v Armstrong*, without expressing a view as to whether either had been correctly decided (at para 5). It was agreed that the letter, as tabled by the Minister, was a parliamentary proceeding. The question before the Court of Appeal was the admissibility of the letter to establish a claim for greater damages. The case is discussed later in this paper, in relation to parliamentary privilege in Queensland.

²⁸² Joint Committee on Parliamentary Privilege, n 2, p 34. The ‘test of necessity’ formulated by the Joint Committee is discussed in section [5.4.1] of this paper.

At common law and under s 30(4) of the NSW *Defamation Act 2005* alike, qualified privilege fails if the communication is motivated by malice. Further to this, concern has been expressed about communications made by whistleblowers to members, on the ground that the claims of corruption or malfeasance often raised by such persons are often represented as having an improper motive.²⁸³ A limited solution to this problem is found under the NSW *Protected Disclosures Act 1994* where provision is made for a public interest disclosure to a Member of Parliament. Section 19 of that Act provides that a disclosure by a public official to a member is protected in specified circumstances: the public official must, without success, have already made substantially the same disclosure to an investigating authority; the public official must have reasonable grounds for believing that the disclosure is substantially true; and the disclosure must be substantially true. On the other hand, informants who are not public officials remain outside the protection offered by this scheme.

6.6 Parliament as a ‘statute free zone’ – applying the ‘test of necessity’

A facet of the ‘exclusive cognisance’ doctrine is that Parliament has traditionally been defined as a ‘statute free zone’. This doctrine does not extend so far as to grant immunity for Members or parliamentary officers from the criminal law.²⁸⁴ Subject to that qualification, it holds that, unless otherwise expressly provided, the Parliament, its officers and staff are neither subject to, nor protected by, the provisions of statute law, including workers’ compensation and anti-discrimination. In other words, the claim is made that the dealings between the Presiding Officers and all levels of parliamentary staff belong to the category of ‘internal affairs’ and are therefore beyond the reach of judicial review. Nor, it was argued in the past, did liquor licensing legislation apply within the parliamentary precincts.²⁸⁵

Until recently the leading decision was *R v Graham-Campbell and others; Ex Parte*

²⁸³ H. Evans, ‘Members’ informants: any protection?’ (1997) *The Table* 19; J. Attwood, ‘Parliamentary privilege and members’ sources of information’, *ASPG 2002 Annual Conference – Parliamentary Privilege*, Melbourne.

²⁸⁴ As Pincus JA said in the Queensland Court of Appeal, ‘If an assault causing grievous injury were committed by one member on another during the course of a debate, it is clear enough that the injured member could sue, under the general law’ - *Criminal Justice Commission v Nationwide News Pty Ltd* [1996] 2 Qd R 444 at 456. Considered by Pincus JA was *Attorney-General v Macpherson* (1870) LR 3 PC 268 where a member of the NSW Legislative Assembly was charged with assaulting another member in an ante-chamber adjoining the chamber, while Parliament was sitting. In *Bradlaugh v Gossett*, Stephens J said he could find no authority ‘for the proposition that an ordinary crime committed in the House of Commons would be withdrawn from the ordinary course of criminal justice’ - (1884) 12 QBD 271 at 283.

²⁸⁵ The *Liquor Amendment (Parliamentary Precincts) Act 2004* (NSW) empowers the Governor to issue a licence authorising the sale of liquor within the parliamentary precincts. The legislation also amended the *Parliamentary Precincts Act 1997* to enable the Presiding Officers to enter into a memorandum of understanding with the Director of Liquor and Gaming to allow government liquor law inspectors to enter the parliamentary precincts to ensure Parliament is complying with the liquor laws.

*Herbert*²⁸⁶ in which it was ruled that the courts would not hear a complaint regarding sales of alcohol in the precinct of Parliament without the necessary licence because the House of Commons was acting collectively in a manner which fell within the area of the internal affairs of the House. The provision of ‘refreshment for the mind in the library and refreshment for the body in suitable places’ was judged to be ‘connected with the affairs of the House’.²⁸⁷ The decision has been questioned, with Professor SA de Smith saying that the court took ‘a remarkably generous view of the scope of the internal affairs of the House of Commons’.²⁸⁸ As GF Lock points out, the origin of this aspect of privilege was the preservation of freedom of speech of Members of Parliament. After following the line of reasoning in *Ex Parte Herbert* to its logical conclusion, Lock commented ‘It is a far cry from this purpose to its use in restricting the normal rights of staff as employees’.²⁸⁹

Relevant Australian authority is thin on the ground. In the 1981 case of *Bear v State of South Australia*²⁹⁰ a single judge of the State’s Industrial Court ruled that an injury to a waitress in the parliamentary dining room was not part of the internal business of Parliament and was not protected by privilege. On one side, Russell J declared that the provision of refreshments is protected by parliamentary privilege, on the grounds that their availability on the premises ‘conduces to the energetic discharge of the duties inherent in the legislative process’.²⁹¹ He was not inclined, however, to think that those employed in the provision of those services were themselves subject to privilege. In finding that the catering staff in Parliament were covered by the *Workers Compensation Act 1971-79* (SA), Russell J distinguished *Ex Parte Herbert*, noting that the formal employer in *Bear* was the statutory Joint House Committee, whose legislative functions extended to the employment of catering staff to provide meals and related services to Members, a relationship which contemplated all the obligations of an employer, including the payment of compensation in suitable circumstances. Without establishing a clear guiding principle, Russell J concluded:

²⁸⁶ [1935] 1 KB 594.

²⁸⁷ [1935] 1 KB 594 at 598.

²⁸⁸ SA deSmith, *Constitutional and Administrative Law*, 3rd ed, Penguin Books 1977, p 313.

²⁸⁹ GF Lock, ‘Labour law, parliamentary staff and parliamentary privilege’ (1983) 12 *Industrial Law Journal* 28 at 32; see also G Lock, ‘Statute law and case law applicable to Parliament’ in *The Law and Parliament* edited by D Oliver and G Drewry, Butterworths 1998, Chapter 4. For a critical account of the *Herbert* case and of its subsequent application and interpretation by the UK Joint Committee on Parliamentary Privilege see – C Robert, ‘An opportunity missed: the Joint Committee on Parliamentary Privilege, Graham-Campbell and internal affairs’ (2006) 74 *The Table* 7-21. Basically, the argument is that, by a misinterpretation of earlier case law, the decision in *Ex Parte Herbert* resulted in ‘the identification of internal affairs as a distinct area of privilege that was previously unknown’ (at 13). Robert argues that the idea of Parliament as a statute-free zone ‘came into existence only as a consequence of this decision’ (at 15).

²⁹⁰ (1981) 48 SAIR 604.

²⁹¹ (1981) 48 SAIR 604 at 620.

The plain fact of the matter is that her [Bear's] relationship with Parliament is not part of the internal business of Parliament but rather it is a relationship between Parliament and a stranger.²⁹²

Reflecting on the ruling in *Ex Parte Herbert*, the UK Joint Committee Report of 1999 said that, irrespective of whether it was 'in accordance with earlier cases', its 'practical consequences' were 'not satisfactory'. Consistent with the Committee's 'test of necessity', the report went on to recommend:

the enactment of a provision to the effect that the privilege of each House to administer its own internal affairs in its precincts applies only to activities directly and closely related to proceedings in Parliament.²⁹³

The difficulties involved in drawing a 'dividing line' between privilege and non-privileged activities was recognised by the Joint Committee. It said:

Perhaps the nearest approach to a definition is that the areas in which the courts ought not to intervene extend beyond proceedings in Parliament, but the privileged areas must be so closely and directly connected with proceedings in Parliament that intervention by the courts would be inconsistent with Parliament's sovereignty as a legislative and deliberative assembly.²⁹⁴

This approach was approved in *Canada v Vaid*,²⁹⁵ a case in which the chauffeur of the

²⁹² (1981) 48 SAIR 604 at 623. Of limited relevance is a 2002 decision of the Tasmanian Anti-Discrimination Tribunal where it was held that Parliament is not subject to the *Anti-Discrimination Act 1998* (Tas). The case related to a witness before a select committee who claimed that he had action taken against him by his employers as a result of his appearing before the committee. The ruling turned on whether, on the facts of the case, Parliament was engaged in any activities connected to the 'provision of facilities, goods or services' as required by s 22(1)(c) of the Tasmanian anti-discrimination legislation. The Tribunal ruled that Parliament was not engaged in any of these activities, specifically in circumstances where an MP had failed to refer the complainant's concerns to the Privileges Committee *In the matter of a complaint made by Mr Le Fevre* (ADT of Tasmania, unreported, 13 September 2002). The background facts were set out in earlier proceedings in the Supreme Court, where the Tasmanian Anti-Discrimination Commissioner sought unsuccessfully to have the matter reviewed by the Ombudsman – *Anti-Discrimination Commissioner v Acting Ombudsman* [2002] TASSC 24 at paras 15-22. Note that in earlier proceedings before the Tribunal it was held that 'proceedings in Parliament' extends to omissions or failures to act, as well to actions, as discussed in a later section of this paper [7.12].

²⁹³ Joint Committee on Parliamentary Privilege, n 2, para 251.

²⁹⁴ Joint Committee on Parliamentary Privilege, n 2, para 247.

²⁹⁵ [2005] SCR 667. The privileges of the Canadian Federal Parliament are on a statutory basis, defined in terms of the privileges possessed in 1867 by the British House of Commons. Whereas the privileges of the Provincial legislatures are on a common law basis and defined to be 'inherent' in nature. In *New Brunswick Broadcasting Co v Nova Scotia* [1993] 1 SCR 319 these 'inherent' privileges were found to be part of the 'Constitution of Canada' and exempt from the Charter of Rights and Freedoms. In *Canada (House of Commons) v Vaid* [2005] SCR 667 at para 33 the Supreme Court suggested in a carefully worded obiter statement that the same exemption applies to the legislated privileges of the

Speaker of the Canadian House of Commons alleged that he had been constructively dismissed on grounds that were forbidden by the Canadian Human Rights Act. On behalf of the House of Commons and the Speaker it was claimed that the hiring and firing of all House employees were ‘internal affairs’ of Parliament that were not subject to judicial review. This ‘fundamentalist’ interpretation of the exclusive cognisance doctrine was rejected by the Supreme Court, for which Binnie J wrote the unanimous judgment. Applying the ‘test of necessity’ it was held that exclusive and unreviewable jurisdiction over all House employees was not necessary to protect the functioning of the House of Commons. The attachment of privilege to ‘some’ parliamentary employees was undoubtedly necessary, but not those who were only indirectly connected to the legislative and deliberative functions of the House.²⁹⁶ This was the case in respect to the Speaker’s chauffeur. Distinguishing *Ex Parte Herbert*, Binnie J concluded that

British authority does not establish that the House of Commons at Westminster is immunized by privilege in the conduct of all labour relations with all employees irrespective of whether those categories of employees have any connection (or nexus) with its legislative or deliberative functions, or its role in holding the government accountable.²⁹⁷

This followed Binnie J’s formulation of the test of necessity in these terms:

In order to sustain a claim of parliamentary privilege, the assembly or member seeking its immunity must show that the sphere of activity for which privilege is claimed is so closely and directly connected with the fulfillment by the assembly or its members of their functions as a legislative and deliberative body, including the assembly’s work in holding the government to account, that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their work with dignity and efficiency.²⁹⁸

The UK Joint Committee recommended legislation clarifying that, as to activities which are not related to the internal proceedings of Parliament, ‘there should be a principle of statutory interpretation that in the absence of a contrary expression of intention Acts of Parliament bind both Houses’. Consistent with its general approach, the report said, ‘For the future, whenever Parliament is to be exempt, a reasoned case should be made out and debated as the legislation proceeds through Parliament’.²⁹⁹ The onus therefore should be on Parliament to establish its case for exemption.

The application of laws to the Commonwealth Parliament is provided for by s 15 of the

Federal Parliament.

²⁹⁶ [2005] SCR 667 at para 75.

²⁹⁷ [2005] SCR 667 at para 70.

²⁹⁸ [2005] SCR 667 at para 46. For a commentary on the case see - S Joyal, n 188.

²⁹⁹ Joint Committee on Parliamentary Privilege, n 2, para 251.

Parliamentary Privileges Act 1987 (Cth). It declares that, ‘for the avoidance of doubt’, subject to s 49 of the Constitution,

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*.

6.7 ‘In any court or place out of Parliament’

The prohibition in Article 9 against impeaching or questioning proceedings in Parliament applies to ‘in any court or place out of Parliament’. Read literally, it would prevent any critical discussion of anything said or done in Parliament anywhere other than in Parliament itself. The absurd outcome would be that the media, to take one example, would be unable to comment on parliamentary proceedings. As the UK Parliament’s Joint Committee on Parliamentary Privilege commented, ‘That cannot be right, and this meaning has never been suggested’.³⁰⁰ However, the Joint Committee also said that the phrase ‘place out of Parliament’ is ‘another obscure expression of uncertain meaning’.³⁰¹ At issue are questions of large practical significance that go to the heart of the relationship between Parliament and the Executive.

The difficulty, practically speaking, is with the adaptation of Article 9 to modern circumstances. The underlying object of Article 9, being to protect Members of Parliament against civil and criminal liabilities for things said or done in the course of parliamentary debate, is clear enough. However, its formulation of that protection pre-dated such bodies as the police force or independent commissions of inquiry. Nor yet was Article 9 drafted with a federal parliamentary system in mind. That a parliamentary committee of another Parliament within a federal system could be a ‘place out of Parliament’ in certain circumstances was not contemplated.

Clearly, a literal interpretation of ‘place out of Parliament’, preventing critical discussion of parliamentary proceedings in a newspaper or at a public bar, would contravene the implied constitutional freedom of political communication. A prohibition of this kind was not, in any event, ever envisaged. The history of Article 9 and its objects indicate a much narrower approach. For Hunt J in *R v Murphy* the word ‘place’ was to be ‘interpreted ejusdem generis with “court”’, so as that Article 9 should apply only to ‘courts and similar tribunals’.³⁰² That view, although *obiter*, was connected to his narrow interpretation of

³⁰⁰ Joint Committee on Parliamentary Privilege, n 2, p. 29

³⁰¹ Joint Committee on Parliamentary Privilege, n 2, p 29. The phrase is considered in *Hamilton v Al Fayed* [1999] 3 All ER 317 at 331-2 (Lord Woolf MR). The main issue there is the distinction between the questioning of parliamentary proceedings by the media and the courts.

³⁰² [1986] 5 NSWLR 18 at 29-30. *Ejusdem generis* is defined as a rule of statutory interpretation to the effect that where at the end of a list of specific terms there is a general term, the meaning of the general term can be no wider than the general category to which the specific terms belong.

Article 9 as preventing the visiting of legal consequences upon a person for having made parliamentary statements. In *Laurence v Katter* this *ejusdem generis* approach was approved by Davies JA who argued that, unless the phrase was so restricted, ‘the literal construction would require a much greater (and seemingly illogical) restriction upon discussion of parliamentary proceedings in court than in other places’.³⁰³

Complicating the argument is that, at the Commonwealth level, because of the separation of powers doctrine operating under Chapter 3 of the Australian Constitution, tribunals are not repositories of ‘judicial power’. A question to ask of the *ejusdem generis* approach, therefore, which seeks out court-like institutions, is whether such institutions are to be restricted to those extra-parliamentary bodies that exercise judicial power (that is, the power to make binding determinations concerning the rights of the parties before it and in accordance with judicial process)?³⁰⁴ That would appear to be the conclusion suggested by Hunt J’s narrow interpretation. Alternatively, might an extra-parliamentary body be a court-like institution for Article 9 purposes on another basis, namely because it possesses those procedural powers associated with a court, in particular the coercive power to summon witnesses and examine them on oath? The ICAC, for example, would not be a court-like body on the first test; it would on the second less restrictive basis.

Broadly, this less restrictive approach would extend ‘places out of Parliament’ to include agencies of government and statutory bodies that are quasi-judicial in nature, including commissions of inquiry. This last interpretation finds expression in the Commonwealth *Parliamentary Privileges Act 1987*.³⁰⁵ Section 16 (3) of that Act is defined to apply to proceedings in ‘any court or tribunal’, and ‘tribunal’ is defined to mean:

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 (emphasis added).

An interpretation along these lines was recommended by the UK Joint Committee which thought it might ‘provide a clear and sensible basis for the future’.³⁰⁶ However, it is yet to be adopted by the courts, in Australia or the UK.

In a rare judicial observation on the matter, Fitzgerald P in *O’Chee v Rowley* contemplated the possibility that ‘place out of Parliament’ in Article 9 ‘might be wider’ than ‘tribunal’

³⁰³ (1996) 141 ALR 447 at 488-9.

³⁰⁴ The problems involved in defining what is meant by judicial power, both in terms of its purpose and the manner of its exercise, were discussed by Justice Gaudron in *Sue v Hill* (1999) 199 CLR 462 at 515.

³⁰⁵ Note that ‘tribunal’ does not exhaust the category of bodies for this purpose. As explained in *Odgers*, this is because section 16 provides that Article 9 has the effect of the provisions of the section ‘*in addition to any other operation*’- H Evans ed, *Odgers’ Australian Senate Practice*, 11th ed, Department of the Senate 2004, p 48.

³⁰⁶ Joint Committee on Parliamentary Privilege, n 2, p 30.

under s. 16 of the federal Act.³⁰⁷ The phrase would extend therefore beyond those bodies with the power to examine witnesses on oath. Carney has argued in this vein, stating that Article 9 should not be confined to any person or body with the power to examine witnesses on oath, ‘otherwise it allows executive interrogation by police or other investigators’.³⁰⁸ Campbell is less categorical on the issue of police questioning, stating Article 9 would not prevent the police questioning a Member who, in parliamentary proceedings, had accused a person of engaging in criminal conduct – ‘at least if, by law, the member cannot be punished for refusal to answer the questions asked by the police’.³⁰⁹

Generally, however, Campbell agrees that a ‘place out of Parliament’ extends beyond extra-parliamentary bodies with the power to compel evidence, but only as far as those bodies with the coercive power to impose sanctions (including disciplinary sanctions).³¹⁰ Would this include the holding of a disciplinary hearing by a political party to expel a Member, where reference is made to statements made by the Member in parliamentary debates? Twomey discusses the New Zealand case of *Peters v Collinge*³¹¹ in this context, where it was held that the examination at the expulsion hearing of Peters’ conduct in parliamentary proceedings did not constitute ‘questioning’ of what Peters had said or done in Parliament.³¹² Special considerations relevant to the working of representative democracy can be said to have applied in this instance. As the Clerk of the New Zealand House of Representatives, David McGee, comments:

the fundamental democratic right of free election to Parliament cannot be inhibited by parliamentary privilege. A political party does not breach privilege by withdrawing electoral support from a sitting member of Parliament on account of that member’s actions, whether they occurred within Parliament or in the country at large.³¹³

Ultimately, the meaning of ‘in a court or place out of Parliament’ must be understood by reference to the underlying purpose of Article 9. As stated in *Prebble v TV New Zealand*, the basic concept is that Members and witnesses have the right to ‘speak freely’ without any fear that their motives, intentions or reasoning will later be questioned or held against them.³¹⁴ Immunity from any extra-parliamentary body with the power to compel evidence

³⁰⁷ (1997) 150 ALR 199 at 201.

³⁰⁸ G. Carney, *Members of Parliament: Law and Ethics*, Prospect 2000, p 227.

³⁰⁹ Campbell, n 147, p 21.

³¹⁰ Campbell, n 147, pp 19-21.

³¹¹ [1993] 2 NZLR 554.

³¹² Twomey, n 26, p 502.

³¹³ D McGee, *Parliamentary Practice in New Zealand*, 3rd ed, Dunmore Publishing 2005, p 619.

³¹⁴ [1995] 1 AC 321 at 334. Lord Browne-Wilkinson does refer specifically to ‘the courts’. At the time, however, he was concerned to articulate the rationale behind Article 9, not to identify the scope of the phrase ‘in any court or place out of Parliament’.

and impose sanctions would seem a necessary incident of that protection. It renders commissions of inquiry ‘places’ out of Parliament, not because they have judicial power, nor yet because they are agents of the Executive, but because, by their power to compel evidence and to make findings and recommendations which may result in legal proceedings, such bodies as the ICAC, PIC and the NSW Crime Commission have the capacity to inhibit parliamentary free speech. Likewise, Royal Commissions or special commissions of inquiry would be ‘places’ out of Parliament, regardless of whether they are embodiments of the Executive Government.

Historically in NSW a different construction seems to have been placed on the relationship between royal commissions and parliamentary privilege. This can be illustrated by reference to the expulsion of Richard Price from the Legislative Assembly in 1917 on the ground of abuse of the parliamentary privilege of free speech. This followed two speeches made by Price in the House, the first on 13 December 1916 and the second on 5 September 1917, both involving charges of financial maladministration against the Minister for Lands and Forestry, WG Ashford. A royal commission, headed by Judge Hugh Hamilton, was appointed to inquire into the truth of the charges. He concluded that the charges made by Price under the cloak of privilege ‘were made wantonly and recklessly and without any foundation whatsoever’.³¹⁵ There is no evidence to suggest that any regard was paid to considerations arising from Article 9.³¹⁶

6.8 Legislative secrecy provisions and parliamentary privilege

Secrecy provisions, which typically prevent public servants from disclosing certain information, are a specific means by which the Executive may seek to avoid scrutiny by a parliamentary committee. In NSW the question is whether such provisions prevent the exercise, by a House or a committee under the *Parliamentary Evidence Act 1901* (s. 11(1)), of the power to require witnesses to answer any ‘lawful question’?

One example of such a secrecy provision is s 148 of the *Casino Control Act 1992* which, subject to certain stated exceptions, prohibits the divulging of information and protects a person from producing any document to any ‘court’, a word which is defined to include ‘any tribunal, authority or person having power to require the production of documents or the answering of questions’. Is a parliamentary committee a ‘court’ for these purposes and, if so, is it prevented by s 148 from requiring witnesses to answer lawful questions put to them?³¹⁷ Different answers have been suggested.

³¹⁵ NSW Parliamentary Papers, 1917-18, vol 2, pp 135-142; *NSWPD*, 17 October 1917, pp 1732-86.

³¹⁶ That seems to have been the position in NSW, at least up to the 1950s. In respect to the royal commission established in 1953 to inquire into matters concerning alleged corrupt and improper association between the former Minister for Mines (JG Arthur) and RA Doyle, a motion was agreed to in the Legislative Council authorising and directing Members and staff alike to appear and give evidence before the Commission - *Legislative Council Journal*, 1953, vol 135, pp 14-5. For a discussion of other New South Wales examples see G Griffith, *Parliamentary Privilege: Use, Misuse and Proposals for Reform*, NSW Parliamentary Library Briefing Paper No 4/1997, pp 43-5.

³¹⁷ The question is one of specific statutory interpretation, not of the application of the Article 9

For Twomey, both a House of the Parliament or a parliamentary committee ‘would appear to fall within that definition’.³¹⁸ Alternatively, it is argued by Bret Walker SC that, if Parliament intended s 148 to operate in this way, the intention would be clear on the face of the statute. His advice was sought in the context of a committee inquiry concerning budget estimates. During the course of the inquiry, a public hearing was held at which a number of officers from the Casino Control Authority appeared as witnesses. During their evidence, on advice from the Crown Solicitor that disclosure would breach s 148 of the *Casino Control Act 1992*, several of these witnesses declined to answer certain questions asked by the committee. Against this background, Walker advised that the words of s 148 ‘are not apt to deprive the Council or the Committee of its pre-existing power, both at common law and under the Parliamentary Evidence Act, to enquire into public affairs as Members see fit’.³¹⁹ For the section to have this effect, it would have required either an express reference to the Houses, including their committees, or a statutory scheme that would be rendered fatally defective unless its application to the Houses were implied. As explained by John Evans, Clerk of the Parliaments,

In reaching this conclusion, Mr Walker referred to two canons of statutory interpretation, which, he advised, apply in cases where it is claimed that legislation has diminished the powers of a House of Parliament. The first recognises that such legislation has direct constitutional implications, and that significant constitutional implications would follow only from plain statutory language. The second recognises the ‘implausibility that Parliament should have intended by indirect means to surrender by implication’ part of the privilege attaching to its proceedings.³²⁰

The effect of statutory secrecy provisions is discussed at length in *Odgers’ Australian*

prohibition against questioning what is said in Parliament in ‘any court or place *out of Parliament*’. The secrecy provision of the *ICAC Act* (s 111) is in similar terms to s 148 of the *Casino Control Act*. It might be asked whether this would prevent disclosure of information by the Commissioner to the Joint Parliamentary Committee established to oversee the ICAC. Almost certainly the answer is ‘no’. The prohibition against disclosure under s 111 is made subject to an exception, by which a person to whom the section applies may divulge information ‘for the purposes of and in accordance with this Act’ (s 111(4)). The strong likelihood is that these purposes would include the inquiry functions of the Joint Committee. Also relevant in this context is s 243 of the *Workplace Injury Management and Workers Compensation Act 1998* which prevents disclosure of information. One exception to the rule is that disclosure is permitted ‘with other lawful excuse’ (s 243(1)(f)). On the assumption that parliamentary committees in NSW have the power to order documents, under statute or at common law, it is likely that a lawful excuse would therefore be provided for disclosure.

³¹⁸ Twomey, n 26, p 521.

³¹⁹ B. Walker, *Legislative Council: Parliamentary privilege and witnesses before General Purpose Standing Committee No 4*, 2 November 2000 (authorised to be published by resolution of the Committee on 6 November 2000), para 2.

³²⁰ J. Evans, ‘Order for papers and executive privilege; committee inquiries and statutory secrecy provisions’, *ASPG 2002 Annual Conference – Parliamentary Privilege*, Melbourne, 12 October 2002, p 12.

Senate Practice, where the argument is that ‘a generic statutory secrecy provision does not affect parliamentary inquiries’. It is a fundamental principle, it is said, that the ‘law of parliamentary privilege is not affected by a statutory provision unless the provision alters that law by express words’. According to *Odgers*, if that rule were abandoned, ‘there is no end to the provisions which may be interpreted as inhibiting the powers of the House and their committees’. Tellingly, it was said that government advisers stopped short of ‘claiming that a person could be prosecuted for presenting information to a parliamentary committee’. One opinion of the Commonwealth Solicitor-General contended that secrecy provisions could apply to parliamentary inquiries ‘not only by express words in the provision but by a “necessary implication” drawn from the statute’. This, too, was challenged by the Clerk of the Senate, who pointed out that the doctrine of ‘necessary implication’ still posed a ‘residual threat to parliamentary privilege’ – because ‘the government’s legal advisers could find “necessary implications” when there was a desire to invoke a particular secrecy provision to inhibit a parliamentary inquiry’.³²¹

Predictably, the history of the debate on statutory secrecy provisions shows parliamentary and Executive authorities lining up on different sides of the argument, the one seeking to affirm that special rules apply to parliamentary privilege, the other arguing for the application of the normal rules of statutory interpretation.³²²

³²¹ *Odgers*, n 143, pp 49-53.

³²² Whether express statutory words are needed for the abrogation of parliamentary privilege is discussed in section [7.1] of this paper.

7. QUESTIONS

7.1 Are express statutory words needed for the abrogation of parliamentary privilege?

From the development and expansion of statutory law over the past century or so questions have been raised as to the effect, if any, certain Acts may have on the operation of parliamentary privilege. Traditionally, the preferred rule of interpretation states that a privilege of Parliament should not be abrogated except by express words in a statute. Authority for the proposition is the case of *Duke of Newcastle v Morris* where Lord Hatherley observed that privilege could not be destroyed ‘unless there was some special clause in the Act striking at and distinctly abolishing it’.³²³ This rule can be said to work as a shield for the protection of parliamentary privilege against the inadvertent or implied operation of legislative measures. The discussion on statutory secrecy provisions is one example of where it is invoked by parliamentary authorities to protect the powers and immunities of the Houses and their committees.³²⁴

In an Australian context, in *Criminal Justice Commission v Parliamentary Criminal Justice Commissioner* McPherson JA affirmed ‘the general interpretive rule that express words (or, as would probably now be said, unmistakable and unambiguous language) are required to abrogate a parliamentary privilege’.³²⁵ In that case, where immunity from liability for damages had been granted by statutory provision to the Parliamentary Commissioner,³²⁶ it was ruled that Parliament could not ‘be assumed to have indirectly surrendered by implication in a statute part of the privilege attaching to its proceedings’.³²⁷ In earlier proceedings in the same matter, Helman J referred to the ‘implausibility of the proposition that Parliament should have intended by such indirect means to surrender by implication part of the privilege attaching to its proceedings’, words later echoed by Brett Walker SC in advice on the effect of statutory secrecy provisions. Helman J did, however, accept that ‘an Act of Parliament can by necessary implication circumscribe parliamentary privilege’,³²⁸ a view that *Odgers’ Australian Senate Practice* treats as a thin end of the wedge. As mentioned earlier, there it is argued that

³²³ (1870) LR 4 HL 661 at 671.

³²⁴ See section [6.8] of this paper.

³²⁵ (2002) 2 Qd R 8 at 23 (Williams JA and Chesterman J concurring).

³²⁶ This was under s 118ZA of the *Criminal Justice Act 1989* (Qld). Rejected was the argument that, by the provision of this limited immunity, Parliament had intended by implication to repeal the immunities attaching to parliamentary privilege. Accepted, rather, was the argument that the statutory provision had in fact augmented the immunities provided to the Parliamentary Commissioner.

³²⁷ *Odgers*, n 143, p 53.

³²⁸ *CJC & Ors v Dick* [2000] QSC 272 at para 13.

once the principle that parliamentary privilege is not affected by a statute except by express words is abandoned, there is no end to the provisions which may be interpreted as inhibiting the powers of the Houses and their committees.³²⁹

The interpretive rule that unmistakable and unambiguous language is required to abrogate parliamentary privilege was reconsidered recently by the Canadian Supreme Court in *Canada (House of Commons) v Vaid*.³³⁰ There the ‘express abrogation’ rule was argued on behalf of the Speaker, only to be decisively rejected by the Court on two grounds. First, it was explained that the argument ‘presupposes the prior establishment of a parliamentary privilege, which has not been done’. Secondly, the Court said that the ‘presumption’ suggested by Lord Hatherley 135 years ago ‘is out of step with modern principles of statutory interpretation in Canada’. Referred to in this context was the second edition of Driedger’s *Construction of Statutes*, which states

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.³³¹

The argument appears to be therefore that an Act of Parliament can by necessary implication limit parliamentary privilege, where this is perceived to be consistent with ‘the intention of Parliament’. The fact therefore that the *Canadian Human Rights Act* did not expressly indicate that it was intended to extend to employees of Parliament was not determinative of the issue. Indeed, that Act was said to be a ‘quasi-constitutional document’ and any exemption from it had to be ‘clearly stated’.³³²

It may be that the application of this approach is to be restricted to those cases where parliamentary privilege cannot be presumed to exist, where statutory construction is central to that inquiry. Admittedly, *Canada (House of Commons) v Vaid* is not really authority for that proposition. Whether a limitation to the effect that the express abrogation rule only ceases to apply where ‘constitutional’ statutes are at issue is also doubtful. Its *ratio* seems to be that, where questions of parliamentary privilege are to be determined, the normal rules of statutory construction apply. This aspect of the Court’s reasoning may need to be considered in the particular setting of Canadian jurisprudence, where it has been decided that parliamentary privilege is part of the ‘Constitution of Canada’ and, uniquely among the powers of the legislatures, that it is not subject to the *Charter of Rights and Freedoms*.³³³ To grant parliamentary privilege further ‘special’ treatment in the field of statutory

³²⁹ Odgers, n 143, pp 51-52. As noted, the application of laws to the Commonwealth Parliament is provided for by s 15 of the *Parliamentary Privileges Act 1987* (Cth).

³³⁰ The case is discussed in section [6.6] of this paper.

³³¹ [2005] SCR 667 at para 80.

³³² [2005] SCR 667 at para 81.

³³³ *New Brunswick Broadcasting Co v Nova Scotia* [1993] 1 SCR 319; *Canada (House of Commons) v Vaid* [2005] SCR 667 at para 33.

interpretation may have been a ‘bridge too far’ for the Court. Be that as it may, the decision’s influence, if any, on Australian courts remains to be determined.

7.2 Are publications incidental to publication in Parliament subject to absolute privilege?

The long-running and complex case of *Cornwall v Rowan*³³⁴ revisited several issues relating to parliamentary privilege. In brief, the facts were that from 1985 to 1987 the respondent in these proceedings (Rowan) was the administrator of the Christies Beach Women’s and Children’s Emergency Shelter. In his then capacity as Minister for Community Welfare, Dr Cornwall, instigated a joint Commonwealth-State review of the management of such shelters and the Review Committee’s report was duly tabled in the South Australian Parliament in August 1987. As a result of the publication of the report by the Review Committee, funding was withdrawn from the Christies Beach Shelter and Rowan instituted action for damages on various grounds against 13 defendants, among them Dr Cornwall and members of the Review Committee. Among other things, the trial judge found that Dr Cornwall was guilty of the tort of misfeasance in a public office because of the malicious use of unsubstantiated allegations contained in the report when deciding to withdraw government funding. Dr Cornwall appealed against this finding.

That the tabling of the report by Dr Cornwall in Parliament was protected by parliamentary privilege was not at issue in the case. The only other relevant publication by Dr Cornwall was to Cabinet ‘for the purpose of approving the tabling of the report in Parliament’. In relation to this, the Full Court of the Supreme Court of South Australia stated that absolute privilege extended beyond ‘anything said or done by Dr Cornwall in Parliament’, to include ‘any necessary publication incidental to such publication’.³³⁵ In other words, not only was the publication in the Parliament subject to absolute privilege, so too was the necessary preliminary publication in Cabinet. Referred to was the authority of the decision in *Holdings v Jennings*³³⁶ where the typing or printing of a Member’s ‘personal explanation’ to Parliament was held to be subject to absolute privilege. The key was the ‘intended use’ of the document, with Anderson J stating ‘If the intended use is one to which privilege attaches, a similar privilege would be concomitant’.³³⁷

To borrow the words used in s 16(2) of the Commonwealth *Parliamentary Privileges Act 1987*, protection extends to ‘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’. That provision was directly at issue in *Szwarcbord v Gallop*³³⁸ where it was held that a

³³⁴ (2004) 90 SASR 269.

³³⁵ (2004) 90 SASR 269 at paras 223-4. It was confirmed that the publication of the report in the Parliament could not be the subject of any misfeasance in public office (at para 225). The decision was affirmed in *Szuty v Smyth* [2004] ACTSC 77 at para 156.

³³⁶ [1979] VR 289.

³³⁷ [1979] VR 289 at 293.

³³⁸ (2002) 167 FLR 262 (Crispin J). The case is also cited as *In the Matter of the Board of Inquiry into Disability Services* [2002] ACTSC 28.

copy of a report that was retained by the ACT Chief Minister for the purpose of tabling in the Assembly would attract parliamentary privilege.

7.3 Do all copies of reports and other documents tabled in Parliament attract parliamentary privilege?

How wide is the net of absolute privilege to be cast? For example, do all copies of all reports tabled in Parliament attract the protection of parliamentary privilege, in particular where the document was publicly released or provided to other persons prior to its tabling? According to Twomey, in *Szwarcbord v Gallop*³³⁹

Crispin J held that a copy of a report of a Board of Inquiry for the purposes of tabling it in the Legislative Assembly did not prevent the plaintiffs from tendering their copy of the report. This was because that document had not been prepared for the purpose of transacting the business of the Parliament.³⁴⁰

By reference to *O'Chee v Rowley*, Crispin J observed:

Privilege may be attracted by the retention of a document for a relevant purpose, but that is because the retention for such a purpose is itself an act forming part of the proceedings. The privilege thereby created does not attach to the document and any copies for all purposes. It applies only to the words used and acts done in the course of, or for the purposes of or incidental to, the transaction of business of the Assembly including the retention of a document for a purpose of that kind.³⁴¹

The facts of the case are that, following pressure from members of the ACT's Legislative Assembly, an inquiry into the Territory's Disability Services was conducted under the *Inquires Act 1991* (ACT). The Board of Inquiry, constituted by John Gallop, a retired ACT Supreme Court judge, had similar powers to a royal commission and could be characterised as a creature of the Executive. Under the Act, two courses of action were open to the Chief Minister, who could make the report public or table it in the Assembly. Substantial extracts from the Board's interim report were tabled in August 2001 by the Chief Minister. The final report was presented to the Chief Minister in December 2001, copies of which were circulated to those public servants that he considered might have been adversely named in it. When the Assembly next met, on 19 February 2002, both the interim report and final report were tabled, along with three 'rebuttal statements' by four public servants who had been named in the report. Concerned that they had been denied procedural fairness, these public servants subsequently commenced actions in the Supreme Court. The Speaker duly intervened, arguing that reliance on the Board's report by the plaintiffs would contravene s 16(2) of the Commonwealth *Parliamentary Privileges Act 1987*.³⁴² The Speaker was later

³³⁹ (2002) 167 FLR 262.

³⁴⁰ Twomey, n 26, p 498.

³⁴¹ (2002) 167 FLR 262 at para 22.

³⁴² This applies in the ACT by virtue of s 24(3) of the *Australian Capital Territory (Self-Government) Act 1988* (Cth).

to comment:

Given the facts that the Assembly had played a pivotal role in calling on and directing the government of the day to establish the Board of Inquiry, that members had questioned the government on the matter during the course of the inquiry, that extracts from the interim report had been tabled in the Assembly, and that members had indicated consistently a high level of interest in the final outcome of the inquiry, it did not seem to be too much of a presumption to conclude that the final report had been prepared for the purpose of or incidental to the transacting of any such business before the Assembly.³⁴³

Crispin J did not agree. He ruled that a copy of the report retained by the Chief Minister for the purpose of tabling in the Assembly would attract parliamentary privilege. However, that did not extend privilege to other copies, not derived from the privileged copy. Crispin J observed: 'It is for this reason that the tabling or retention of copy of a newspaper can not prevent the continued circulation of the paper or the receipt in evidence of another copy'. Likewise, while the retention of a letter by a Member for use in a parliamentary context will attract absolute privilege, the wholesale application of the same level of protection does not apply to other copies. For example:

If copies had also been supplied to newspapers for publication, the fact that the member had decided to keep the copy in his or her possession for a relevant purpose would not prevent the copies supplied to the newspapers from being tendered in defamation proceedings against others.³⁴⁴

As for the report at issue, it was found that it had not been 'prepared' for a parliamentary purpose, but rather 'in fulfillment of a statutory duty'. All copies of the report would not therefore attract parliamentary privilege. The focus, ultimately, was on the actual copy of the report tendered to the court. It was possible, Crispin J acknowledged, that it 'was produced for purposes of or incidental to the transaction of business of the Assembly'. There was, however, 'simply no evidence to that effect'.³⁴⁵ More to the point, perhaps, evidence was presented to that effect, but not accepted by the Court in the context of a decision which may not prove to be the last word on this question.

³⁴³ W Berry, 'Privilege and the Supreme Court', *Paper presented at the 33rd Conference of Australian and Pacific Presiding Officers and Clerks*, Brisbane, July 2002, p 3.

³⁴⁴ (2002) 167 FLR 262 at para 22.

³⁴⁵ (2002) 167 FLR 262 at para 24. Subsequent to the ruling, in 2003 both the ACT's *Inquiries Act 1991* and the *Royal Commissions Act 1991* were amended in identical terms. In his Second Reading speech, the Chief Minister, Mr Stanhope, noted the amendments require the provision of natural justice during the course of an inquiry and provision is also be made for the notification of persons or agencies against which adverse findings are to be made. Further, a board of inquiry or royal commission report made public by the Chief Minister is taken to be a 'public document' for the *Civil Law (Wrongs) Act 2002* (ACT) - *ACT Legislative Assembly Debates*, 28.8.2003, pp 3326-3328.

7.4 Are all tabled papers protected by parliamentary privilege?

In *Szwarcbord v Gallop* the fact that a copy of the report had been tabled in Parliament was not decisive, with Crispin J arguing that

privilege may not prevent even documents that have been tabled from being admitted into evidence if they were not prepared for purposes of or incidental to business of the Parliament and their subsequent production would not reveal words used or acts done that might fairly be regarded as falling within the concept of ‘proceedings in Parliament’.³⁴⁶

This controversial proposition was illustrated by the following example:

a Member of Parliament sued for defamation in respect of the publication of a letter for purposes unrelated to parliamentary business could not effectively prevent the maintenance of the proceedings against him by the simple expedient of tabling the only copy of the offending letter.³⁴⁷

While agreeing with the general thrust of the decision in *Szwarcbord v Gallop*, the correctness of this example was questioned in *Szuty v Smyth*. There Higgins CJ argued that the ‘original letter... could be prevented from production unless the Assembly permitted it’, although, that would not prevent ‘secondary evidence of its content being given by persons to whom it had otherwise previously been published’.³⁴⁸

Generally, the protection afforded to parliamentary papers is statutory in nature, in NSW under the *Defamation Act 2005* and the *Parliamentary Papers (Supplementary Provisions) Act 1975*, as well as by Article 9 of the *Bill of Rights 1689*. By s 27(2)(a)(i) of the *Defamation Act 2005* absolute protection is provided to all documents published by order, or under the authority, of a ‘parliamentary body’. As in Crispin J’s example, not all papers which are tabled are ordered or authorised to be published by the House, including documents laid before the House by private members. However, as Campbell and Groves assert:

Even if there is no order that a tabled paper be published, the acts of tabling and the subsequent use of the paper in the Parliament are treated as proceedings in Parliament for the purposes of art 9 of the Bill of Rights 1689.³⁴⁹

³⁴⁶ (2002) 167 FLR 262 at para 23.

³⁴⁷ (2002) 167 FLR 262 at para 23.

³⁴⁸ [2004] ACTSC 77 at para 157. It was further suggested by Crispin J that reliance on figures in the annual report of a statutory authority which had been tabled would be admissible, though the court ‘would be precluded from receiving any evidence as to the use to which it had been put in Parliament’ - (2002) 167 FLR 262 at para 23.

³⁴⁹ E Campbell and M Groves, ‘Parliamentary papers and their protection’ (2004) 9(2) *Media and Arts Law Review* 113 at 120-121. The article presents an overview of the position in all Australian jurisdictions, as well as an analysis of the scope of the protection.

To the question whether all ‘tabled’ papers are parliamentary proceedings, the answer is almost certainly ‘yes’, at least if the papers have been formally tabled and used for the business of the House.

In its First Report in 1999 the UK Joint Committee on Parliamentary Privilege considered whether the protection afforded to parliamentary papers is too broad, extending as it does to all documents tabled by Ministers, including the annual reports of government departments and statutory authorities. As Campbell and Groves commented: ‘These reports are increasingly occupied by bland and self-serving policy statements, routine annual financial statistics and information about compliance with regulatory requirements such as freedom of information and occupational health and safety legislation’.³⁵⁰ For the Joint Committee the absolute legal immunity afforded by parliamentary privilege should be confined to ‘those areas which need this immunity if Parliament is to be effective’. According to the Joint Committee, ‘the presumption should be that, unless there are strong reasons in the public interest, no paper other than one emanating from the House or its committees should be absolutely privileged’.³⁵¹ Such an approach is consistent with that adopted by the Joint Committee, one that tends to strip down parliamentary privilege to its bare bones.

7.5 Is the publication of a tabled paper by an officer of the Parliament to Members and non-Members protected by parliamentary privilege?

In some jurisdictions, notably the Commonwealth and Queensland, the publication of tabled papers by an officer to a Member is protected by statute. The Queensland legislation is, in fact, more comprehensive as it also provides ‘a general authorisation for the privileged publication and reporting of tabled documents not otherwise ordered to be printed’. Sections 52 and 54 of the *Parliament of Queensland Act 2001* provides:

Section 52

- (1) A person may read any document that is tabled in the Assembly by a member, but is not ordered or otherwise authorised by the Assembly to be printed.
- (2) The person may make a copy of, take an extract from, or take notes of, the document.
- (3) A person does not incur any civil or criminal liability for the doing by the person or another person of an act permitted to be done under this section.

Section 54

- (1) A person does not incur any civil or criminal liability for the publication of a fair report of a document that is tabled in the Assembly by a member with –
 - (a) the express permission of the Speaker; or
 - (b) the leave of the Assembly.
- (2) Subsection (1) applies to a document whether or not the Assembly order or otherwise authorises the document to be printed.

³⁵⁰ E Campbell and M Groves, n 349, p 123.

³⁵¹ Joint Committee on Parliamentary Privilege, n 2, pp 89-90.

Commenting on the position in NSW, the Legislative Assembly states that ‘there is no clear protection for an officer of the House publishing to a Member of Parliament (let alone a member of the public) a tabled paper not ordered to be printed’. Arguing that the situation in NSW is ‘clearly unsatisfactory’ and in need of legislative clarification, it is said:

One of the clear intentions behind tabling a paper in a House of Parliament is to make that document a public document. Therefore the publication of all tabled papers to a Member of Parliament or to the public should be absolutely privileged. In this respect the Queensland provisions are an exemplary model, providing absolute privilege to the publication of tabled papers and the subsequent publication of fair reports of a tabled paper whether or not the House has ordered that document to be printed.³⁵²

7.6 Is the power to preclude cross-examination necessary to the functioning of a parliamentary committee?

This question was considered in *Gagliano v Canada (Attorney General)*³⁵³ by Tremblay-Lamer J in the Canadian Federal Court. At issue in that case was whether parliamentary privilege precludes a person from being cross-examined before a commission of inquiry on inconsistent statements previously made before a parliamentary committee? Counsel for the applicant (Gagliano) relied on the NSW case of *R v Murphy*,³⁵⁴ in which Hunt J held that a witness could be confronted with his contradictory testimony given before a Senate committee when such questioning would not have any legal consequences for the witness. In *Gagliano* the applicant’s argument was predicated on the claim that the Gomery Commission had no power to convict or even recommend prosecution or civil proceedings.

In the course of the judgment, Tremblay-Lamer J noted that ‘Article 9 does not admit of only one construction’, adding ‘Therefore it does not follow inexorably from Article 9 that cross-examination of a witness, in a proceeding such as the present Commission where he faces no civil or legal consequences, is barred’.³⁵⁵ However, it was also observed that the narrow construction of Article 9 preferred by Hunt J had been ‘unequivocally rejected’ by Lord Browne-Wilkinson on behalf of the House of Lords and the Judicial Committee of the Privy Council, stating that the law as stated by Hunt J was ‘not correct so far as the rest of the Commonwealth is concerned’.³⁵⁶ Tremblay-Lamer J concurred with that view. The central plank of the ruling was that the power to preclude cross-examination of previous proceedings in Parliament falls within the scope of parliamentary privilege ‘because it is necessary to the functioning of Parliament’. According to Tremblay-Lamer J:

³⁵² NSW Legislative Assembly, Parliamentary privilege attaching to tabled paper’ - <http://bulletin/prod/parliament/publications.nsf/0/6BBCE1A6C61F84BECA256ED8001D942F>

³⁵³ [2005] 3 FCR 555; (2005) FC 576.

³⁵⁴ (1986) 5 NSWLR 18.

³⁵⁵ [2005] 3 FCR 555; (2005) FC 576 at para 61.

³⁵⁶ *Prebble v Television New Zealand* [1995] 1 AC 321 at 333-334.

It is necessary at three levels: to encourage witnesses to speak openly before the parliamentary committee, to allow the committee to exercise its investigative functions and, in a more secondary way, to avoid contradictory findings of fact.³⁵⁷

7.7 Is evidence before a parliamentary committee admissible to prove malice or an improper purpose?

Also at issue in *Cornwall v Rowan*³⁵⁸ was the question of admissibility of evidence before a parliamentary committee. The trial judge found that, for members of the Review Committee, the defence of qualified privilege was defeated by express malice in publishing the report to the Minister. In arriving at this finding the trial judge erred by relying on evidence given before a Parliamentary Select Committee. The evidence was clearly inadmissible. Following a detailed review of the relevant case law, including *Church of Scientology of California Inc v Johnson-Smith*,³⁵⁹ the Full Court ruled that parliamentary privilege

prevents subsequent reliance in a court on what a witness has said before a parliamentary committee in order to prove that witness' state of mind for the purpose of the proceedings in court.³⁶⁰

Likewise, in *Commonwealth of Australia & Air Marshall McCormack in His Capacity as Chief of Air Force v Vance*,³⁶¹ it was held by the Full Court of the ACT Court of Appeal that the trial judge had been in error to admit evidence given before a Senate Committee. The evidence had been used to answer a question of fact concerning the relationship between RAAF legal officers and their employer for the purpose of deciding whether certain evidence was subject to legal professional privilege. The Full Court's decision was to remit the matter to the trial judge to apply the test for client legal privilege on evidence that would not offend the *Parliamentary Privileges Act 1987* (Cth).

Consistent with this approach, in the Western Australian case of *Re MacTiernan: Ex Parte Coogee Coastal Action Coalition Incorporated*,³⁶² McLure J refused to allow the transcript of evidence of a witness before the Public Accounts Committee. This was where the

³⁵⁷ [2005] 3 FCR 555; (2005) FC 576 at para 72.

³⁵⁸ (2004) 90 SASR 269.

³⁵⁹ [1972] 1 QB 522. The plaintiff church sued the defendant, an MP, for remarks made by him in a TV program. The MP pleaded fair comment and the plaintiff replied with a plea of malice, relying on statements made in Parliament. The question arose at trial whether such reliance infringed Article 9 and Browne J ruled that it did. The plaintiff could not ask the court to infer malice from statements made only in Parliament.

³⁶⁰ (2004) 90 SASR 269 at para 397.

³⁶¹ [2005] ACTCA 35.

³⁶² [2004] WASC 264.

evidence went to the issue of whether there was an evidentiary foundation to support a claim that a decision of the Western Australian Planning Commission was ‘made for an improper purpose’.³⁶³

In *Priest v State of New South Wales*,³⁶⁴ a case in which a former police officer sought damages in negligence against the State, various Legislative Council reports and transcripts of evidence were only admitted in evidence at the interlocutory stage to ‘prove, as a fact, that certain things had been said in the course of proceedings in the Legislative Council’. Johnson J acknowledged that ‘the question of admissibility of this material at the final hearing of this matter may involve greater controversy’.³⁶⁵

7.8 Can parliamentary proceedings be admitted into evidence for the limited purposes of claiming greater damages in defamation proceedings?

It was this novel question that had to be answered by the Queensland Court of Appeal in *Erglis v Buckley*.³⁶⁶ As discussed earlier in this paper,³⁶⁷ the facts were that the Health

³⁶³ [2004] WASC 264 at para 43. McLure J commented that counsel for the applicant had relied on *Pepper v Hart* [1993] AC 593 where the House of Lords decided that the use of clear ministerial statements as an aid to construction of ambiguous legislation did not amount to questioning or impeaching proceedings in Parliament and did not contravene Article 9 of the *Bill of Rights 1689*. In Western Australia, as in NSW, the position is governed by the State’s Interpretation Act of 1984. In *Pepper v Hart* the House of Lords ruled that *R v Secretary of State for Trade; Ex parte Anderson Strathclyde PLC* (1983) 2 All ER 233 was wrongly decided. In this last case a Divisional Court refused to allow a *Hansard* report of proceedings in Parliament to be tendered in support of a ground for judicial review of a decision made outside Parliament. Despite this, McLure commented that ‘*Pepper v Hart* is not authority for the general proposition that a proceeding in Parliament tendered to support a ground of judicial review cannot involve a breach of Article 9 of the Bill of Rights’ (at para 44). In relation to the decision in *Pepper v Hart*, Gray J in *Mees v Roads Corporation* (2003) 128 FCR 418; [2003] FCA 306 at para 82 said: ‘The House of Lords seems to have refrained from grappling with the question whether the resolution of an ambiguity in a ministerial statement, or embarking on an inquiry as to whether the statement is clear or ambiguous, would amount to impeaching or questioning the statement. There may well be circumstances in which the expression of a view that a statement made to Parliament is not clear will be tantamount to a finding that the maker of a statement has misled Parliament’.

³⁶⁴ [2006] NSWSC 12. Johnson J acknowledged that ‘the question of admissibility of this material at the final hearing of this matter may involve greater controversy’ (at para 86).

³⁶⁵ [2006] NSWSC 12 at para 86. The approach adopted by Johnson J is consistent with the finding in *NSW AMA v Minister for Health* (1992) 26 NSWLR 114 where the Minister for Health sought permission to adduce in evidence a report of the Public Accounts Committee. Hungerford J ruled that the 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. Applying the same principle, in *Kable v State of NSW & Anor* [2000] NSWCS 1173 the Master of the NSW Supreme Court refused to allow *Hansard* extracts to be introduced to show that the *Community Protection Act 1994* had been introduced for ‘an improper purpose’, as to do so would offend Article 9.

³⁶⁶ *Erglis v Buckley* [2004] 2 Od R 599; [2004] QCA 223. As discussed, the issue was considered in *Thomson v Broadley* [2000] QSC 100, but there the reasoning of Jones J seemed to be more relevant to a wider question of admissibility.

Minister had tabled in the Assembly a copy of a letter written by a group of nurses, responding to claims made by the plaintiff about a ward at the Royal Brisbane Hospital. In these earlier proceedings, Erglis claimed she had been defamed and sought to have the tabling of the letter admitted into evidence. On the other hand, the defendants claimed immunity for the document on the grounds that its admission into evidence would amount to a questioning of parliamentary proceedings. The specific issue before the Court of Appeal was whether certain paragraphs in Erglis' statement of claim should be struck out. These sought substantially greater damages on the basis of the publication of the letter to the Minister, in circumstances where the defendants knew that the Minister would be likely to read it in Parliament, with all the consequent publicity in the media that would follow. The issue was whether admission of the fact of the tabling of this letter – an act in itself protected by parliamentary privilege – for the purposes of claiming greater damages, constituted an impeaching or questioning of parliamentary proceedings?

By a 2:1 majority the Queensland Court of Appeal held that, for the specific purpose at issue, the tabling of the letter was admissible. McPherson JA found that the tabling of the letter was relied on by the plaintiff (Erglis) only as 'a matter of history', and that such limited purpose did not impeach, question or impair parliamentary freedom of speech and debate.³⁶⁸ Fryberg J found that neither the allegation of indirect damage caused by the tabling of the letter, nor that of publication of defamatory material in Parliament caused the statement of claim to constitute an impeachment of parliamentary freedoms.³⁶⁹

Dissenting, Jerrard JA held that, where proof of publication of words in Parliament is relied on, even in an action brought against third parties, the proceedings in Parliament are called into question. Jerrard JA reasoned that 'Proving that the Minister was the medium for the defendant's message means that a sufficient reason for the Minister's making the statement to Parliament is established to the court's satisfaction'.³⁷⁰ He further argued that a foreseeable consequence of allowing the appeal would be unwillingness of citizens to provide information to MPs, with consequences for proceedings in Parliament.³⁷¹

In contrast, McPherson JA found that parliamentary democracy in Australia is 'sufficiently vigorous' not to be threatened by such considerations. He stated that the plaintiff's statement of claim involved no allegation that the Minister's motives were improper. The adverse consequences asserted were not against the Minister but against those who provided the letter to her, knowing it would become public knowledge. McPherson JA continued:

³⁶⁷ In section **[6.5]** of this paper.

³⁶⁸ [2004] 2 Od R 599; [2004] QCA 223 at para 9.

³⁶⁹ [2004] 2 Od R 599; [2004] QCA 223 at para 89.

³⁷⁰ [2004] 2 Od R 599; [2004] QCA 223 at para 31.

³⁷¹ [2004] 2 Od R 599; [2004] QCA 223 at para 34.

That does not reflect, nor is it intended to reflect, on the Minister, who was simply informing Parliament of what the letter said. Nor do I consider that she was or would have been inhibited in any way by the risk, if she had contemplated it, that, by doing so, the defendant's might, if the plaintiff brought these proceedings for defamation, be likely to incur liability for larger damages by reason of the potential for greater publicity following the Minister's action.³⁷²

It should be said, however, that the views of Jerrard JA would seem to be more consistent with the continued provision of information to Members of Parliament, the flow of which should not be impeded if parliamentary democracy is to remain vigorous. Writing in a similar vein, Campbell and Groves comment:

The reasoning of the majority of the court in *Erglis* does not sit easily with the wider purpose of parliamentary privilege. The fundamental purpose of the freedom of speech embodied in Art 9 of the Bill of Rights and its successors is to grant members the freedom to say in parliament what they wish without incurring possible legal liability. That right can be impeded if people who provide information to members of parliament face liability, or increased liability, when a member who receives information subsequently uses it in proceedings of parliament. This possibility might inhibit the conduct of members of parliament and is, therefore, in tension with the freedom of speech and debate in parliament. The right of citizens to complain to members of parliament about a wide range of issues is a cornerstone of modern democratic government. That right might be hampered if citizens could face increased legal liability as a result of having complained to a member of parliament.³⁷³

7.9 Can parliamentary proceedings be admitted into evidence for the limited purposes of mitigating damages in defamation proceedings?

On the facts, in *Szuty v Smyth*,³⁷⁴ a ruling of a single judge of the ACT Supreme Court, the answer was 'no'. The question at issue was whether the defendant (Brendan Smyth, the then Minister for Housing) could rely on what was said in the Legislative Assembly as a matter mitigating the damages otherwise assessable. Two parliamentary statements had been made: one by Bill Wood MLA on behalf of the plaintiff (Szuty), complaining of what had been said about her in a letter from Smyth to the Real Institute of the ACT, saying that her behaviour in a certain matter showed a 'sad lack of ethics';³⁷⁵ the other by the defendant in reply. A report of these proceedings was subsequently published in *The Canberra Times*. Higgins CJ posed the following questions:

³⁷² [2004] 2 Od R 599; [2004] QCA 223 at para 11.

³⁷³ E Campbell and M Groves, 'Correspondence with Members of Parliament' (2006) 11(3) *Media and Arts Law Review* 227 at 235.

³⁷⁴ [2004] ACTSC 77 (Higgins CJ).

³⁷⁵ [2004] ACTSC 77 at para 29.

What of the statements by Mr Wood? Could they be used to show that the plaintiff enjoyed a good reputation and that the allegations of the defendant against her were baseless? Could the defendant rely on Mr Wood's statement in the Assembly in mitigation of damage yet not be faced with evidence of his own adverse statements in reply? Can the newspaper report of the statements in the Assembly be relied on to mitigate, to the extent it was in favour of the plaintiff, the damage to her reputation?³⁷⁶

The answer arrived at by Higgins CJ was that, unlike the subsequent newspaper report, neither statement in Parliament could be 'used to the advantage or disadvantage of either party'.³⁷⁷ *Erglis v Buckley*³⁷⁸ was distinguished on the basis that, in this case, the Minister had not initiated, nor could he foresee, the debate in the ACT Assembly. Nor could he have foreseen that the letter he had sent to the Real Institute of the ACT would be tabled in the Assembly by Mr Wood.³⁷⁹ In addition, in the circumstances any use of the parliamentary proceedings in *Szuty v Smyth* would have required the court to traverse issues of truth or falsity. Higgins CJ concluded in this respect that 'The Court could not find or draw inferences that any person making a statement to Parliament had misled Parliament'.³⁸⁰

7.10 Can a statement made to Parliament be tendered to a court to prove the truth of its contents?

This question was considered by a single judge of the Federal Court in *Mees v Road Corporation*³⁸¹ In that case, pursuant to Commonwealth legislation,³⁸² the applicant (Mees) sought to restrain the respondents (the Victorian Roads Corporation – VicRoads) from taking further action relating to the Scoresby Freeway or Eastern Ring Road in Melbourne. The second respondent in the case was the Victorian Minister for Transport (Peter Batchelor), a Member of the Legislative Assembly. In that House he had made a statement in October 2001 denying that the Government had any intention of linking the Eastern Freeway with the Greensborough Bypass. An answer to the same effect was given in the Legislative Council in March 2002 on behalf of the Minister for Transport. An injunction was sought by Mees on the ground that false and misleading information had been provided to avoid the Transport Minister having to refer the road construction proposal to the Commonwealth Environment Minister.³⁸³

³⁷⁶ [2004] ACTSC 77 at para 168.

³⁷⁷ [2004] ACTSC 77 at para 171.

³⁷⁸ [2004] 2 Od R 599; [2004] QCA 223.

³⁷⁹ [2004] ACTSC 77 at para 159.

³⁸⁰ [2004] ACTSC 77 at para 170.

³⁸¹ (2003) 128 FCR 418; [2003] FCA 306.

³⁸² *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 475.

³⁸³ In contravention of s 489 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

Counsel for the respondents sought to rely on what was said in Parliament to establish the truth of the proposition that the Government had no plans to build the roadways that the proceedings sought to restrain. It was further contended that it was not open to the applicant to argue, or for the Court to find, that either of the parliamentary statements were untrue or misleading. The first plank of this argument was rejected by the Court, with Gray J stating: ‘The proposition that a statement made to Parliament can be tendered to a court to prove the truth of its contents, but that the truth of its contents cannot be the subject of any contest in the court, is fraught with difficulty’. He continued:

If accepted, it would have the effect of enabling a member of Parliament to create unchallengeable truth with respect to a factual situation, simply by making a statement to Parliament containing assertions of fact. The notion of manufactured truth is irreconcilable with the duty and function of a court to find the facts relevant to the issues in dispute in a case before it...The unacceptability of the proposition is demonstrated by postulating the existence of more than one statement to Parliament, when there is a conflict between the statements. Plainly, a court could not be placed in the situation in which opposing parties tender the conflicting statements and the court is obliged to accept the truth of each of them.³⁸⁴

Gray J concluded: ‘There are therefore many sound reasons for taking the view that it is not open to a party to tender a statement made to Parliament as evidence of the truth of the facts stated’.³⁸⁵

The decision was approved in *Szuty v Smyth*.³⁸⁶ Higgins CJ of the ACT Supreme Court quoted the views expressed by Blackburn CJ in *Comalco Ltd v ABC*,³⁸⁷ to the effect that

to make an inference from what was said in Parliament (whether the inference be that what was said was true, or whether it be what was said was false) would...be a breach of Article 9 of the *Bill of Rights 1689*, and of the privileges of the Parliament of Queensland. It is not for the courts to assess the weight or truthfulness of a statement made in Parliament; to do so must surely be to ‘impeach or question’ the ‘proceedings in Parliament’.³⁸⁸

³⁸⁴ (2003) 128 FCR 418; [2003] FCA 306 at para 85.

³⁸⁵ (2003) 128 FCR 418; [2003] FCA 306 at para 85. In *Re McTiernan; Ex Parte Coogee Coastal Coalition Incorporated* [2004] WASC 264 at para 45 McLure J expressed his agreement with Gray J’s view that the proposition at issue was ‘fraught with difficulty’. McLure J commented, ‘For example, inferences to be drawn from evidence in isolation may be rebutted or significantly modified in the context of the evidence as a whole’.

³⁸⁶ [2004] ACTSC 77 (Higgins CJ).

³⁸⁷ (1985) 64 ACTR 1.

³⁸⁸ Quoted with approval at [2004] ACTSC 77 at para 145.

7.11 Can a finding by a court indirectly call into question parliamentary proceedings?

To say that a court cannot directly inquire into the truth or falsity of parliamentary proceedings is not the end of the matter. Parliamentary proceedings may be impugned indirectly, as evidenced by the ‘repetition’ cases discussed earlier in this paper.³⁸⁹ This is in circumstances where evidence of speeches or proceedings in Parliament are admitted for the limited purpose of establishing what was said as an historical fact, but where the cause of action is the affirmation or repetition of that statement outside Parliament. As Davies JA observed in *Laurence v Katter*,³⁹⁰ to prove that the repetition was false is also to prove that the original statement made in Parliament was false. In these circumstances, however, that outcome is the indirect consequence of the subsequent incorporation by reference of the earlier parliamentary statement. It is an inevitable, though unexpressed, conclusion.

The same interpretation was arrived at in the second limb to the inquiry in *Mees v Roads Corporation* where the Court had a duty to resolve the issue whether misleading information had been provided to the Environment Minister at any stage. A finding to this effect would indirectly call into question what was said in Parliament (evidence of which could be admitted only to establish that the words had been spoken as a matter of historical fact). As Gray J said:

As long as the Court refrains from making a finding, or drawing an inference, to the effect that Parliament has been misled, it commits no breach of parliamentary privilege and does not trespass upon the area for which Parliament alone has responsibility, namely control of its own proceedings.³⁹¹

By reference to *Mees v Roads Corporation*, *Odgers’ Australian Senate Practice* puts the matter thus:

Contrary to academic misconception, findings by a court, on evidence lawfully before it, which indirectly call into question parliamentary proceedings (for example, a finding that a statement outside parliamentary proceedings was false, which would mean that a similar statement in the course of parliamentary proceedings was also false), are not prevented by parliamentary privilege.³⁹²

7.12 Can omissions or failures to act constitute ‘proceedings in Parliament’?

The question arose in the context of a case heard before the Tasmanian Anti-Discrimination

³⁸⁹ Section [6.3.1] of this paper.

³⁹⁰ (1996) 141 ALR 447 at 490.

³⁹¹ (2003) 128 FCR 418; [2003] FCA 306 at para 87.

³⁹² *Odgers*, n 143, p 43.

Tribunal in 2001.³⁹³ The case related to a witness before a select committee who claimed that he had action taken against him by his employers as a result of his appearing before the committee. The witness had referred the matter, as constituting a breach of parliamentary privilege, to an MP who had subsequently failed to refer the complainant's concerns to the Privileges Committee. One question before the Tribunal was whether this omission or failure to act on the part of the MP was itself a proceeding in Parliament? In finding that 'proceedings in Parliament' extends to omissions or failures to act, as well to actions, the Tribunal followed the decision in *Mangawaro Enterprises Ltd v Attorney General*.³⁹⁴ There Gallen J considered the statutory obligation under s 7 of the *New Zealand Bill of Rights Act 1990* on the Attorney General to report certain matters to the House of Representatives and an allegation that the Attorney General had failed to comply with that obligation. It was argued that a failure to report was no more than an omission and 'proceedings in Parliament' involve actions but not omissions. That argument was rejected and it was held that the obligation imposed upon the Attorney General and his response or lack of it to that obligation can properly be described as a part of the proceedings in Parliament and was therefore privileged. Having consulted *Erskine May*, which contemplated 'positive action' but only as a 'primary meaning', Gallen J concluded, 'I do not think any distinction between commission or omission could be decisive here'.³⁹⁵

Reflecting on this decision, the Chairperson of the Tasmanian Anti-Discrimination Tribunal stated:

The principles in *Mangawaro* have application to this case and a distinction cannot be drawn between an omission to report a matter to the Privileges Committee and the action of doing so.

Arriving at what would appear to be the only logical conclusion, he found that

the failure of a Member of Parliament to take the complainant's grievance to the Privileges Committee is part of the 'proceedings of Parliament' and therefore privileged. The substance of the complaint in this case relates to 'proceedings of Parliament'.

³⁹³ *In the matter of a complaint made by Mr Le Fevre* (ADT of Tasmania, unreported 31 May 2001). Related proceedings are considered in an earlier section of this paper [6.6].

³⁹⁴ (1994) 2 NZLR 451. The case involved the obligation imposed on the Attorney General by s 7 of the New Zealand Bill of Rights Act 1990 to report to Parliament where a Bill appears inconsistent with the Bill of Rights. This statutory process was held to be a proceeding in Parliament and therefore exempt from judicial review as an internal process of the House of Representatives – D McGee, *Parliamentary Practice in New Zealand*, 3rd ed, Dunmore Publishing Ltd 2005, p 622 and p 632. Gallen J described the obligation on the Attorney General to report as 'a procedural consideration designed to ensure that members of Parliament are fully aware of the consequences of the passing of a particular Bill as proposed' ((1994) 2 NZLR 451at 458).

³⁹⁵ (1994) 2 NZLR 451 at 455-456.

The Tribunal concludes that the Members of Parliament in this case should not be required to answer questions which relate to ‘proceedings in Parliament’ and which attract parliamentary privilege.³⁹⁶

³⁹⁶

In the matter of a complaint made by Mr Le Fevre (ADT of Tasmania, unreported 31 May 2001), paras 17-20.

8. CONCLUDING COMMENT

Recent cases on parliamentary privilege may not point in any discernible direction or reveal any definite trend, turning as most of them do on the particular facts at issue. What can be said by way of a general observation is that the 1999 report of the UK Joint Committee on Parliamentary Privilege, chaired by Lord Nicholls of Birkenhead, one of the Law Lords, has proved a landmark in thinking on this subject, one that clearly resonates with the courts in their attempts to apply the principle of non-intervention in contemporary circumstances. With NSW in mind, it might be said that the ‘test of necessity’ favoured by the Joint Committee is really only a restatement of the test of ‘reasonable necessity’ which has always applied in this jurisdiction. What is different perhaps is the new vigour with which the courts, in their capacity as the guardians of the rule of law, approach their task of determining the limits of Parliament’s jurisdiction.

This paper has highlighted certain areas of continuing debate or uncertainty in the law of parliamentary privilege. These include the law relating to: the execution of search warrants, the issuing of subpoenas and orders for discovery in Parliament; the ‘effective repetition’ of statements outside Parliament and other areas where parliamentary privilege impinges on the law of defamation; the meaning of the words ‘place out of Parliament’ in Article 9 of the *Bill of Rights 1689*; and the interpretation of statutory secrecy provisions and their effect on parliamentary privilege. Also discussed in this paper are continuing issues relevant to orders and addresses for papers, at the heart of which lies the struggle between Executive power and parliamentary scrutiny.

An ongoing debate in NSW concerns the introduction of comprehensive legislation to define the powers and privileges of the Houses of the NSW Parliament. The main advantages of codification are clarity and accessibility of the law. Against this is the argument that the test of reasonable necessity is well adapted to contemporary needs.

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