



# background paper



## NSW Parliamentary Research Service

**Parliamentary Privilege: the continuing debate**

**Background Paper No 2/2014**

by Gareth Griffith

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# Parliamentary Privilege: the continuing debate

by

Gareth Griffith

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## SUMMARY

The first decade of the 21<sup>st</sup> century proved to be momentous for constitutional reform in the UK and, at times, a period of lively, even torrid, commentary on the law and practice of parliamentary privilege. The purpose of this paper is to identify the key developments in this debate and to consider the main issues that have arisen, with reference made to the equivalent position in NSW.

On 3 July 2013 the [Joint Committee of the UK Parliament on Parliamentary Privilege](#), chaired by Lord Brabazon of Tara, published the latest instalment in what has been a long dialogue on the subject. The Joint Committee had been appointed by the two Houses to consider the Government's [Green Paper on Parliamentary Privilege](#), published in April 2012. The authors of the 2012 Green Paper acknowledged that they were guided "above all" by the [1999 Joint Committee on Parliamentary Privilege](#), chaired by Lord Nicholls of Birkenhead.**[2.1]**

The 2012 Green Paper, the first government-led review of parliamentary privilege in the UK, was published against the background of a number of scandals and controversies, in particular the events surrounding the case of [R v Chaytor](#) [2010] UKSC 52 in which three MPs had argued that criminal proceedings could not be brought against them on charges of making fraudulent expenses and entitlements claims because the court proceedings would infringe parliamentary privilege.**[2.2]**

Other recent developments in parliamentary privilege since 1999 are set out in Annex 1 to the 2013 Joint Committee Report, as well as in the 2012 [Green Paper on Parliamentary Privilege](#). **[2.4]**

Writing in 2010, William McKay (a former Clerk of the UK House of Commons) and Charles W Johnson discussed a number of recent UK judicial decisions and comments that seemed to place "parliamentary privilege under pressure". The "increased reliance" since 1999 of the courts on using select committee reports has been remarked upon by Sir Malcolm Jack, another former Clerk of the UK House of Commons. **[2.3]**

One UK academic has noted that "The scope of privilege is increasingly being narrowed to avoid it being used for reasons unrelated to those functions considered essential to an MP's democratic duties, central to which is the ability to debate openly and fearlessly in Parliament". **[4.3.1]**

It is in this context that issues in the continuing debate about parliamentary privilege are discussed. This paper builds on previous Research Service publications in this field, notably [Parliamentary Privilege: major developments and current issues](#), Background Paper 1/2007 and [Parliamentary Privilege: first principles and recent applications](#), Briefing Paper 1/2009.



## 1. INTRODUCTION

The first decade of the 21<sup>st</sup> century proved to be momentous for constitutional reform in the UK and, at times, a period of lively, even torrid, commentary on the law and practice of parliamentary privilege. The purpose of this paper is to identify the key developments in this debate and to consider the main issues that have arisen, with reference made to the equivalent position in NSW.

This paper builds on previous Research Service publications in this field, notably [Parliamentary Privilege: major developments and current issues](#), Background Paper 1/2007 and [Parliamentary Privilege: first principles and recent applications](#), Briefing Paper 1/2009.

## 2. KEY DEVELOPMENTS IN THE UK

### 2.1 Two committee reports and one Green Paper

On 3 July 2013 the [Joint Committee of the UK Parliament on Parliamentary Privilege](#), chaired by Lord Brabazon of Tara, published the latest instalment in what has been a long dialogue on the subject. The Joint Committee had been appointed by the two Houses to consider the Government's [Green Paper on Parliamentary Privilege](#)<sup>1</sup>, published in April 2012.<sup>2</sup> The authors of the 2012 Green Paper acknowledged that they were guided "above all" by the [1999 Joint Committee on Parliamentary Privilege](#),<sup>3</sup> chaired by Lord Nicholls of Birkenhead.

It is something of a paradox that, while few, if any, of the specific recommendations of the 1999 Joint Committee have been acted upon,<sup>4</sup> its report has influenced parliamentary,<sup>5</sup> governmental and judicial thinking alike. In broad terms, its influence has been to bolster the judicial trend towards exploring the limits to be placed on parliamentary privilege. Significant in this respect was the test by which both the retention and discarding of privilege might be judged in a modern setting. The "touchstone" or guiding principle for 1999 Joint Committee was that, while the "necessary rights and immunities" associated with parliamentary privilege remain essential for the effective working of Parliament, their precise extent needed to be reconsidered in terms

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<sup>1</sup> HM Government, [Green Paper on Parliamentary Privilege](#), April 2012, Cm 8318.

<sup>2</sup> Appointed by the House of Commons on 3 December 2012 and by the House of Lords on 9 January 2013.

<sup>3</sup> Joint Committee on Parliamentary Privilege, [Parliamentary Privilege – First Report](#), Session 1998-99.

<sup>4</sup> The Joint Committee [Parliamentary Privilege](#), Report of session 2013-14, HL Paper 30/HC 100 noted (para 8) that: "Neither House formally endorsed the Report. While the Government generally supported its recommendations, no time was found for legislation in any of the subsequent ten parliamentary Sessions, although the Report's recommendations on *sub judice* formed the basis of new Resolutions in each House".

<sup>5</sup> In his statement of 3 December 2008 on the Damian Green affair, Speaker Michael Martin made reference to the Joint Committee's "authoritative report": [HC Debates](#), 3 December 2008.

of Parliament's "current needs". The 1999 Joint Committee said that "the thread running through this report involves matching parliamentary privilege to the current requirements of Parliament and present-day standards of fairness and reasonableness".<sup>6</sup>

For its part, the report of the [2013 Joint Committee](#) can be said to have adopted a more "pragmatic and evolutionary"<sup>7</sup> approach than its predecessor. It stated:

13....Much has changed since the publication of the report of the 1999 Joint Committee: privilege evolves as Parliament evolves, and as the law evolves. Successive committees have warned against a piecemeal consideration of privilege: we welcome the opportunity to examine privilege in the round, and to revisit the issues explored by the 1999 Joint Committee, which has been given by the 2012 Green Paper.

## 2.2 The *Chaytor* case

The 2012 Green Paper, the first government-led review of parliamentary privilege in the UK, was published against the background of a number of scandals and controversies, in particular the events surrounding the case of [R v Chaytor](#)<sup>8</sup> in which three MPs had argued that criminal proceedings could not be brought against them on charges of making fraudulent expenses and entitlements claims because the proceedings in the Supreme Court of the UK would infringe parliamentary privilege.<sup>9</sup> In the event it was held that parliamentary privilege, as originating either from Article 9 of the Bill of Rights 1689 or from the doctrine of exclusive cognisance, was not a bar to the trial of the defendants.<sup>10</sup> Article 9 provides: "*freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament*".

The Supreme Court held that the submission of expenses claims did not fall within the exclusive jurisdiction of Parliament; making claims for parliamentary allowances was held to be an administrative activity. The Court agreed with the 1999 Joint Committee that only in "exceptional" circumstances were management functions so closely and directly connected to parliamentary proceedings that judicial intervention intruded on Parliament's sovereignty.<sup>11</sup> Recognised were the overlapping jurisdictions of Parliament and the courts where criminal issues were raised within a parliamentary context.<sup>12</sup> The court

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<sup>6</sup> [Parliamentary Privilege – First Report](#), para 32.

<sup>7</sup> [2013 Joint Committee Report](#), para 279.

<sup>8</sup> [2010] UKSC 52.

<sup>9</sup> Facing similar charges, a member of the House of Lords (Lord Hanningfield) was a fourth party in the case. He did not appeal to the Supreme Court, but was granted permission to intervene for the limited purpose of drawing attention to any distinction between expenses schemes and privileges in the two Houses.

<sup>10</sup> For commentary on the case see: Y Tew, "No longer a privileged few: expense claims, prosecutions and parliamentary privilege" (2011) 70(2) *The Cambridge Law Journal* 282-284.

<sup>11</sup> [2010] UKSC 52 at paras 73 and 89.

<sup>12</sup> [2010] UKSC 52 at para 81.

reasoned that, by cooperating with the police investigation, Parliament had indicated it did not wish to assert exclusive cognisance over the issue at hand, which did not preclude the possibility that Parliament might seek to discipline a member for criminal conduct that amounted to contempt.<sup>13</sup>

### 2.3 Parliamentary privilege under pressure

As acknowledged by the 2013 Joint Committee, over recent years there has been a “significant increase” in the number of references made in court to parliamentary proceedings.<sup>14</sup> In many instances this was unproblematic, including where, following the decision in *Pepper v Hart*,<sup>15</sup> the court was seeking to resolve ambiguity in primary legislation. Potentially more difficult are those instances where parliamentary proceedings are admitted into evidence to prove that something was said or done as a matter of historical fact, “without any accompanying allegations of impropriety or any other questioning”.<sup>16</sup> More problematic again are those instances where the question of the admissibility of parliamentary proceedings arises in the context of judicial review cases, where for example Ministerial statements to Parliament have been admitted to demonstrate what Government policy is.<sup>17</sup>

Writing in 2010, William McKay (a former Clerk of the UK House of Commons) and Charles W Johnson discussed a number of UK judicial decisions and comments that seemed to place “parliamentary privilege under pressure”. Cited for example was the 2003 case of *Wilson and Others v Secretary of State for Trade and Industry (Appellant)*<sup>18</sup> in which the Law Lords reversed a Court of Appeal decision that allowed the parliamentary record to be used not simply as a means of determining what a statute was intended to mean but whether that meaning could be reconciled with (in this case) the European Convention on Human Rights. According to McKay and Johnson:

In other words, the Court of Appeal had passed from using words spoken in debate to find out the intended meaning of an apparently obscure statutory text to measuring against an external standard the acceptability of Parliament’s reasons for legislating in the way it did.<sup>19</sup>

The same source made reference to the case of [Weir and others v Secretary of State for Transport and others](#),<sup>20</sup> in which “a former minister was permitted to be

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<sup>13</sup> [2010] UKSC 52 at paras 90-91. See Y Tew, “No longer a privileged few: expense claims, prosecution and parliamentary privilege” (2011) 70(2) *The Cambridge Law Journal* 282 at 283.

<sup>14</sup> [2013 Joint Committee Report](#), para 118.

<sup>15</sup> [1993] AC 593.

<sup>16</sup> *Prebble v TV New Zealand* [1995] 1 AC 321 at 337.

<sup>17</sup> *R v Secretary of State for the Home Department, ex parte Brind* [1991] AC 696.

<sup>18</sup> [2003] UKHL 40.

<sup>19</sup> W McKay and CW Johnson, *Parliament & Congress: representation and scrutiny in the twenty-first century*, Oxford University Press 2010, p 512.

<sup>20</sup> [2005] EWHC (Ch D) 2192.

cross-examined in court in order to establish whether what he told a select committee was truthful”.<sup>21</sup>

The “increased reliance” since 1999 of the courts on using select committee reports has also been remarked upon by Sir Malcolm Jack, another former Clerk of the UK House of Commons. He wrote in 2012 that “in recent years there have been quite a number of occasions when the Speaker of the House of Commons had to intervene to seek the laying aside of privileged material”. On the other side of the ledger, his comments on the *Chaytor* judgment were more positive, saying that, while it was concerned with the limits of parliamentary privilege in relation to criminal matters, it nonetheless “recognised Parliaments’ exclusive cognisance of its own affairs”.<sup>22</sup>

## 2.4 Other recent developments

Other recent developments in parliamentary privilege since 1999 are set out in Annex 1 to the 2013 Joint Committee Report, as well as in the 2012 [Green Paper on Parliamentary Privilege](#).<sup>23</sup> In addition to the *Chaytor* case, the developments cited in the 2012 Green Paper included:

- a number of occasions on which Members of either House have used parliamentary privilege apparently to circumvent injunctions made by order of a court, which has led to reports from the Culture, Media and Sport Select Committee, by a special Committee on Super-Injunctions established under the chairmanship of the Master of the Rolls, and most recently by a Joint Committee on Privacy and Injunctions;<sup>24</sup>
- the inquiry by the Culture, Media and Sport Select Committee into phone hacking by the press, which has raised questions over the powers of select committees in the House of Commons;
- attempts by the previous Government to make limited exemptions to Article 9 in the draft Corruption and Bribery Bills, and in the Bill which became the Parliamentary Standards Act 2009 (none of which exemptions ultimately became law); and
- the arrest in 2009 of Damian Green MP on charges relating to misconduct in public office, including the searching of his parliamentary offices by the Metropolitan Police and the report of the Select Committee which followed this.

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<sup>21</sup> W McKay and CW Johnson, p 513. The judge in his summing up apologised to the House for not having intervened to stop this line of questioning.

<sup>22</sup> Sir Malcolm Jack, “Parliamentary privilege: a dignified or efficient part of the constitution?” (2012) 80 *The Table* 54 at 65-67.

<sup>23</sup> [Green Paper on Parliamentary Privilege](#), para 34.

<sup>24</sup> This referred to the naming of the footballer Ryan Giggs in Parliament.

### 3. PARLIAMENTARY PRIVILEGE IN SUMMARY

The 2012 [Green Paper on Parliamentary Privilege](#) explained that there are two main aspects to parliamentary privilege, as follows:

- Freedom of speech is for all those who participate in parliamentary proceedings, whether MPs, peers or non-members. This freedom of speech exists only in parliamentary proceedings, which includes (among other things) debates, committee hearings and published reports, but does not apply to anything said by an MP or a peer outside parliamentary proceedings.
- The exclusive cognisance of each House of Parliament (sometimes referred to as “exclusive jurisdiction”) – which broadly translates as the right of each House to regulate its own proceedings without interference from the courts. This includes the conduct of its Members and of other participants such as witnesses before select committees. If the Houses did not have such rights, any person might be able (to take one example) to question in the courts the decision-making processes behind the passage of legislation. This would undermine the independence of a sovereign Parliament and in particular of the democratically elected House of Commons.<sup>25</sup>

More succinctly, the [2013 report](#) stated:

Privilege refers to the range of freedoms and protections each House needs to function effectively: in brief, it comprises the right of each House to control its own proceedings and precincts, and the right of those participating in parliamentary proceedings, whether or not they are Members, to speak freely without fear of legal liability or other reprisal.<sup>26</sup>

In [Mees v Road Corporation](#) Gray J formulated the principles underlying the privilege encapsulated in Article 9 as follows:

Aside from its historical context, which was a doctrinal struggle for supremacy between absolute monarchy and parliamentary democracy...the privilege has a modern rationale in the constitutional separation of powers ...A member of Parliament, must be able to participate in debates and other proceedings in Parliament, safe in the knowledge that he or she will not be called to account in a court in respect of the truth or content of what is said...Only Parliament has the right to discipline its members for their conduct in its affairs. The courts must refrain from anything which would interfere with or usurp this function of Parliament...<sup>27</sup>

In [Prebble v Television New Zealand Ltd](#) the rationale behind Article 9 was explained as:

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

<sup>25</sup> [Green Paper on Parliamentary Privilege](#), para 17.

<sup>26</sup> [2013 Joint Committee Report](#), p 3.

<sup>27</sup> (2003) 128 FCR 418; [2003] FCA 306 at para 76 (references omitted); referred to with approval in [Sportsbet Pty Limited v State of NSW \(No 3\)](#) [2009] FCA 1283.

what they say will later be held against them in the courts. 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.<sup>28</sup>

The relationship between Parliament and the Courts was commented on in a recent Queensland case in which Fryberg J observed:

The judiciary does not enquire into the internal workings of Parliament and evidence of what has happened in Parliament is generally inadmissible in court, regardless of its relevance.<sup>29</sup>

#### 4. ISSUES IN THE DEBATE

It is in the context of the developments in the UK outlined above that issues in the continuing debate about parliamentary privilege are discussed in this section of the paper. Reference is made at several points to Background Paper 1/2007 and Briefing Paper 1/2009 which contain a fuller analysis of some of these issues.

##### 4.1 The doctrine of necessity and the “necessary connection” test

**4.1.1 The 1999 Joint Committee, necessity and exclusive cognisance:** The doctrine that the privileges of Parliament (other than certain punitive powers that derive from the law and custom of the Westminster parliament) are founded on necessity can be traced at least as far back as the landmark case of *Stockdale v Hansard*, where Lord Denman CJ observed: “If the necessity can be made out, no more need be said: it is the foundation of every privilege of Parliament and justifies all that it requires”.<sup>30</sup>

But if the doctrine is hardly novel, following the 1999 Joint Committee report it has attracted renewed interest. As noted, the Joint Committee was guided by the idea that only those rights, powers and immunities that are strictly necessary in a contemporary setting for the effective functioning of Parliament are to be retained. When writing of the “sole justification for the existence of parliamentary privilege”, the report observed:

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. 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.<sup>31</sup>

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<sup>28</sup> [1995] 1 AC 321 at 334

<sup>29</sup> *R v Brown* [2013] QSC 299 at para 9.

<sup>30</sup> (1839) 9 AD&E 1 (112 ER 1112 at 1169). Lord Denman commented that privilege is grounded on three principles – “necessity, practice, universal acquiescence”.

<sup>31</sup> [Parliamentary Privilege – First Report](#), para 4.

Added to this, by way of an operational test, the 1999 Joint Committee formulated a dividing line between privileged and non-privileged activities. This test was formulated, not in the context of interpreting what is meant by proceedings in Parliament under Article 9, but in relation to the exclusive cognisance doctrine, in terms of those activities over which Parliament should have exclusive control. However, in drawing its dividing line the Joint Committee made reference to proceedings in Parliament, thereby suggesting that the common law doctrine of exclusive cognisance is to be interpreted either in light of the statutory formulation or in connection with it. The Joint Committee said:

247. The dividing line between privileged and non-privileged activities of each House is not easy to define. 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.<sup>32</sup>

**4.1.2 Vaid, the purposive connection test and exclusive cognisance:** The test of necessity was applied in *Canada (House of Commons) v Vaid*,<sup>33</sup> a case concerning Parliament's exclusive jurisdiction over the management of employees, in this case the Speaker's chauffeur. Rejecting a "fundamentalist" interpretation of that jurisdiction, it was held that exclusive and unreviewable jurisdiction over all House employees was not necessary to protect the functioning of the Canadian House of Commons.

Formulating a purposive connection between necessity and the functions of Parliament, the Supreme Court held that:

if the existence and scope of a privilege have not been authoritatively established, the court will be required to test the claim against the doctrine of necessity — the foundation of all parliamentary privilege. In such a case, in order to sustain a claim of 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 fulfilment 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 legislative work with dignity and efficiency.<sup>34</sup>

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<sup>32</sup> [Parliamentary Privilege – First Report](#), para 247.

<sup>33</sup> [2005] 1 SCR 667 at para 44.

<sup>34</sup> [2005] 1 SCR 667 at headnote and para 46. Both the 1999 Joint Committee and *Vaid* were followed in [Pankiw v Canadian Human Rights Commission](#) [2007] 4 FCR 578 at para 94. In that case the Federal Court of Canada held that the publication by a Member of Parliament (Dr Pakiw) – of a "householder" which he printed and delivered in his capacity as a Member and under the authority of the House of Commons and which contained discriminatory comments about Aboriginal peoples - was not immune by reason of privilege from review by the Canadian Human Rights Commission. The 1999 Joint Committee had rejected the argument that parliamentary immunity should be available to correspondence between an MP and his constituents. On this question, Lemieux J said (para 95): "neither the House of

**4.1.3 *R v Chaytor, the necessary connection test and Article 9:*** In *R v Chaytor* Lord Phillips discussed the test specifically to be applied to the interpretation of proceedings in Parliament under Article 9. In doing so he arrived at a “necessary connection” test, very similar in substance to those adopted in *Vaid* and in the 1999 Joint Committee report. According to Lord Phillips:

In considering whether actions outside the Houses and committees fall within parliamentary proceedings because of their connection to them, it is necessary to consider the nature of that connection and whether, if such actions do not enjoy privilege, this is *likely to impact adversely on the core or essential business of Parliament*. [emphasis added]<sup>35</sup>

**4.1.4 *The 2013 Joint Committee and necessity:*** Both the doctrine of necessity and what was said to be the “essentially similar” necessary connection test were adopted by the 2013 Joint Committee, the latter as applied in *R v Chaytor* by Lord Phillips. In effect, the tests set out above were collapsed together and applied to parliamentary privilege generally, deriving either from the common law or statute. By reference to *Vaid*,<sup>36</sup> the 2013 Joint Committee said that:

Absolute privilege attaches to those matters which, either because they are part of proceedings in Parliament or because they are necessarily connected to those proceedings, are subject to Parliament’s sole jurisdiction.<sup>37</sup>

For the 2013 Joint Committee an advantage of the “doctrine of necessity” was that “it ensures a degree of flexibility”, thereby allowing for changes both in the working practices of Parliament and in the understanding of what should be subject to its exclusive jurisdiction. The other side of this coin is that “such flexibility leaves an element of uncertainty, at least at the outer edges of privilege”.<sup>38</sup>

**4.1.5 *Attorney General and Gow v Leigh and the doctrine of necessity:*** A case in point is the 2011 New Zealand Supreme Court ruling in *Attorney General and Gow v Leigh*<sup>39</sup> that only qualified privilege attached to a briefing given by a civil servant to a Minister prior to the Minister answering a question in the House of Representatives, a decision that was reached based on the doctrine of necessity.

As formulated by the Court, the question in the case was whether “it is necessary for the proper and efficient functioning of the House of Representatives that the occasion on which Mr Gow communicated with the

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Commons at Westminster nor its counterpart in Ottawa has considered absolute immunity over communications to constituents is necessary for the performance of legislative duties”.

<sup>35</sup> [2010] UKSC 52, para 47.

<sup>36</sup> [2005] 1 SCR 667 at para 4.

<sup>37</sup> [2013 Joint Committee Report](#), para 24.

<sup>38</sup> [2013 Joint Committee Report](#), para 27.

<sup>39</sup> [2011] NZSC 106.

Minister be regarded as an occasion of absolute privilege”.<sup>40</sup> In arriving at that formulation, the Court discussed the absolute privilege at issue both in relation to proceedings in Parliament under Article 9 and to the exclusive cognisance doctrine, referring both to Lord Phillips’ “necessary connection” test and to *Vaid’s* “doctrine of necessity”. In effect, the Court seemed to adopt a single approach, with one test to apply in these varied statutory and common law contexts.<sup>41</sup>

In the case, the Attorney General and the Speaker of the House of Representatives had argued that absolute privilege should apply, because of the necessary connection between the briefing supplied by the official and the parliamentary proceeding itself. For the Speaker it was submitted that the proper test was whether the occasion in question was “reasonably incidental to the discharge of the business of the House”, with the concept of “reasonably incidental” being derived from the language of s 16(2)(c) of the Australian *Parliamentary Privileges Act 1987* (Cth).<sup>42</sup> The Court commented:

11. The concept of reasonable incidentality may be a relevant factor, but it is not, as we have seen, the ultimate question. It is hard to see how absolute privilege could be justified if there were no close connection between the occasion in question and the proper and efficient discharge of parliamentary business or if the occasion were not reasonably incidental thereto. But to show either of these circumstances is by no means sufficient to justify a claim for absolute privilege. We accept the submissions of Mr Miles QC, for the respondent, in this respect. A test based on the degree of connection or incidentality of the occasion to proceedings literally in Parliament would have an unsatisfactory degree of uncertainty.

The Court continued:

Necessity has a sharper focus and involves significantly less uncertainty than closeness of connection. Furthermore, any test involving less than necessity would impinge too much on common law rights. Necessity is therefore the appropriate test.

For the New Zealand Supreme Court, therefore, for an activity to be protected by absolute privilege it is not sufficient for it to have a close connection or “reasonable incidentality” to parliamentary proceedings. Rather, consistent with *Vaid’s* doctrine of necessity, there must be a necessary connection to the efficient functioning of the Parliament. Quoted with approval was the test formulated by Lord Phillips in *Chaytor*, to the effect that, if the activity in question did not enjoy privilege, whether “this is *likely to impact adversely on the core or essential business of Parliament*” [emphasis added].<sup>43</sup>

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<sup>40</sup> [2011] NZSC 106 at para 8.

<sup>41</sup> [2011] NZSC 106 at paras 2 to 5.

<sup>42</sup> [2011] NZSC 106 at para 10. Section 16(2)(c) refers to “the preparation of a document for the purpose of or incidental to the transacting of any such business [of a House or of a committee]”.

<sup>43</sup> [2011] NZSC 106 at para 4.

In this case it was decided that the advice given by a public servant to a Minister does not need more than qualified privilege for the Minister, and the House as a whole, to “properly and efficiently” deal with parliamentary questions. The Court explained:

It cannot be conducive to the proper and efficient functioning of the House to give those communicating with a Minister in present circumstances a licence to speak with impunity when predominantly motivated by ill will, nor a licence to take improper advantage of the occasion by using it for an improper purpose.<sup>44</sup>

As for the potentially chilling effect of the decision on what public servants said to Ministers, the Court commented:

If the absence of absolute privilege chills any inclination of public servants to advise Ministers with ill will or otherwise to make improper use of the occasion, that would be no bad thing. To the extent that any chilling effect may otherwise inhibit public servants we consider there are two answers. First, this seems inherently unlikely, and secondly, the risk is not such as to require the balance between vindication of reputations and absolute privilege to be struck in favour of the latter.<sup>45</sup>

Not surprisingly, the decision has proved to be controversial, with the New Zealand Privileges Committee recommending legislation in response to it and stating that “Parliament now finds itself in the position of needing to clarify for the courts the nature of Parliament’s privileges”.<sup>46</sup> For its part, the 2013 Joint Committee said it regretted the decision in [Attorney General and Gow v Leigh](#) and that it agreed with the Clerk of the New Zealand House of Representatives that the case “could potentially have a chilling effect on the content of briefings by officials if officials could be legally liable for that content”. It recommended that such briefings, which are “necessarily antecedent to proceedings in Parliament”, should continue to enjoy absolute privilege in the UK.<sup>47</sup>

The 2013 Joint Committee did not comment on how the New Zealand Supreme Court derived its argument largely from the same sources as those in the report, including *Vaid* and the statement of Lord Phillips in *Chaytor*, a statement the Joint Committee itself had earlier endorsed as an expression of the “necessary connection” test. Indeed, the *Leigh* case seems to endorse the Joint Committee’s own approach by applying a single test, an approach which finds its contemporary origins in the 1999 Joint Committee report.

**4.1.6 NSW and the tests of reasonable necessity and reasonable incidentality:** NSW is something of an exception where the law of parliamentary privilege is concerned, where Article 9 applies further to s 6 of the

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<sup>44</sup> [2011] NZSC 106 at para 19.

<sup>45</sup> [2011] NZSC 106 at para 21.

<sup>46</sup> D Angus, “Recent developments in New Zealand on parliamentary privilege”, *44<sup>th</sup> Presiding Officers and Clerks Conference 2013, Canberra*, p 13.

<sup>47</sup> [2013 Joint Committee Report](#), paras 247-248.

*Imperial Laws Applications Act 1969*,<sup>48</sup> but otherwise the privileges of its Houses are primarily on a common law basis, to be implied by reasonable necessity.<sup>49</sup>

Expanding on this, the 2007 Background Paper [\*Parliamentary Privilege: major developments and current issues\*](#) explained:

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*”.<sup>50</sup> 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.<sup>51</sup>

The test of “reasonable necessity”, subject to historical evolution, is therefore familiar to NSW. One comment from the above briefing paper was that the test of reasonable necessity is well adapted to contemporary needs, being “right in principle as well as practice, delivering sensible outcomes based on clear and readily articulated criteria”.<sup>52</sup> A further comment is that the reasonable necessity test, as articulated in *Kielley v Carson*, is in substance the same as *Vaid's* doctrine of necessity, by which a purposive connection is established between a privilege and the efficient functioning of Parliament.

The approach in NSW has been to apply the reasonable necessity test to those powers and privileges that derive from the common law, whereas in recent

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<sup>48</sup> For other statutes relevant to parliamentary privilege in NSW see – G Griffith, *Parliamentary privilege: major developments and current issues*, NSW Parliamentary Library Background Paper No 1/07, pp 11-16.

<sup>49</sup> *Kielley v Carson* (1842) 4 Moo PC 63; 13 ER 225. Tasmania has several parliamentary privilege Acts, but none provides a general incorporation of power by reference to the House of Commons. By s 3 of the *Parliamentary Privileges Act 1858* the Houses do have a power to punish for contempt. See also *Australian Capital Territory (Self-Government) Act 1988* (Cth), s 24, by which the House of Assembly's privileges are defined for the time being by reference to those of the House of Representatives; and the partial codification of parliamentary privilege under the *Legislative Assembly (Powers and Privileges) Act 1992* (NT), with any residual privileges again being defined by reference to those of the House of Representatives. The relevant legislation in New Zealand is the *Parliamentary Privileges Act 1865*, by which the privileges of the New Zealand House of Representatives are defined by reference to those of the House of Commons as at 1 January 1865

<sup>50</sup> *Kielley 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. In *Kielley v Carson* local legislatures were said to have “every power reasonably necessary for the proper exercise of their functions and duties”.

<sup>51</sup> *Armstrong v Budd* (1969) 71 SR (NSW) 386.

<sup>52</sup> [\*Parliamentary Privilege: major developments and current issues\*](#), Background Paper 1/2007, p 22.

years at least the statutory interpretation of those privileges associated with proceedings in Parliament under Article 9 has tended to draw on other sources. In the past the dichotomy was not so significant, when Article 9 itself was rarely relied upon as a source of privilege before the 1980s. Now, with the courts tending to focus on that statutory source, the dichotomy is more obvious and perhaps of greater consequence.

In any event, it seems to be currently assumed in NSW that the “reasonable necessity” test does not provide a criterion of implementation or dividing line for which activities are to count as proceedings in Parliament. Instead, such a test is sought by reference to s 16(2)(c) of the federal *Parliamentary Privileges Act 1987*; in that context the key question is whether words said, acts done or documents prepared were “for purposes of or incidental to the transacting of business” in a House or committee. It was this test that the New Zealand Supreme Court rejected in *Leigh* where it was referred to as the “reasonable incidentality” test.

The Australian interpretation of s 16(2)(c) in Australia was considered in Background Paper 1/2007, with particular reference to *Rowley v O’Chee*.<sup>53</sup> In that case documents were held to be for the purpose of proceedings in Parliament within the meaning of s 16(2) of the federal *Parliamentary Privileges Act* in circumstances where the documents were created or prepared for the purpose of or incidental to the transacting of business in the Senate.

As discussed in the section on “ICAC and the execution of search warrants” below [4.8.2], the “reasonable incidentality” test has been employed by the NSW Parliament to decide whether certain documents constitute proceedings in Parliament. That approach has also found judicial favour.

**4.1.7 Recent interpretation of s 16(2)(c) of the Parliamentary Privileges Act 1987 (Cth):** In [Sportsbet Pty Limited v State of NSW \(No 3\)](#)<sup>54</sup> one question before the Federal Court referred to the admissibility of three categories of documents relating to the making of draft laws for which the State claimed absolute privilege on the ground that they were incidental to the transaction of parliamentary business. Jagot J ruled that two categories were not so privileged, those documents that were “simply communications about the terms of the draft legislation” and a briefing note and email that had no “particular connection with the conduct of business in Parliament other than in the most tenuous sense”. Based on the approach in *Rowley v O’Chee*, only one category was found to have a sufficient connection to parliamentary business to be protected by privilege, two documents in total, one of which was described as House Notes created by a public servant for a Minister’s use in Parliament.<sup>55</sup>

The judgment of Jagot J was followed in [In the matter of OPEL Networks Pty](#)

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<sup>53</sup> [2000] 1 Qd R 207; the case is also reported as *O’Chee v Rowley* (1997) 150 ALR 199.

<sup>54</sup> [2009] FCA 1283 (13 November 2009).

<sup>55</sup> [2009] FCA 1283 (13 November 2009) at para 21.

[\*Ltd \(in liq\)\*](#)<sup>56</sup> where s 16(2)(c) specifically was ruled to be consistent with Article 9. Very different in tone and substance to the decision in *Leigh*, Austin J concluded:

It seems to me necessarily true, and not dependent upon the evidence of the particular case, that if briefings and draft briefings to Parliamentarians for Question Time and other Parliamentary debate are amenable to subpoenas and other orders for production, the Commonwealth officers whose task it is to prepare those documents will be impeded in their preparation, by the knowledge that the documents may be used in legal proceedings and for investigatory purposes that might well affect the quality of information available to Parliament. To take a step that would have that consequence would, I think, derogate from the force of the Bill of Rights and run contrary to the historical justification for that legislation...<sup>57</sup>

That is the legal position in NSW at present, in relation to the interpretation of proceedings in Parliament under Article 9. Similar to the “necessary connection” test, the key consideration is that parliamentary privilege extends only to documents closely or directly connected with proceedings in Parliament. A sufficient nexus was not found in [\*Stewart v Ronalds\*](#),<sup>58</sup> a case in which the Executive Government instigated a report by Ms Ronalds into allegations of misconduct by a Minister (Tony Stewart), resulting in the withdrawal of his commission, and in respect to which Mr Stewart alleged he had been denied procedural fairness. The Ronalds report was subsequently tabled in Parliament, thus raising the question whether the report was privileged and not admissible into evidence.

On the issue of privilege, the key finding (Hodgson JA, Handley AJA) was that whilst the preparation of a report directed by Parliament or a committee of Parliament, and produced to Parliament or a committee, would clearly be protected by privilege, it is uncertain whether the privilege extends to an inquiry commissioned by the Executive, with the results to be reported to the Executive, and subsequently tabled in Parliament.<sup>59</sup> Hodgson JA went on to reflect more broadly on the law of parliamentary privilege, commenting:

124 It was submitted for the defendants that the investigation report in this case was within s 16(2)(c) as being the preparation of a document for the purposes of or incidental to the transacting of any business of a House or committee; and that the relevant business here was the Legislative Assembly’s role in holding the Executive to account and overseeing its activities and composition, having regard to the need of the Executive to maintain the confidence of the Legislative

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<sup>56</sup> [2010] NSWSC 142 (4 March 2010).

<sup>57</sup> [2010] NSWSC 142 (4 March 2010) at para 118.

<sup>58</sup> [2009] NSWCA 277.

<sup>59</sup> [2009] NSWCA 277 at para 121; *Parliament Matters*, Issue 23, February 2010, p 19 – “..it is reasonably clear that the content of a document prepared independently of ‘proceedings of Parliament’ but subsequently tabled in the House, such as an annual report of a government agency, or correspondence exchanged between two or more parties, does not attract parliamentary privilege. It is the act of tabling itself that is privilege as part of the ‘proceedings in Parliament’, not the content of the document”.

Assembly. As at present advised, I am not able to hold that this is so: it seems arguable to me that this role of Parliament is not itself business of Parliament or a committee of Parliament, and that the tabling of a report prepared at the request of the Executive and provided to the Executive for the purposes of the Executive is not itself Parliamentary business that makes the report itself immune to criticism in the courts; and that if s 16(2)(c) were to be otherwise construed, it would not reflect the general law and would be irrelevant to the position in relation to the New South Wales Parliament.<sup>60</sup>

A case to note at the federal level is [\*British American Tobacco Limited v Secretary, Department of Health and Ageing\*](#).<sup>61</sup> The background facts and the earlier proceedings before the Administrative Appeals Tribunal are considered later in this paper [4.3.3]. For the moment it is enough to note that, on appeal, the Full Court of the Federal Court held in respect to s 16(2) of the Commonwealth privileges legislation that the tabling in the Senate of a Government Response to a Senate committee report was a proceeding in Parliament. However, the same did not apply to its subsequent republication on the Government's website. This was a question the Tribunal had failed to consider, either in respect to s 16(2) or Senate Standing Order 167, which provides "The publication of each document laid on the table of the Senate is authorised by this Standing Order". By reference to the controversial New Zealand case of *Buchanan v Jennings*,<sup>62</sup> the Court commented that it:

should not be astute to confine the scope of parliamentary privilege, but neither should they give effect to exorbitant claims which are apt to interfere with the rights of subjects without any corresponding benefit in terms of the freedom of debate in Parliament and the protection of Parliamentarians... It would, we think, give an unduly expansive operation to the provisions of Senate Standing Order 167 to regard it as clothing with parliamentary privilege any re-publication by any stranger of any document tabled in the Senate. And for present purposes, the officers of the executive government who published the Government Response on its website were strangers to the Senate.

## 4.2 *Chaytor*, Article 9 and Exclusive Cognisance

[\*R v Chaytor\*](#) concerned false claims made by three MPs for costs incurred in the performance of their parliamentary duties.<sup>63</sup> They argued that the criminal courts did not have jurisdiction to try their cases because they were protected by parliamentary privilege, a contention rejected by both the Crown Court and the Court of Appeal. As Yvonne Tew writes:

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<sup>60</sup> For detailed commentary on the case see – J Moore, "David, Goliath and the stone of judicial review: the shield of parliamentary privilege in *Stewart v Ronalds*" (Spring 2011) 26(2) *Australasian Parliamentary Review* 70.

<sup>61</sup> [2011] FCAFC 107.

<sup>62</sup> [2005] 1 AC 115. A New Zealand "effective repetition" defamation case in which an MP was held to be liable in circumstances where they said that they "do not resile" from what they said in the House: Briefing Paper No 1/2009, p 24.

<sup>63</sup> The MPs were charged with false accounting under s 17(1)(b) of the *Theft Act 1968*.

The Lord Chief Justice, giving judgment for the Court of Appeal...concluded “parliamentary privilege...has never attached to ordinary criminal activities by members of Parliament”.<sup>64</sup>

The argument was also rejected by the Supreme Court. *Erskine May's Parliamentary Practice* comments that the leading judgment of Lord Phillips:

distinguished between the protection provided by article IX and that provided by exclusive cognizance. In respect of the former the judgment concluded that submitting claims did not form part of, nor was it incidental to, the core business of Parliament and was therefore not part of the proceedings of Parliament. As to the latter, whereas the allowances scheme itself was a matter that (at that time) fell with the House's exclusive cognizance, its implementation was not, so there was no bar in principle to the Crown Court considering whether the claims made by the defendants were fraudulent.<sup>65</sup>

An unusual, if not unique feature of the judgments in [R v Chaytor](#)<sup>66</sup> is the extent to which Article 9 on one side and exclusive cognizance on the other are treated as separate bases for parliamentary privilege. The relationship between the two can be misconstrued, not least because the judicial tendency to focus on Article 9 only surfaced in the second half of the 20<sup>th</sup> century. As Lord Phillips observes, “One of the problems when considering the scope of article 9 is that decisions on parliamentary privilege frequently make no mention of the Bill of Rights”.<sup>67</sup> Indeed, the 23<sup>rd</sup> edition of *May's Parliamentary Practice* comments that “None of the great 19<sup>th</sup> century cases did more than glance at Article 9, if that: decisions then were based on constitutional first principles”.<sup>68</sup> Similarly, Justice McHugh observed in *Egan v Willis*:

In neither *Stockdale [v Hansard]* nor *Bradlaugh [v Gossett]* did the judges suggest that it was Art 9 of the Bill of Rights that precluded them from exercising jurisdiction. Rather, their reasoning indicates that by parliamentary law – which as customary law is part of the common law – matters affecting the internal administration of the House of Commons are outside the jurisdiction of the common law courts.<sup>69</sup>

The point is that, historically, the privileges encapsulated in Article 9 pre-date its statutory expression and can therefore be traced to an alternative source,

<sup>64</sup> Y Tew, “No longer a privileged few: expense claims, prosecution and parliamentary privilege” (2011) 70(2) *The Cambridge Law Journal* 282; *R v Chaytor* [2010] EWCA Crim 1910 at para 81.

<sup>65</sup> *Erskine May's Parliamentary Practice*, 24<sup>th</sup> edition, Lexis Nexis UK 2011, p 242.

<sup>66</sup> [2010] UKSC 52.

<sup>67</sup> [2010] UKSC 52 at para 29.

<sup>68</sup> *Erskine May's Parliamentary Practice*, 23<sup>rd</sup> edition, Lexis Nexis UK 2004, p 177; D McGee, ‘The scope of parliamentary privilege’ (March 2004) *The New Zealand Law Journal* 84 – “The greater focus on Article 9 may be part of a tendency to look for an authoritative legislative or judicial expression of law in a form recognisable to the practising lawyer”.

<sup>69</sup> (1998) 195 CLR 424 at para 69. The modern tendency of the courts to focus on Article 9 was commented on in [Parliamentary Privilege: first principles and recent applications](#), Briefing Paper 1/2009.

namely, the inherent rights of Parliament associated with the “exclusive cognisance” doctrine. Of the Bill of Rights 1689, the latest edition of *May’s Parliamentary Practice* states that “The statute did not supersede the privilege of freedom of speech but it put the claim on a more defined basis”.<sup>70</sup>

In *R v Chaytor*<sup>71</sup> the relationship between Article 9 and exclusive cognisance was construed somewhat differently, as between Lord Rodger on one side and Lord Phillips and Lord Clarke on the other. Lord Rodger argued that exclusive cognisance comprehends the ambit of privilege under Article 9, stating: “article 9 cannot be intended to apply to any matter for which Parliament cannot validly claim the privilege of exclusive cognisance”.<sup>72</sup> That would seem to confirm the view expressed by Mr Justice Saunders in early proceedings in the case, to the effect that Article 9 is part of the wider privilege associated with exclusive cognisance, “there are no dividing lines between the two”.<sup>73</sup> On this understanding, it seems that if Article 9 was repealed, freedom of speech in Parliament would not be diminished to the slightest degree but would continue to apply on the inherent basis of Parliament’s exclusive cognisance of its own affairs. What would not apply directly any longer would be the precise statutory formulation of that freedom found in Article 9.<sup>74</sup>

It is Lord Rodger’s approach that is expressed in the [2013 Joint Committee Report](#), which states “The principle of exclusive cognisance underpins all privilege, including those aspects of privilege which are now based in statute”. Of Article 9, the report noted that this:

encapsulated a pre-existing claim to exclusive cognisance over things said or done in Parliament – the preamble to the Bill of Rights notes that King James II had sought to subvert the liberties of the realm ‘by Prosecutions in the Court of King’s Bench for Matters and Causes cognizable only in Parliament’.<sup>75</sup>

The 2013 report concluded:

Absolute privilege attaches to those matters which, either because they are part of proceedings in Parliament or because they are necessarily connected to

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<sup>70</sup> *Erkine May’s Parliamentary Practice*, 24<sup>th</sup> edition, Lexis Nexis UK 2011, p 227.

<sup>71</sup> [2010] UKSC 52.

<sup>72</sup> [2010] UKSC 52 para 102.

<sup>73</sup> *R v Chaytor and others* [2010] EW Misc 9 (EWCC) para 12.

<sup>74</sup> In an Australian context, the issue of the repeal or substantial amendment of Article 9 was canvassed but not decided in the hearing for special leave to appeal to the High Court in *Arena v Nader* (1997) 71 ALJR 1604. In that case legislation had been passed – the *Special Commissions of Inquiry Amendment Act 1997* (NSW) – to allow parliamentary privilege in relation to proceedings of a House to be waived by resolution. Suggesting a line of argument based on the idea of “institutional integrity”, the High Court observed: “The critical question on the present application is whether the Act so affects the parliamentary privilege of free speech that it invalidly erodes the institution of Parliament”: (1997) 71 ALJR 1604 at 1605; G Griffith and D Clune, “Arena v Nader and the waiver of parliamentary privilege” in *State Constitutional Cases* edited by G Winterton, The Federation Press 2006, pp 354-361.

<sup>75</sup> [2013 Joint Committee Report](#), para 16.

those proceedings, are subject to Parliament's sole jurisdiction or "exclusive cognisance".<sup>76</sup>

Lord Phillips, on the other hand, distinguished between separate bases of parliamentary privilege, in terms of "the narrow privilege under article 9 and the broader exclusive cognisance of Parliament",<sup>77</sup> a line of reasoning adopted by Lord Clarke.<sup>78</sup> In respect to Article 9 Lord Phillips observed:

The principal matter to which article 9 is directed is freedom of speech and debate in the Houses of Parliament and in parliamentary committees. This is where the core or essential business of Parliament takes place. In considering whether actions outside the Houses and committees fall within parliamentary proceedings because of their connection to them, it is necessary to consider the nature of that connection and whether, if such actions do not enjoy privilege, this is likely to impact adversely on the core or essential business of Parliament.<sup>79</sup>

With that test in place, Lord Phillips went on to say:

There are good reasons of policy for giving article 9 a narrow ambit that restricts it to the important purpose for which it was enacted – freedom for Parliament to conduct its legislative and deliberative business without interference from the Crown or the Crown's judges. The protection of article 9 is absolute. It is capable of variation by primary legislation, but not capable of waiver, even by Parliamentary resolution. Its effect where it applies is to prevent those injured by civil wrongdoing from obtaining redress and to prevent the prosecution of Members for conduct which is criminal.<sup>80</sup>

As for exclusive cognisance, Lord Phillips wrote:

This phrase describes areas where the courts have ruled that any issues should be left to be resolved by Parliament, rather than determined judicially. Exclusive cognisance refers not simply to Parliament, but to the exclusive right of each House to manage its own affairs without interference from the other or from outside Parliament. The boundaries of exclusive cognisance result from accord between the two Houses and the courts as to what falls within the exclusive province of the former. Unlike the absolute privilege imposed by article 9, exclusive cognisance can be waived or relinquished by Parliament. Thus in 1980 Parliament agreed to a resolution which permitted reference to be made in court to certain Parliamentary papers which, up to then, had been subject to a claim of exclusive cognisance – see *Erskine May* at p 105. The areas subject to exclusive cognisance have very significantly changed, in part as a result of primary legislation.<sup>81</sup>

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<sup>76</sup> [2013 Joint Committee Report](#), para 47.

<sup>77</sup> [2010] UKSC 52 para 30.

<sup>78</sup> [2010] UKSC 52 paras 130-133.

<sup>79</sup> [2010] UKSC 52 para 47.

<sup>80</sup> [2010] UKSC 52 para 61.

<sup>81</sup> [2010] UKSC 52 para 63.

One implication seems to be that, if Article 9 were repealed, then the common law doctrine of freedom of speech in Parliament could be waived by parliamentary resolution. However, the tenor of the Lord Phillips' judgment suggests rather a categorical distinction between parliamentary privilege derived from the statutory basis of Article 9 and that sourced from exclusive cognisance. At the very least the judgment implies that, while freedom of speech in Parliament as defined under Article 9 is "absolute", the basket of residual common law privileges, rights and immunities are more mutable and, perhaps, more conducive to judicial review.

As for Article 9, Lord Phillips acknowledged, that its "absolute" nature is qualified by the fact that it can be varied by primary legislation, as would have occurred, for example, if the former Labour Government's attempts to make limited exemptions to Article 9 in the draft Corruption and Bribery Bills had been successful. It is also the case that Lord Phillips promotes "giving article 9 a narrow ambit", a contemporary judicial standpoint that suggests a change in emphasis since the House of Lords declared in 1993 that "Article 9 is a provision of the highest constitutional importance and should not be narrowly construed".<sup>82</sup> That contemporary judicial standpoint finds expression in various "exceptions" to Article 9, applied in the name of judicial review, which qualify Article 9 still further.<sup>83</sup>

Comparing the judicial approaches found in [R v Chaytor](#), Yvonne Tew writes first of Lord Rodger that:

collapsing both bases into one question in this way obscures the distinction between protection based on article 9 and the exclusive cognisance of Parliament. Lord Phillips' approach is preferable because it recognises that freedom of speech and debate lie at the very heart of what privilege aims to protect. These issues are afforded absolute protection under article 9 and may overlap with, but are distinct from, issues that fall under the exclusive cognisance of Parliament.

Conversely, it might be said that the distinction Lord Phillips makes obscures the historical record, preferring neat categorisation over the complexities of legal history. The distinction might also be said to obscure the constitutional first principles that lie at the heart of parliamentary privilege, concerning the relationship between the Parliament, the Executive and the Courts. With the current emphasis on the relationship between Parliament and the Courts,<sup>84</sup> it is sometimes overlooked that parliamentary privilege serves to assert Parliament's independence from the modern day Executive. [Briefing Paper 1/2009](#) observed in this respect:

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<sup>82</sup> *Pepper v Hart* [1993] 1 AC 593 at 638; *Erkine May's Parliamentary Practice*, 24<sup>th</sup> edition, p 233.

<sup>83</sup> *Toussaint v Attorney General of St Vincent and the Grenadines* [2007] UKPC 48.

<sup>84</sup> *Mees v Roads Corporation* (2003) 128 FCR 418 at paras 77-78. Gray J said that "Article 9 seems to be construed now as a constraint on the judicial arm of government".

Parliament's immunities prevent incursions into parliamentary freedoms, by commissions of inquiry, police questioning or other means. Its powers facilitate the scrutiny of the Executive on behalf of the electorate.<sup>85</sup>

### 4.3 Parliament, the courts and judicial questioning of parliamentary proceedings

#### 4.3 1 *The debate in the UK*: One commentary on the *Chaytor* case concludes:

The scope of privilege is increasingly being narrowed to avoid it being used for reasons unrelated to those functions considered essential to an MP's democratic duties, central to which is the ability to debate openly and fearlessly in Parliament.<sup>86</sup>

This suggests that parliamentary privilege remains "under pressure" in the UK, required as it is to defend itself against judicial scrutiny. Such scrutiny has its merits. At the same time it might also cast doubt on the principle of comity that it said to inform the relationship between the Courts and Parliament.

Whereas the jurisdiction of the courts to determine privilege questions is not in dispute, traditionally the decisions of the courts on parliamentary privilege tended to be mostly favourable to Parliament, as re-affirmed in the 1995 case of *Prebble*. In that case the question was really about what constitutes a fair trial under the rule of law where, by the operation of parliamentary privilege, evidence relevant to the case is rendered inadmissible.<sup>87</sup> The comity principle and its historical antecedents were discussed by reference to:

a long line of authority which supports a wider principle, of which article 9 is merely one manifestation, viz. that the courts and Parliament are both astute to recognise their respective constitutional roles. So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges.<sup>88</sup>

Nonetheless, applying what is referred to as the "historical exception doctrine",<sup>89</sup> it was held in *Prebble* that Hansard can be referenced to prove what was done and said in Parliament "as a matter of history", provided that this is not used to suggest that the words were "improperly spoken". Another potential

<sup>85</sup> Briefing Paper 1/2009, p 8.

<sup>86</sup> Y Tew, "No longer a privileged few: expense claims, prosecution and parliamentary privilege" (2011) 70(2) *The Cambridge Law Journal* 282 at 284.

<sup>87</sup> There a New Zealand Minister had brought a defamation case, in answer to which the defendants wished to assert that the Minister had made misleading statements in the House of Representatives to the effect that the government did not intend to sell state assets when he was conspiring to do just that.

<sup>88</sup> [1995] 1 AC 321 at 332. The comity principle was applied in *Boscawen v Attorney General* [2009] NZCA 12 to reject an application for judicial review of the Attorney General's decision not to report on an inconsistency between section 7 of the New Zealand *Bill of Rights Act 1990* and the Electoral Finance Bill 2007.

<sup>89</sup> Briefing Paper 1/2009, p 15.

breach in the defences was recorded in *R v Secretary of State for the Home Department, ex parte Brind*,<sup>90</sup> where it was held that in the context of judicial review Ministerial statements to Parliament could be admitted into evidence to demonstrate what government policy is.

Following these leads, the 1999 Joint Committee made several [recommendations](#) relevant to the relationship between the courts and Parliament, including that:

- Article 9 should not prevent courts from examining parliamentary proceedings when there is no suggestion that anything forming part of those proceedings was inspired by improper motives or was untrue or misleading *and* there is no question of legal liability; and
- Article 9 should not preclude the use of parliamentary proceedings in court for the purpose of judicial review of governmental decisions or in other court proceedings in which a governmental decision is material.<sup>91</sup>

On both these fronts, the Joint Committee's views have proved influential. For example, as discussed in more detail in Briefing Paper No 1/2009:

- [Buchanan v Jennings](#) [2005] 1 AC 115 – a New Zealand “effective repetition” defamation case in which an MP was held to be liable in circumstances where they said that they “do not resile” from what they had said in the House. References to the 1999 Joint Committee report led to the Privy Council concluding that “it cannot now be said, as it once perhaps could, that mere reference to or production of a record of what was said in Parliament infringes Article 9”.<sup>92</sup>
- [Toussaint v Attorney General of St Vincent and the Grenadines](#) [2007] UKPC 48 – a case where the appellant was allowed to rely on statements made by the Prime Minister in the House of Assembly as evidence of unlawful motivation in a case of compulsory purchase. In effect, it was held that, for the purposes of judicial review, a Minister's statement in Parliament could be relied upon to explain the motivation for executive action outside of Parliament (even to the extent that that statement was evidence that the action was an improper exercise of power). Reference was made to the 1999 Joint Committee report, specifically to its view that Parliament should “welcome” the use of ministerial statements in judicial review, on the basis that “Both parliamentary scrutiny and judicial review have important roles, separate and distinct, in a modern democratic society”.<sup>93</sup>

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<sup>90</sup> [1991] AC 696.

<sup>91</sup> [Parliamentary Privilege – First Report](#), Summary of Recommendations.

<sup>92</sup> [2005] 1 AC 115 at para 16.

<sup>93</sup> [2007] UKPC 48 para 17; [Parliamentary Privilege – First Report](#), para 50.

These and other cases were reviewed in the [2012 Green Paper](#) where it was said that:

85. The reason that these apparent exceptions have arisen is that none of these uses of proceedings by the court is seen to “impeach or question” proceedings; in each case, the courts are interrogating matters of fact. These uses of parliamentary materials by the courts are widely accepted in Parliament, Government and the courts are representing sensible, pragmatic positions.

Rejected by the 2012 Green Paper was the recommendation of the 1999 Joint Committee that this approach to Article 9 should be embodied in statute. Nonetheless, the Green Paper went on to conclude that:

88.....The Government believes that the current situation, whereby the courts can use proceedings in Parliament as long as they are not questioned or impeached, is perfectly satisfactory, and that providing a definition in statute, in the absence of complete codification of privilege, would not be necessary or desirable.

For its part, the [2013 Joint Committee](#) took a less sanguine view of these developments, in particular in the area of judicial review. As to the use of parliamentary proceedings in the judicial review of government decisions, reflecting on more recent events the 2013 report said it did not “concur” with the recommendation of the 1999 Joint Committee on the ground that it would lead to “damaging consequences”.<sup>94</sup>

For the 2013 Joint Committee, “such questioning of proceedings in Parliament is not just the breaching of Article 9, but the blurring of the constitutional separation of Parliament and the courts”.<sup>95</sup> In arriving at this conclusion, the Joint Committee had particular regard to a number of recent cases which were acknowledged by the Lord Chief Justice to be “best ‘treated as...mistakes’, rather than a challenge to Parliament”.<sup>96</sup> Earlier the 2013 report had noted that several recent cases had “gone much further” than those instances where Ministerial statements to Parliament had been admitted to “demonstrate what Government policy is, not least by praying in aid reports from select committee[s]”. According to the 2013 report:

122...The Clerk of the Parliaments drew attention to a 2011 case involving the Home Office, in which the judge cited a report by the House of Lords Delegated Powers and Regulatory Reform Committee, relying heavily on the Committee’s conclusions in developing his own argument. For instance, the judge noted that “the committee accepted that the department had ... arguable grounds for concluding that its consultation was adequate”.<sup>97</sup>

<sup>94</sup> [2013 Joint Committee Report](#), para 132.

<sup>95</sup> [2013 Joint Committee Report](#), para 126.

<sup>96</sup> [2013 Joint Committee Report](#), para 135.

<sup>97</sup> The reference is to *R (Pelling) v. Secretary of State for the Home Department and others* [2011] EWHC 329.

The 2013 report added:

123. In a still more recent case the Court of Appeal drew attention to a report by the House of Lords Merits of Statutory Instruments Committee in the following terms: “The Committee did not suggest that the Regulations were unlawful but I regard their concern as supportive of the conclusion I have reached”.<sup>98</sup>

After noting that the Lord Chief Justice agreed that these cases had questioned proceedings in Parliament, the 2013 report commented:

We agree with the Lord Chief Justice that, in an adversarial system, the admission of evidence derived from committee reports in submissions from one party will necessarily lead to its questioning by the other party, thus contravening Article 9.<sup>99</sup>

For the 2013 Joint Committee, the danger was that, even if “mistakes” were acknowledged as such, and do not establish a precedent, “their frequency in judicial review cases risks having a chilling effect upon parliamentary free speech”.<sup>100</sup>

**4.3.2 Parliamentary privilege and judicial review in NSW:** In the NSW context, in a 2011 Aboriginal land rights case before the Land and Environment Court<sup>101</sup> brief consideration was made of the admissibility of an extract of a Hansard recording of a meeting of the GPS Committee No 3 on 18 September 2009 in which the then Police Minister, Michael Daley, was asked a question about the Malabar police station, whether it would be reinstated as a fully functioning police station irrespective of whether the local Aboriginal land claim was successful. The Minister objected to the tendering of the evidence on the ground of privilege.

For the applicant it was contended, first, that the question of admissibility “goes simply to proof of historical fact” and, secondly, that the “underlying truth of the Minister’s assertions recorded in Hansard is borne out by other evidence before the court”. After quoting the views of Justice Hungerford in *NSW Branch of the Australian Medical Association v Minister of Health and Community Service*<sup>102</sup> on the admissibility of committee reports, the Court concurred with the applicant’s submissions and accepted the tender of the Hansard extract, only to add that the extract did not address the key issue at stake and “can have limited weight in the circumstances”.<sup>103</sup> It begs the question why the Hansard extract was tendered in evidence at all, tangential as it was to the case and apparently

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<sup>98</sup> The reference is to *R (on the application of Reilly) v Secretary of State for Work and Pensions* [2013] EWCA Civ 66.

<sup>99</sup> [2013 Joint Committee Report](#), para 124.

<sup>100</sup> [2013 Joint Committee Report](#), para 135.

<sup>101</sup> [La Perouse Local Aboriginal Land Council v Minister Administering the Crown Lands Act](#) [2012] NSWLEC 5.

<sup>102</sup> (1992) 26 NSWLR 114.

<sup>103</sup> [2012] NSWLEC 5 at para 81.

having little or no substantive bearing on the matter at hand. Moreover, by contemplating the issue of the “underlying truth” of the Hansard extract, the Court seemed to be moving beyond the “historical exception” doctrine into more dangerous waters.

**4.3.3 Developments in other Australian jurisdictions:** In *Comalco Ltd v Australian Broadcasting Corporation*,<sup>104</sup> Blackburn CJ made the point that “The court upholds the privileges of Parliament, not by a rule as to the admissibility of evidence, but by control over the pleadings and the proceedings in court”.<sup>105</sup> By way of illustration, [Goodman v Western Australia](#)<sup>106</sup> is a case concerning the transfer of land by the Government to Crown Perth further to an agreement which had statutory status under the *Casino (Burswood Island) Agreement Act 1985 (WA)*. The proceedings concerned the plaintiff’s application for pre-action discovery, one issue being the admissibility of an affidavit to which extracts from Hansard were annexed detailing answers given by certain Ministers to questions in Parliament. Master Sanderson explained his changing perspective on the Hansard extracts as follows:

14. After hearing submissions from both counsel I indicated a tentative view the plaintiffs could rely on the Hansard extracts. Argument then proceeded. The further the argument went the more clear it became there was a real question as to whether or not the plaintiffs’ evidence from Mr Kidd did offend parliamentary privilege. I therefore called a halt to the proceedings and advised the plaintiffs they should serve copies of the documents on the Speaker of the Legislative Assembly.

The Speaker submitted that the reference to Hansard did offend Article 9. In the event, the question was not pursued as the plaintiff ceased to claim reliance on the extracts. Master Sanderson then explained how the proceedings should progress:

16....It is therefore not necessary for me to formally determine whether or not the affidavit offended parliamentary privilege. But it is inappropriate for parts of an affidavit which have been challenged as breaching the provisions of the Bill of Rights to remain on the court record. Therefore those parts of Mr Kidd’s affidavit to which objection was taken will be struck out.

More broadly, parliamentary privilege and judicial review make difficult bedfellows for the courts, often requiring lengthy analysis. In [Town of Gawler v Minister for Urban Development and Planning and Others](#)<sup>107</sup> the plaintiff argued that the “fact that the Minister” made certain statements in Parliament was “relevant in establishing apprehended bias because what the Minister said might have given rise to a perception in the mind of the ordinary bystander that the Minister might not have approached the decision” to amend the

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<sup>104</sup> (1983) 78 FLR 449.

<sup>105</sup> (1983) 78 FLR 449 at 453.

<sup>106</sup> [2013] WASC 316.

<sup>107</sup> [2011] SASC 26.

Development Plan of the Town of Gawler with an impartial mind.<sup>108</sup> On this question, Justice Duggan made reference to the case law, including the decision in *Rann v Olsen*,<sup>109</sup> after which he concluded:

In my view this situation cannot provide an appropriate analogy to the situation of the reasonable observer considering the statements of the Minister in Parliament in the present case. The mere fact that the statement was made by the Minister contributes nothing to the perception of the reasonable bystander. In order to be of such use, the bystander would have to compare those statements with events which occurred outside Parliament. The statements made in Parliament by the Minister are of no assistance to the bystander in forming a view as to bias unless, by reason of other facts known to the bystander, the Parliamentary statements give the appearance of being misleading. However, the assessment of the Minister's statement in this way is prohibited by the principle of Parliamentary privilege.<sup>110</sup>

At the Commonwealth level, Deputy President Forgie of the AAT of Australia observed in [\*Philip Morris Limited and British American Tobacco Australia Limited and Department of Health and Ageing\*](#) that "It is easy to move from using a reference to proceedings of Parliament in order to establish an historical event and using them for an impermissible purpose".<sup>111</sup> The pitfall to avoid is the implied questioning of a proceeding in Parliament where, by reference to extraneous evidence, the truth of what was said in such proceedings is doubted or contradicted. In this case, the applicants sought access to legal advice provided by the Attorney-General's Department to a Commonwealth Government Department, claiming that legal professional privilege (LPP) had been waived in part because aspects of the advice had been disclosed in the Government Response to a Senate Community Affairs Reference Committee report tabled in the Senate on 3 September 1997 and subsequently incorporated into Hansard.

One question for the Tribunal was whether the Government Response was a proceeding of Parliament and, if so, could the Tribunal have regard to it. As noted, the first question arose in respect to s 16(2) of the Commonwealth *Parliamentary Privileges Act 1987*, the Tribunal deciding that the tabling of the Government Response in the Senate could be "described as 'proceedings in Parliament' on the basis of its being incidental to the transacting of business either of the SCAR [Senate Community Affairs Reference] Committee or of the Senate".<sup>112</sup> The admissibility question arose further to s 16(3)(c) of the Commonwealth *Parliamentary Privileges Act 1987*, a section which prohibits the admission into evidence of parliamentary proceedings by way of, or for the purpose of "drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament".

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<sup>108</sup> [2011] SASC 26 at para 86.

<sup>109</sup> [2000] SASC 83; (2000) 76 SASR 450; see Background Paper 1/2007 at 5.1.2.

<sup>110</sup> [2011] SASC 26 at para 92.

<sup>111</sup> [2011] AATA 215 at para 157.

<sup>112</sup> [2011] AATA 215 at para 112.

Both Deputy President Forgie and O’Laughlin SM held that the Government Response was a proceeding in Parliament and that the Tribunal could not have regard to it as it would involve the drawing of a legal inference or conclusion. O’Laughlin SM held that:

217. Section 16(3)(c) of the PP Act prohibits reception of evidence concerning proceedings in Parliament for the purpose of drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings. That section does not prevent reception of evidence concerning parliamentary proceedings merely to establish the fact of occurrence of particular events as part of those proceedings, however where what is sought is a judgement to be made upon what occurred in the proceedings then evidence cannot be led.

218. The operation of s.16(3)(c) in the context of what is required to determine whether or not a disclosure of the content of a privileged communication operates to waive that privilege means that the Government Response cannot be relied on as an act constituting a waiver of LPP. For there to be a waiver, a judgment is required. It is necessary to judge whether the behaviour of the person entitled to assert LPP is such that it is inconsistent with maintenance of the privilege. That judgment is the very thing that attracts s.16(3)(c).<sup>113</sup>

Deputy President Forgie’s judgment included lengthy analysis of the case law on judicial review, from the UK and Australia, which led her to conclude:

When the constitutionality or lawfulness of executive action is in issue, regard may be had to proceedings of Parliament in order to ascertain what was said or done but no more than that. Although regard may be had to the proceedings of Parliament when they are simply historical facts or events, care must be taken not to make evaluative judgments about what has been said or done. Therefore, in *Egan v Willis*, a court was permitted to look at what had been done in the House in order to determine whether what was done was constitutional but not to make an evaluative judgment as to whether Mr Egan’s conduct merited what was done. In a similar vein, the English case of *R v Home Secretary; Ex parte Brind*, permitted the court to look to what had been said by the Secretary of State as his reasons for making a decision. It did so as part of its supervisory jurisdiction and drew a distinction between its doing so in that role and its doing so in order to examine the merits of the decision. The latter role was not a role permitted to it to perform just as it may not test the accuracy or veracity of something said in Parliament or that words said or actions taken were inspired by improper motives.<sup>114</sup>

In respect to the Government Response, Deputy President Forgie’s reasoning was similar to that of O’Laughlin SM, basically stating that in order to come to a view on the question at hand she “would have to draw an inference or conclusion from the parliamentary proceedings”, which would be contrary to s 16(3)(c).<sup>115</sup>

<sup>113</sup> [2011] AATA 215 at paras 217-218.

<sup>114</sup> [2011] AATA 215 at para 161.

<sup>115</sup> [2011] AATA 215 at para 196.

As for the admissibility generally under s 16(3)(c), Deputy President Forgie concluded:

I may have regard to the proceedings of Parliament in order to ascertain historical facts or events. They include ascertaining what words were spoken and acts done. Regard may be had to those words and acts provided their only relevance is that they were spoken or done. If judgments must be made or conclusions drawn as to why they were said or done or their accuracy or appropriateness questioned, regard may not be had to them for to do so would be to draw inferences or conclusions from them. If judgments must be made or conclusions drawn about the accuracy or appropriateness of what is said or done outside Parliament, the proceedings of Parliament cannot be used as part of the material to make that judgment or conclusion for to do so requires inferences or conclusions to be drawn about those proceedings.<sup>116</sup>

To illustrate the preferred approach to interpretation, attention was later drawn to the outcomes in two recent cases, [Habib v Commonwealth of Australia](#)<sup>117</sup> and [AMI Australia Holdings Pty Ltd v Fairfax Media Publications Pty Ltd and Ors.](#)<sup>118</sup> In summary, as explained by Deputy President Forgie:

Whereas Mr Habib had sought to rely on the proceedings of the Senate Standing Committee to establish that inferences could be drawn from the correspondence following the hearing, Fairfax wanted only to use it to establish that there had been a committee hearing and to establish what was said at that hearing.<sup>119</sup>

The Tribunal's decision was appealed to the Federal Court, which upheld its ruling in relation to s 16(3), whereby the act of tabling the Government Response in the Senate precluded the Tribunal from deciding whether legal professional privilege had been waived. However, as discussed earlier in this paper, the Court also found that the Tribunal had erred in law in failing to consider the subsequent disclosure of the Government Response on the Government's website which, the Court found, was not protected by s 16(2) of the federal *Parliamentary Privileges Act 1987* [4.1.7].

In Australia, one issue to emerge is the tension between parliamentary privileges and the role of the courts as the guardians of the Commonwealth Constitution. In [Sportodds Systems Pty Ltd v NSW](#)<sup>120</sup> the Full Court of the

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<sup>116</sup> [2011] AATA 215 at para 167. It was acknowledged that this approach was "perhaps at odds with the judgment of Pincus JA in *Laurance v Katter*" (1996) 141 ALR 447. For an overview of the relevant case law see Background Paper No 1/2007 at 5.1.2 where it was noted that in *Rann v Olsen* (2000) 76 SASR 450 at para 113 Doyle CJ said that s 16(3) should not be read as subject to the provision that "something apparently made unlawful by the provision [s 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".

<sup>117</sup> [2008] FCA 1494.

<sup>118</sup> [2009] NSWSC 863; (2009) 74 NSWLR 612.

<sup>119</sup> [2011] AATA 215 at para 178.

<sup>120</sup> [2003] FCAFC 237.

Federal Court considered four enactments of the New South Wales Parliament regulating horse and greyhound racing and concluded that three of these were, in part, inconsistent with s 92 of the Commonwealth Constitution. The plaintiffs sought to admit into evidence a reference from the Second Reading speech for a relevant Bill to prove the objective of the legislative scheme. The State objected to the use of the parliamentary record for the purpose of showing that Parliament had intended to achieve what the Full Court described as an “*illegitimate*” objective. By reference to the decision of Kirby J in *Egan v Willis*,<sup>121</sup> the Court commented that:

it is clear enough that the usual common law and/or statutory rules against the use of what is said in Parliament to ‘impugn’ the intention of the relevant Parliamentary speaker or of the Parliament itself are necessarily limited by the [*Commonwealth*] Constitution.<sup>122</sup>

Wading into these waters, the Full Court went on to conclude “On this basis we would accept that it is permissible to refer to the Parliamentary debates if it is relevant to do so”.<sup>123</sup>

#### 4.4 Codification and piecemeal legislative reform

**4.4.1 The codification debate in the UK:** A feature of the 1999 Joint Committee report was for the codification of particular areas of privilege, including that the terms “place out of Parliament” and “proceedings in Parliament” should be defined in statute; the view was taken that legislation should provide that privilege only apply to activities “directly and closely related to proceedings in Parliament”.<sup>124</sup> A further recommendation was for the codification of “parliamentary privilege as a whole”. The case was made that “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”.<sup>125</sup> Such codification was seen to be along the lines of the Australian *Parliamentary Privileges Act 1987* (Cth).<sup>126</sup> The Joint Committee’s final recommendation was that:

There should be a Parliamentary Privileges Act, bringing together all the changes in the law referred to above, and codifying parliamentary privilege as a whole. This would make it easier to understand that parliamentary privilege matters not just to members of Parliament but to the electorate.

<sup>121</sup> (1998) 195 CLR 424 at 492-493.

<sup>122</sup> [2003] FCAFC 237 at para 40.

<sup>123</sup> [2003] FCAFC 237 at para 40. See [Philip Morris Limited and British American Tobacco Australia Limited and Department of Health and Ageing](#) [2011] AATA 215 at paras 131-132.

<sup>124</sup> [Parliamentary Privilege – First Report](#), para 247.

<sup>125</sup> [Parliamentary Privilege – First Report](#), para 385.

<sup>126</sup> Contrary to the 2012 Green Paper, that codification was acknowledged not to be “comprehensive” in nature: [2013 Joint Committee Report](#), para 45.

The [2012 Green Paper](#) noted that, in 2009, the Joint Committee on the Draft Bribery Bill reported that the Clerks of both Houses supported the introduction of Parliamentary privilege legislation, along the lines of the Commonwealth *Parliamentary Privilege Act 1987*.<sup>127</sup> The concerns of the Clerks arose from actual and proposed statutory changes, some of which proved controversial, including:

- In 1996 the Defamation Act was amended to permit an MP to waive privilege for evidentiary purposes in defamation proceedings (the case involved MP Neil Hamilton and the owner of Harrods, Mohammed Al-Fayed).
- Since 2003, MPs have not been exempt from jury service.<sup>128</sup>
- The attempts to introduce limited exemptions to Article 9 in the draft Corruption Bill (2002-03), the draft Bribery Bill (2010), and in the Bill which became the Parliamentary Standards Act 2009.

Commenting on this process of piecemeal legislative reform, the 2002-2003 [Joint Committee on the Draft Corruption Bill](#) recommended that “it would be better if the [1999] Joint Committee recommendations were followed and a Parliamentary Privilege Bill dealing with all these matters were brought forward”.<sup>129</sup> Quoted in support was the Clerk of the House, saying:

I would find it somewhat easier to accept the inclusion in the Bill of a provision derogating from the principle of freedom of speech in the case of alleged corruption by a Member of Parliament if it were being presented in the context of a wider statutory restatement of parliamentary immunities and the scope of parliamentary freedom of speech.<sup>130</sup>

Also warning against piecemeal reform and the “accidental undermining of the principle by means of its steady leaking away”,<sup>131</sup> in July 2009, the [Joint Committee on the Draft Bribery Bill](#) called for consistency across statutes dealing with parliamentary privilege, stating that:

Legislating in a piecemeal fashion risks undermining the important constitutional principles of parliamentary privilege without consciousness of the overall impact of doing so.<sup>132</sup>

A similar note of caution was struck in the March 2010 House of Commons

<sup>127</sup> See also Sir Malcolm Jack, “Parliamentary privilege: a dignified or efficient part of the constitution?” (2012) 80 *The Table* 54 at 67; W McKay and CW Johnson, *Parliament & Congress: representation and scrutiny in the twenty-first century*, Oxford University Press 2010, p xvi.

<sup>128</sup> This is discussed in NSW Legislative Council, Standing Committee on Law and Justice, *Inquiry into the eligibility of members Parliament to serve on juries*, Report 46, November 2010, para 2.109.

<sup>129</sup> [Joint Committee on the Draft Corruption Bill](#), Session 2002-03, HL Paper 157, HC 705, para 114.

<sup>130</sup> [Joint Committee on the Draft Corruption Bill](#), para 112.

<sup>131</sup> [Joint Committee on the Draft Corruption Bill](#), para 226.

<sup>132</sup> [Joint Committee on the Draft Corruption Bill](#), para 228.

Privileges Committee report, [Police Searches on the Parliamentary Estate](#), which reported that:

It would in our view be a mistake for Parliament to legislate in haste or to address only one aspect of the multi-faceted relationship between liberty, Parliament and the law.....Before setting out to define and limit parliamentary privilege in statute, there needs to be a comprehensive review of how that privilege affects the work and responsibilities of an MP in the twenty-first century.<sup>133</sup>

In the event, neither the [2012 Green Paper](#) nor the [2013 Joint Committee](#) report supported the recommendation of the 1999 Joint Committee for the broad codification of law of parliamentary privilege. The 2012 Green Paper said that “the Government does not believe the case has yet been made for a comprehensive codification of privilege in a Parliamentary Privilege Act as was done in Australia in 1987”.<sup>134</sup> Nor did the Government endorse the more limited suggestion of the 1999 Joint Committee that the phrases “place out of Parliament” and “proceedings in Parliament” should be defined in statute. As noted, it was of the view that “the current situation, whereby the courts can use proceedings in Parliament as long as they are not questioned or impeached, is perfectly satisfactory...”.<sup>135</sup>

As discussed, the 2013 Joint Committee did not even support the Green Paper’s limited legislative reforms for the disapplication of Article 9 in relation to criminal proceedings. Favoured by the 2013 report’s “pragmatic and evolutionary” approach is the introduction of legislation only when the need for reform was clear and supported by a thorough review of the issues at stake.<sup>136</sup>

**4.4.2 The codification debate in NSW:** The lengthy and circuitous debate about codification that has taken place in the UK over the past decade or so has its equivalent in NSW, being an issue that has been canvassed intermittently since at least as far back as 1844.<sup>137</sup> For the present it is enough to note the more recent contributions to the debate. In 2006 the Legislative Council Privileges Committee, in its [Review of Members’ Code of Conduct and draft Constitution \(Disclosures by Members\) Amendment Regulation 2006](#), recommended:

That the Government enact a statutory codification of the privileges and immunities of both Houses of the NSW Parliament in a similar form to the *Parliamentary Privileges Act 1987* (Cth).<sup>138</sup>

<sup>133</sup> House of Commons Privileges Committee report, [Police Searches on the Parliamentary Estate](#), March 2010, para 169.

<sup>134</sup> [Green Paper on Parliamentary Privilege](#), para 37.

<sup>135</sup> [Green Paper on Parliamentary Privilege](#), para 88.

<sup>136</sup> [2013 Joint Committee Report](#), para 279.

<sup>137</sup> This history, along with the arguments for and against, some level of codification is discussed in Background Paper 1/2007.

<sup>138</sup> Legislative Council, *Review of Members’ Code of Conduct and draft Constitution*

In November 2009 the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics, in its [Report on a Memorandum of Understanding with the ICAC Relating to the Execution of Search Warrants on the Parliament House Offices of Members](#), recommended:

That the Government be requested to introduce legislation similar to s16 of the Parliamentary Privileges Act (Commonwealth) to confirm the protection of Article 9 of the Bill of Rights.

This recommendation arose out of uncertainties about what would constitute “proceedings in parliament” in the context of the exercise of a search warrant within Parliament, uncertainties that were resolved by the 2010 Memorandum of Understanding (see above).

Subsequently, on 2 December 2010 an exposure draft of the Parliamentary Privileges Bill 2010 was tabled by the then Speaker, Richard Torbay. According to the Explanatory Note the objects of the exposure draft Bill were:

- *To confirm the scope of the privilege of freedom of speech and debates and other proceedings in the House of Parliament.* This was achieved by reference to and the incorporation of relevant sections of the Commonwealth *Parliamentary Privileges Act 1987*, including s 16 “Parliamentary privilege in court proceedings”.<sup>139</sup>
- *To set out the procedures by which alleged breaches of parliamentary privilege (described in the Bill as offences against the House) may be dealt with and the penalties for such breaches.* Again taking its lead from the federal Act, the Draft Bill defined “offence against a House” to include a “contempt” of the House, a term that was also defined in the Draft Bill (clauses 4 and 5). Under the Draft Bill, a House, by resolution, would have been empowered to impose a fine of up to \$5,000 for a natural person or \$10,000 for a corporation, or imprisonment for up to 6 months. By clause 5(2) it was for the House to decide, acting on any advice it considered appropriate, whether any particular conduct constituted an offence.
- *To protect certain confidential communications contained in the records and correspondence of members from disclosure in response to pre-trial discovery, subpoena and other disclosure documents and to make them inadmissible in court proceedings (except in specified circumstances).* By clause 9(1) this privilege from disclosure, the need for which was not explained, appears to have been limited to civil proceedings. Among the exceptions were the statutory requirements for disclosure under the *ICAC Act 1988* and the *Special Commissions of Inquiry Act 1983*, which

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(Disclosures by Members) Amendment Regulation 2006, Report 35, October 2006, Recommendation 9. The report envisaged that the changes to the Code and the extension of disclosure requirements introduced in the draft legislation on pecuniary interests would “heighten the prospect of future disputes over parliamentary privilege” (para 4.51).

<sup>139</sup> The exposure draft heading for clause 7 read “Parliamentary privilege in court and tribunal proceedings.”

indicates that the privilege was not intended to stifle or circumvent inquiries into alleged misdeeds by Members of Parliament. “Confidential communication” was defined to mean a communication or information provided to a Member: (a) in the exercise of his or her functions as a Member; and (b) on the understanding that it was confidential and would not be disclosed.

This initiative of the former Speaker, which was tabled in the last days of the 54<sup>th</sup> Parliament, did not proceed beyond this exposure draft stage. Nor has the O’Farrell Government introduced legislation along the lines of s 16 of the Commonwealth *Parliamentary Privileges Act*.

#### 4.5 Parliament as a statute free zone

**4.5.1 The debate in the UK:** There is in Lord Phillips’ judgment in *Chaytor* a tendency to limit the non-statutory aspects of parliamentary privilege, to bring privilege to heel as it were, with Lord Phillips stating that “extensive inroads have been made into areas that previously fell within the exclusive cognisance of Parliament”. Specifically, he wrote:

Following *Ex p Herbert [R v Graham-Campbell]* there appears to have been a presumption in Parliament that statutes do not apply to activities within the Palace of Westminster unless they expressly provide to the contrary. That presumption is open to question”.<sup>140</sup>

The comment was referred to in the 2013 Joint Committee report, as was the decision of the Canadian Supreme Court in *Vaid*,<sup>141</sup> so too was the fact that the 1999 Joint Committee, applying the test of necessity, was highly critical of the legacy of *R v Graham-Campbell*<sup>142</sup> where, on the basis of exclusive cognisance, it was held that the court would not hear a complaint that alcohol was being sold in the precincts of the Palace of Westminster without the necessary licences. Quoted in the 2013 report was the comment in the [2012 Green Paper](#):

In light of the *Chaytor* judgment, the line likely to be taken by the courts in future appears to be reasonably clear. Courts remain respectful of parliamentary privilege and exclusive cognisance; but statute law and the courts’ jurisdiction will only be excluded if the activities in question are core to Parliament’s functions as a legislative and deliberative body.<sup>143</sup>

For the 2013 Joint Committee, “This oversimplifies the position”, for the reason that since *R v Graham-Campbell* in 1935 “legislation has mostly been drafted on the presumption that the case was correctly decided”. The result is that, if that presumption were to be reversed, “sweeping retrospective change to the

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<sup>140</sup> [2010] UKSC 52 at para 78.

<sup>141</sup> [2005] 1 SCR 667.

<sup>142</sup> [1935] 1 KB 594.

<sup>143</sup> CM 8318, para 216.

law” would have “unforeseeable practical repercussions”.<sup>144</sup>

Favoured by the 2013 report was the recommendation of the 1999 Joint Committee that it should be made clear in prospective legislation that every law applies to Parliament unless Parliament has been expressly excluded. That Committee had stated:

The right of each House to administer its internal affairs within its precincts should be confined to activities directly and 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.<sup>145</sup>

However, the Government in the Green Paper showed no enthusiasm for this legislative approach, leaving the 2013 Joint Committee to conclude that “however undesirable it may be as a statement of principle”, the safest way forward “is to reiterate and formalise the current presumption that legislation does **not** apply to Parliament unless it expressly provides otherwise”. It was on this pragmatic basis that the 2013 report recommended that the two Houses be invited to adopt resolutions stating that they should in future be expressly bound by legislation creating individual rights which could impinge on parliamentary activities, and that in the absence of such express provision such legislation is not binding upon Parliament.

**4.5.2 The NSW Parliament as a statute free zone:** The view expressed in the first edition of *NSW Legislative Council Practice* is a confirmation of the “well-established principle that parliamentary privilege is not affected by a statutory provision except by express words”.<sup>146</sup> In the absence of any judicial consideration that appears to be the present position, although it is one that may be advocated less forcefully in the future, having regard to the tenor of the debate in comparable jurisdictions, including the decision in *Vaid* where the “express abrogation” rule was decisively rejected.<sup>147</sup> The view there was that the normal rules of statutory interpretation should apply when deciding whether an Act of Parliament can by necessary implication limit parliamentary privilege, where this is perceived to be consistent with the intention of Parliament.

*Vaid* was considered in some detail in the 2008 judgment of Chief Judge Colgan in the New Zealand Employment Court in [Witcombe v Clerk of the House of Representatives](#),<sup>148</sup> in which Witcombe alleged that he was dismissed constructively by his employer, the Clerk. The key question before the Court at

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<sup>144</sup> [2013 Joint Committee Report](#), para 224; [Parliamentary Privilege – First Report](#), para 251.

<sup>145</sup> [Parliamentary Privilege – First Report](#), Executive Summary.

<sup>146</sup> L Lovelock and J Evans, *NSW Legislative Council Practice*, The Federation Press 2008, p 108.

<sup>147</sup> [2005] SCR 667 at para 80; See the discussion in Background Paper 1/2007 at 6.6; Briefing Paper 1/2009 at 4.6.

<sup>148</sup> WN WC 17/08, 26 September 2008.

this stage was whether parliamentary privilege precluded consideration of certain evidence, including statements made by the Clerk to the Finance and Expenditure Committee, which had been effectively repeated verbally and in correspondence.<sup>149</sup> However, the judgment traversed the legislative context in which the dispute had arisen, notably the *Employment Relations Act 2000* and the *Clerk of the House of Representatives Act 1988*, in respect to which it was concluded that Parliament had not “reserved to itself any separate jurisdiction to deal with complaints of aggrieved parliamentary employees”.<sup>150</sup> In summary, the Court was of the view that the employment relationship should be determined, to the greatest extent possible, by the Court and that, consistent with *Vaid*, “privilege may be surrendered or curtailed not only by express legislative provision but also by necessary implication of a statute”.<sup>151</sup>

In NSW, a related issue is whether the powers of the Public Service Commissioner were intended to extend to the Parliament, including the powers of entry and inspection provided to the Commissioner under the *Public Sector Employment and Management Amendment (Ethics and Public Service Commissioner) Act 2011*. Under s 3 of the principal Act the term “public sector service” is defined to include “the service of either House of Parliament, or the President or Speaker, or the President and the Speaker jointly”. At the federal level the potential difficulties that might arise have been circumvented by the establishment of a separate [Parliamentary Service Commissioner](#).

#### 4.6 Eligibility of Members of Parliament to serve on juries

Since 2003, MPs in England and Wales have not been exempt from jury service. This followed the 1999-2001 review into the criminal courts of England and Wales by Lord Justice Auld, which recommended that “no-one should be excusable from jury service as of right, only on showing good reason for excusal”.<sup>152</sup>

A recommendation of the 2013 Joint Committee was that legislation should provide that Members of either House should be among those who have a right to be excused from jury service in England and Wales, thereby reversing the effect of the *Criminal Justice Act 2003*.

In NSW, where Members are exempt from jury service at common and statutory law, the matter was considered in 2010 by the Legislative Council’s Standing Committee on Law and Justice. It concluded that the exemption should remain

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<sup>149</sup> WN WC 17/08, 26 September 2008 at para 177. Following *Buchanan v Jennings* [2005] 1 AC 115 it was held that Witcombe could not rely on the truth or otherwise of statements made by the Clerk to the Finance and Expenditure Committee, but that effective repetition of those statements in circumstances that were not privileged could be relied on.

<sup>150</sup> WN WC 17/08, 26 September 2008 at para 18.

<sup>151</sup> WN WC 17/08, 26 September 2008 at para 175.

<sup>152</sup> This is discussed in NSW Legislative Council, Standing Committee on Law and Justice, *Inquiry into the eligibility of members Parliament to serve on juries*, Report 46, November 2010, para 2.109.

in place. In part this was on the basis of the separation of powers doctrine which, it was argued, could not be maintained “if individuals who make laws are then permitted to adjudicate on those laws”, although it might be noted in this respect that juries are tribunals of fact only. The status quo was also argued for on the basis of the primary responsibility of Members to their respective Houses and their constituents, as well as on the ground that the position in NSW should remain consistent with that in all other Australian jurisdictions.<sup>153</sup>

#### 4.7 Registers of Members’ interests and proceedings in Parliament

A question that has not been resolved either in the UK or in NSW is whether the registration of the pecuniary interests of Members is a “proceeding in Parliament” for the purposes of Article 9. The issue was raised in the 1990 case of *Rost v Edwards*,<sup>154</sup> which was described by the [1999 Joint Select Committee](#) as a “cause for concern”. The 1999 report went on to explain:

122. In 1989 Mr Peter Rost, a member of Parliament, sued the writer of an article in *The Guardian* newspaper for libel in asserting that Mr Rost had been seeking to sell confidential information obtained by him as a member of the House of Commons select committee on energy. As part of a defence of justification, the defendants asserted that Mr Rost should have registered his parliamentary consultancies. In response Mr Rost wished to establish, by reference to the published rules and to *Erskine May*, the requirements laid down by the House for the registration of pecuniary interests, and to call evidence on the nature of his consultancies and the reason why he had not registered them. The Solicitor General submitted that the House of Commons register of members' interests and the related practice and procedure formed part of the proceedings of Parliament. The trial judge rejected this submission, and held that registration of members' interests is not a proceeding in Parliament.

The 1999 report commented:

123. It would not be appropriate for us to venture a view on the correctness of this decision as a matter of law. But we are in no doubt that, if this decision is correct, the law should be changed. As the law now stands, it is open to a court to investigate and adjudicate upon an alleged wrongful failure to register. That ought to be a matter for Parliament alone, in the same way as any other alleged breach of its rules is a matter for Parliament alone. We **recommend** that legislation should make clear that keeping the registers (and hence the registers themselves) are proceedings in Parliament.

The 2013 Joint Select Committee commented that the Government in the 2012 Green Paper found no ambiguity in this area of law and made no suggestion that *Rost* had been wrongly decided. For its part, however, the 2013 report agreed with its 1999 predecessor, stating

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<sup>153</sup> Legislative Council's Standing Committee on Law and Justice, *Inquiry into the eligibility of members of Parliament to serve on juries*, Report 46, November 2010, p 28.

<sup>154</sup> [1990] 2 QB 460.

233. It is clear to us that the decision in *Rost v. Edwards* represented an inappropriate encroachment on an area that should be subject to Parliament's exclusive cognisance. We note that the decision was not definitive, and that it has been criticised in other judgments. In the event that a similar case were to come before the courts, we consider that there is a strong possibility that the decision in *Rost v. Edwards* would be reversed. We would expect the two Houses to intervene should such a case arise.

234. In the meantime we agree with the 1999 Joint Committee that, if legislation on parliamentary privilege is contemplated, it should clarify that the Registers of Members' Interests, and other Registers prescribed by resolution of either House, are proceedings in Parliament for the purposes of Article 9 of the Bill of Rights.

In NSW the legislative scheme for the disclosure of Members' interest is provided for by s 14A of the *Constitution Act 1901* and the relevant regulation.<sup>155</sup> Under the regulations, the registers are to be compiled and maintained by the Clerks of the respective Houses, to be tabled in Parliament and are to be available for inspection by the public at large. None of which is determinative of their privileged status. The question as to how these registers may be used in an investigative sense in a "court or place out of Parliament" is not answered.

This precise issue came to the fore in 2012 in the context of ICAC's Operations Acacia and Jasper. Operation Acacia concerned the conduct of Ian Macdonald (a former MLC and Minister for primary industries and the Minister for mineral resources) in granting Doyles Creek Mining Pty Ltd (DCM) consent to apply for a coal exploration licence in relation to land at Doyles Creek, and in granting the licence to DCM. Operation Jasper concerned a range of issues involving the conduct of Mr Macdonald, Edward Obeid Senior (another former MLC) and others relating to, and arising from, the awarding of exploration licences in respect of the coal mining allocation areas known as Mount Penny, Glendon Brook and Yarrowa.

As explained by the President of the Legislative Council, the Hon Don Harwin, at the [2013 ASPG Annual Conference](#), the ICAC on a number of occasions sought from the Clerk of the Legislative Council by notice under section 22 of the *Independent Commission Against Corruption Act 1988* various interest disclosure returns prepared by members of the Legislative Council pursuant to the Parliament's interest disclosure regime. Advice from the Crown Solicitor confirmed the ambiguous nature of this area of the law, arguing that there are "competing arguments" which are "relatively finely balanced" as to whether the Register of Disclosures by Members of the Legislative Council is protected by parliamentary privilege. However, as the President explained, ultimately the Crown Solicitor "was inclined to think that the arguments in favour of the view that the Register forms part of the 'proceedings in Parliament' outweighed the arguments against".

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<sup>155</sup> Constitution (Disclosures by Members) Regulation 1983.

In the event, with specific reference to the ICAC only, privilege was waived in relation to the Registers of Disclosures for both Houses, with s 122 of the *ICAC Act 1988* amended to provide (in part):

(2) The Commission may use a relevant register:

(a) for the purpose of any investigation into whether or not a member of Parliament publicly disclosed a particular matter or as to the nature of any matter disclosed, and

(b) for the purpose of any finding, opinion or recommendation concerning the disclosure or non-disclosure

and for that purpose Parliament is taken to have waived any parliamentary privilege that may apply to the register.

Reflecting on the “sound policy” reasons for waiving privilege in this instance, the President observed that:

waiving of privilege over interest returns in relation to the ICAC in no way would inhibit the freedom of speech in Parliament. Indeed, the measure could be seen as enhancing the accountability of members and thereby public confidence in the Parliament.

As to the specific question of whether the registers are “proceedings in Parliament” for the purpose of Article 9, there does not appear to be a clear answer. The waiver provided under the 2012 amendment is not a blanket one, designed as it is to facilitate the specific investigative work of ICAC and, as such, to serve the broader public interest in enhancing transparent democratic processes. Thus, even if such registers can be characterised as proceedings in Parliament, as reasonably incidental to the transacting of business in the House, in this broader context the policy reasons for limited waiver were considered to be of greater weight.<sup>156</sup>

Another way of stating the argument is that, by this limited waiver, the Parliament is indicating that for other purposes, based on the “reasonable incidentalness” test, the registers of pecuniary interest would constitute proceedings in Parliament; for example, the relevant Presiding Officer would be likely to intervene were such a register to be used in the context of private litigation against a Member, such as where a person sought the payment of a bad debt. If that were to occur, it would be for the Court to decide on the status of such registers in the circumstances of the case.

The issue can also be approached from the standpoint of the exclusive

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<sup>156</sup> If hypothetically the “necessary connection” test were applied, as formulated in the *Chaytor* case, the decision to waive privilege in this context suggests that for the ICAC, operating as a “court or place out of Parliament”, to impeach or question a Member’s disclosure of interests is unlikely “to impact adversely on the core or essential business of Parliament”. In particular, the approach adopted by the NSW Parliament suggests that the waiver will not have a “chilling effect” on freedom of speech in Parliament.

cognisance doctrine. Following the 2013 Joint Select Committee, it may be that registers of pecuniary interests are best characterised as arising from the doctrine of exclusive cognisance, as matters intimate to the relationship between the Houses and their members. If so, they would have to satisfy the common law tests of necessity or reasonable necessity, that is, that they are necessary for the effective functioning of the Parliament.

Registers of pecuniary interests are of course quite recent in origin. How then, it might be asked, can these registers be necessary when the Parliament functioned well enough without them in the past? But note in this respect that the tests of necessity are contemporary in application, so that, just as some presumed privileges may fall into disuse, others may gain that status as the imperatives of modern democracy develop in new directions. At issue are those activities that are necessary for the effective functioning of Parliament in today's conditions.

Considered from that perspective, just as the waiver of privilege in relation to registers of interest can be explained in terms of the accountability and public confidence, so too can the necessity of creating and maintaining such registers in the first place, in an era when Parliaments and their members are under pressure to comply with democratic norms of accountability. It is not inconsistent to maintain that these registers are both reasonably necessary to the effective functioning of Parliament, on the one hand, and at the same time capable of limited waiver, if the same overarching public interest is served in both cases. In brief, it may be therefore that the status of the registers can be implied by reasonable necessity.

#### **4.8 Parliament, the Executive and the Damian Green Affair**

**4.8.1 *The Damian Green Affair.*** Neglect of constitutional first principles can lead to serious error, as occurred in the UK in the Damian Green Affair. This relates to the arrest in 2009 of Damian Green MP on charges relating to misconduct in public office, including the searching of his parliamentary offices by the Metropolitan Police and the report of the Select Committee which followed this. The Damian Green affair was the result of leaks involving (it was claimed) "national security" information from the Cabinet Office, leading to the arrest of a public servant (Christopher Galley). After extensive consultation with parliamentary officers, the police were permitted to enter the Parliamentary Estate without a search warrant and proceeded to search the MPs parliamentary office (and later his home, but then with a search warrant). The damning finding of the March 2010 House of Commons Privileges Committee report, [Police Searches on the Parliamentary Estate](#) was that:

We consider that seriously inadequate communication between these three key figures — Speaker, Clerk of the House and Serjeant at Arms — resulted in complete misunderstanding about the proper process for allowing a search of a Member's office.<sup>157</sup>

<sup>157</sup> House of Commons Privileges Committee report, [Police Searches on the Parliamentary](#)

On 8 December 2008 the Speaker issued a protocol establishing that a warrant is a necessary condition of a police search, but that the Speaker reserves the right to rule on the validity of the warrant, may direct how it is to be executed, and may impose conditions.<sup>158</sup>

**4.8.2 The ICAC and the execution of search warrants:** While the developments in the Damian Green Affair appear to have taken parliamentary officers in the UK somewhat by surprise, in NSW the execution of search warrants within the precincts of Parliament has been an issue of interest over many years, arising from the ICAC's execution in 2003 of a search warrant on the Parliament House office of the Upper House member, Peter Breen. Between 2003 and 2006 the Legislative Council's Privileges Committee published three reports on the issue. The second of these, from 2004, discussed the conflicting authorities on what constitute "proceedings in Parliament" and, based on the views expressed by McPherson JA in *O'Chee v Rowley*<sup>159</sup> in respect to s 16(2) of the Commonwealth *Parliamentary Privileges Act*, the 2004 report produced a three-step-test to decide if a disputed document constitutes a proceeding in Parliament based on whether a document was produced "for purposes of or incidental to the transacting of business" in a House or committee.

The first report, from 2003,<sup>160</sup> recommended an inquiry into the development of protocols for the execution of search warrants on Members' offices, an issue that was further discussed in the third report,<sup>161</sup> from 2006. The catalyst for the latter 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 aspects of the procedures followed in the Breen case and protocols and procedures in place in other jurisdictions, notably the Commonwealth Parliament. The full text of the

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[Estate](#), March 2010, para 115.

<sup>158</sup> A Bradley, "The Damian Green affair" [2012] *Public Law* 396 at 402. The protocol is reproduced in full in [Police Searches on the Parliamentary Estate](#), para 145. Reviewing these developments, Anthony Bradley wrote in *Public Law*: "Nonetheless, questions remain, in particular regarding the role of the Speaker in acting as guardian of parliamentary privilege in criminal matters: it is not clear whether and on what grounds the Speaker may refuse to allow a police search at Westminster even if a warrant has been obtained": A Bradley, "The Damian Green affair" [2012] *Public Law* 396 at 405-406.

<sup>159</sup> (1997) 150 ALR 199. In respect to s 16(2), 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.

<sup>160</sup> Legislative Council Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary privilege and seizure of documents by ICAC*, Report 25, December 2003.

<sup>161</sup> Legislative Council Standing Committee on Parliamentary Privilege and Ethics, *Protocol for execution of search warrants on members' offices*, Report 33, February 2006.

draft protocol, as finally agreed to by the Privileges Committee, was set out in its report of February 2006, including the three-step test the Committee had developed in its 2004 inquiry on the Breen case.<sup>162</sup> As explained by the Privileges Committee:

the recommended protocol incorporated procedures to be followed in cases where privilege or immunity has been claimed by a member. These procedures were based on the understanding that members' documents are protected by parliamentary privilege if they are brought into existence, used or retained for the purposes of or incidental to the transacting of business of the House. This is consistent with section 16(2) of the *Parliamentary Privileges Act 1987* (Cth)...<sup>163</sup>

That draft protocol was not adopted by the House; in the interim, the ICAC established its own practices in the relevant circumstances, culminating in the adoption in August 2008 of Procedure 9 of the ICAC's Operations Manual. Then in August 2009, responding to a question on notice to the parliamentary committee on the ICAC, the Commissioner suggested he did not support the test formulated in the draft protocol to determine whether documents are subject to parliamentary privilege; reference was also made to seeking "judicial review" of any claims made by a Member.<sup>164</sup> In response, a further inquiry was undertaken by the Legislative Council Privileges Committee, as well as a separate inquiry by the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics.<sup>165</sup> In a later report the Lower House Committee noted that in 2008 the Inspector of the ICAC reported on inadequacies in the ICAC's application for, and execution of, search warrants and of "clear deficiencies in the understanding of parliamentary privilege on the part of ICAC officers".<sup>166</sup>

Both the Upper and Lower House Privileges Committees reported in November 2009 recommending that their respective Presiding Officers enter into an MOU with the ICAC Commissioner concerning the execution of search warrants on Members' offices. Agreed to by the Houses was the text of the MOU set out at

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<sup>162</sup> The ICAC rejected the three-step test, preferring instead that disputed claims of privilege be resolved by an independent arbiter. 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.

<sup>163</sup> Legislative Council Privileges Committee, [A memorandum of understanding with the ICAC relating to the execution of search warrants on members' offices](#), Report 47, November 2009, para 1.5.

<sup>164</sup> Legislative Council Privileges Committee, [A memorandum of understanding with the ICAC relating to the execution of search warrants on members' offices](#), Report 47, November 2009, Chapter 1.

<sup>165</sup> Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics, [Report on a Memorandum of Understanding with the ICAC Relating to the Execution of Search Warrants on the Parliament House Offices of Members](#), November 2009.

<sup>166</sup> Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics, [Report on a Memorandum of Understanding with the NSW Police relating to the execution of search warrants on Members' premises](#), October 2010, p 9.

Appendix 7 of the Legislative Council Privileges Committee report, Part 10 of which deals with the execution of search warrants on a parliamentary office.<sup>167</sup> Detailed practices and procedures are provided for and, while the MOU does not indicate which specific categories of documents may or may not constitute “proceedings in Parliament”, based on s 16(2) of the Commonwealth *Parliamentary Privileges Act* it does say that:

Proceedings in Parliament includes all words spoken and acts done in the course of, or for the purposes of or incidental to, the transacting of the business of a House or committee.

**4.8.3 NSW Police and the execution of search warrants:** There followed in November 2010 a Memorandum of Understanding, signed by the Speaker and President with the Commissioner of Police, concerning the execution of search warrants on Members' premises. It was explained that:

This includes the Parliament House office, electorate office and the residence of a member. It also includes the ministerial office of a member who is also a Minister. Such a memorandum of understanding is an important recognition of the privileges connected with the Parliament. The Presiding Officers have already entered into a memorandum of understanding with the Independent Commission Against Corruption which sets out protocols to be observed in the execution of search warrants, recognising and preserving parliamentary privilege.<sup>168</sup>

The terms of this second MOU, as well as the process by which it was agreed to, are set out in the September 2010 [report](#) of the Legislative Council Privileges Committee<sup>169</sup> and in the October 2010 [report](#) of the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics. In respect to the procedures for the execution of search warrants, the MOU states (in part):

A search warrant, if otherwise valid, can be executed over premises occupied or used by a member of the NSW Parliament, including the Parliament House office of a member, the ministerial office of a member who is also a minister, the electorate office of a member and the residence of a member. Evidential material cannot be placed beyond the reach of officers of the NSW Police Force simply because it is held by a member or is on the premises use or occupied by a member.<sup>170</sup>

The MOU acknowledges that, in executing a warrant on the office of a Member of Parliament, care must be taken regarding claims of parliamentary privilege. Some guidance is offered as to what may or may not constitute “proceedings in Parliament” in this context. Included, for example, may be “notes, draft speeches and questions prepared by the member for use in Parliament”; likely

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<sup>167</sup> Resolution agreed to by the Legislative Council on 25 November 2009, by the Legislative Assembly on 2 December 2009.

<sup>168</sup> [NSWPD](#), 12 November 2010, p 27788.

<sup>169</sup> Legislative Council, [Final Report, Report No 53: A memorandum of understanding with the NSW Police Force relating to the execution of search warrants on members' premises](#).

<sup>170</sup> [Report on a Memorandum of Understanding with the NSW Police relating to the execution of search warrants on Members' premises](#), Appendix 9.

to be excluded are “a member’s travel documentation and political party material”. Based again on s 16(2) of the Commonwealth Parliamentary Privileges Act, the MOU observes that:

In some cases the question of whether material constitutes “proceedings in Parliament” will turn on what has been done with the material, or what the member intends to do with it, rather than what is contained in the material or where it is found.<sup>171</sup>

## 4.9 Bribery and corruption offences and the disapplication of Article 9

**4.9.1 Bribery and corruption offences in the UK:** The 1999 Joint Committee reported that, while bribery of a member or the acceptance of a bribe by a member is a contempt of Parliament: “There is some uncertainty on whether the common law offence of bribery of a person holding a public office extends to members of Parliament”.<sup>172</sup> After a lengthy commentary on the difficult issues and competing public interests involved, the Joint Committee recommended statutory amendment to ensure that evidence relating to a bribery offence “shall be admissible notwithstanding article 9”. The report went on to say:

The practical impact this proposed change will have on article 9 should not be overstated. We anticipate there will be few prosecutions of members, because we believe there are few instances of corruption of members. We anticipate, further, that in only a small proportion of any prosecutions will it be necessary to question proceedings in Parliament. Thus, to allow evidence to be given as we recommend will involve only a minimal encroachment upon the territory safeguarded by article 9. The occasions when a court will be called upon to question a parliamentary proceeding will be rare indeed.<sup>173</sup>

Clause 12 of the draft Corruption Bill of 2003 followed up on this recommendation, in addition to which it proposed to withdraw the protection of Article 9 from witnesses before select committees (and not just from Members and Peers). This broad formulation was rejected by the [Joint Committee on the Draft Corruption Bill](#), which argued instead that clause 12 should be narrowed, to apply only to words or actions of an MP or Peer in a case where they are a defendant. The following re-drafted version of clause 12 was proposed (with new words in italics):

<sup>171</sup> [Report on a Memorandum of Understanding with the NSW Police relating to the execution of search warrants on Members’ premises](#), Appendix 9.

<sup>172</sup> There was uncertainty whether either House was a “public body” for the purposes of the Public Bodies Corrupt Practices Act 1889, or whether an MP was an “agent” under the Prevention of Corruption Act 1906; whether the offence of bribery of a person holding a public office was also in doubt, as membership of Parliament may not have constituted a “public office” under the common law: Joint Committee on Parliamentary Privilege, [Parliamentary Privilege – First Report](#), paras 135-136. In 1976 the Royal Commission on Standards of Conduct in Public Life asserted that “neither the statutory nor the common law applies to the bribery or attempted bribery of a Member of Parliament in respect of his Parliamentary activities”: Cmnd 6524 (July 1976), para 307.

<sup>173</sup> [Parliamentary Privilege – First Report](#), paras 167-168.

No enactment or rule of law preventing proceedings in Parliament being impeached or questioned in any court or place out of Parliament is to prevent any evidence *of words spoken, or acts performed, by a person alleged to have committed a corruption offence as a Member of either House of Parliament, being admissible –*

- a) *in proceedings for that offence against that person; or*
- b) *in proceedings for a corruption offence which arises out of the same facts.*

Clause 12 was not enacted, either in its original or in this amended form. The former Labour Government returned to the issue in the 2009 draft Bribery Bill, again to no effect as it transpired. Along the lines proposed by the 1999 Joint Committee, the draft Bribery Bill sought to provide an exemption to the prohibition against the admissibility of parliamentary proceedings into evidence in cases where the parliamentary activities and/or statements of an MPs are relevant to the bribery charges. The Explanatory Note to clause 15 of the draft Bill stated:

Clause 15 makes the word or conduct of an MP or peer admissible in proceedings for a bribery offence under the Bill where the MP or peer is a defendant or co-defendant notwithstanding any enactment or rule of law including Article 9 of the Bill of Rights 1689.<sup>174</sup>

Concerned about consistency between statutory provisions,<sup>175</sup> the [Joint Committee on the Draft Bribery Bill](#) recommended that clause 15 be deleted, taking the view that the issue should only be addressed, if at all, as part of a comprehensive Bill dealing specifically with parliamentary privilege. Informing that conclusion was the view that waiving privilege was not “necessary” in order to facilitate prosecutions in certain bribery cases, and that, as the Clerk of the House of Commons had said in 2003, the proposed legislation was tantamount to using “a mighty sledgehammer to crack an almost invisible nut”.<sup>176</sup> The [Joint Committee on the Draft Bribery Bill](#) observed that: “It is far from clear that privilege has proved to be an impediment to conviction even in cases where it has been cited as such”.<sup>177</sup> Commenting on the “undesirable consequences” that might arise under clause 15, it was said (in part):

- (a) There would be an imbalance between the treatment of accused Members on the one hand and other Members and witnesses on the other. Whereas the words of an accused witness spoken before a select committee could not be used as evidence against them, the words of an accused Member could be. Thus clause 15 may not remove all the evidential problems that any removal of privilege undertakes to address.

<sup>174</sup> Quoted in House of Commons Library, [Parliamentary Privilege: current issues](#), July 2013.

<sup>175</sup> Specifically, the concern was that the approach to waiving privilege differed as between the Draft Corruption Bill and clause 10 of the Parliamentary Standards Bill 2009.

<sup>176</sup> [Joint Committee on the Draft Corruption Bill](#), para 214.

<sup>177</sup> [Joint Committee on the Draft Corruption Bill](#), para 212.

- (b) Accused Members would be unable to rely on the words of other Members or witnesses spoken during proceedings, even if they were exculpatory.<sup>178</sup>

Similar considerations had arisen in the debate about clause 10 of the 2009 Parliamentary Standards Bill. That Bill sought a similar exception by waiving privilege in relation to the work of the Independent Parliamentary Standards Authority, the Commissioner for Parliamentary Investigations and in any specific legal proceedings against an MP in corruption cases. However, in this case the clause was more widely drawn as, unlike clause 15 of the Draft Bribery Bill, no exception was made for proceedings in respect to a witness or non-accused Member. But as the Clerk of the House of Commons, Sir Malcolm Jack, informed the Justice Select Committee:

However, even if the qualification were narrowed, the accused Member would be put in the position of having his words used against him, without being given the opportunity to adduce words spoken by other Members which might tend to exculpate him. This would create a very real risk of the trial being unfair and contrary to the requirements of Article 6 ECHR. This demonstrates the difficulty caused by admitting evidence of proceedings in Parliament: either the admission is on such a wide basis that it has a chilling effect on Parliamentary proceedings (by prejudicing or effectively removing the right of free speech), or it is on such a narrow basis that the fairness of trials is put at risk.<sup>179</sup>

As with the relevant clauses of the draft Corruption and Bribery Bills, clause 10 of the 2009 Parliamentary Standards Bill was not enacted into law.

The Government's commitment to publish a Green Paper originated in a statement in the Coalition Agreement that the Government would work to "prevent the possible misuse of Parliamentary privilege by MPs accused of serious wrongdoing".<sup>180</sup> Notwithstanding the decision of the Supreme Court in *Chaytor*, the Government expressed a continuing concern that: "it would be wrong if MPs or peers accused of serious criminal offences could use parliamentary privilege to avoid criminal prosecution, where these are not related to the key elements of freedom of speech and debate".<sup>181</sup>

Further to this concern, the issue of whether the protection of parliamentary privilege should be "disapplied" in cases of alleged criminality, including bribery and corruption charges, was considered in the [2012 Green Paper](#), which also included draft clauses illustrating how this "limited disapplication" option might be implemented. In the Green Paper the Government sought further consideration of a proposal to disapply Article 9 in respect to members and non-members alike "in proceedings for an offence". The draft clause read in part:

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<sup>178</sup> [Joint Committee on the Draft Corruption Bill](#), para 220.

<sup>179</sup> Justice Select Committee [Constitutional Reform and Renewal: Parliamentary Standards Bill](#) HC 791 2008-09. Written evidence from Dr Malcolm Jack 30 June 2009.

<sup>180</sup> Quoted in [2013 Joint Committee Report](#), para 137.

<sup>181</sup> [Green Paper on Parliamentary Privilege](#), para 93.

- (1) No enactment or rule of law preventing the freedom of speech and debate or proceedings in Parliament being impeached or questioned in any court or place out of Parliament is to prevent any evidence being admissible in proceedings for an offence.

By sub-clause (2) the above was not to apply to proceedings for offences set out in a Schedule to the Act. These offences included “speech” related offences for which, in order to avoid any “chilling effect”, the protection of parliamentary privilege should continue to apply. The list of scheduled offences included breaches of the Official Secrets Act 1989 and the encouragement of terrorism under the Terrorism Act 2006. The idea was that such exceptions would help dispel any fear that the suggested reform would stifle frank deliberation in Parliament, or the willingness of witnesses before select committees to speak freely and openly.<sup>182</sup> Included, too, in the proposed Schedule were a number of offences relating to the passing of information, for example the disclosure of documents which are subject to the Official Secrets Act 1989 or the Data Protection Act 1998, or the disclosure of information that might prejudice a trial, further to the Contempt of Court Act 1981. Privilege would still apply in these cases, with the Green Paper commenting that “As now, where unlawful disclosure of information has occurred, criminal proceedings can be brought without the use of proceedings in Parliament”.<sup>183</sup>

The disapplication of Article 9 proposed by the Government was not endorsed by the [2013 Joint Committee](#), with the report concluding:

We believe that general disapplication of Article 9 in respect of criminal prosecutions is unnecessary and would have a disproportionately damaging effect upon free speech in Parliament.<sup>184</sup>

In support of this conclusion, the 2013 report noted the strong views in opposition expressed by both the Clerk of the House and the Clerk of the Parliaments; it noted too that the Government itself had in the interim changed its position on this issue. The 2013 report stated:

We have not seen any evidence that suggests such a step is necessary today. The main mischief the 1999 Joint Committee sought to address (uncertainty over whether MPs could in fact be prosecuted for the common law offence of bribery) was addressed by means of the Bribery Act 2010.<sup>185</sup> Requesting or agreeing to receive a bribe are now statutory criminal offences, irrespective of whether or not the acts for which the bribe was sought or offered are actually carried out. This makes the situation in the United Kingdom analogous to that in the United States, where the case of *US v. Brewster* established that a Senator could be prosecuted by demonstrating that an unlawful agreement was entered

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<sup>182</sup> [Green Paper on Parliamentary Privilege](#), paras 116-124.

<sup>183</sup> [Green Paper on Parliamentary Privilege](#), para 127.

<sup>184</sup> [2013 Joint Committee Report](#), para 156.

<sup>185</sup> By s 3(2)(a) of the Bribery Act 2010, the functions or activities to which a bribe may relate includes “any function of a public nature”.

into, without the need to show that the bribe led to specific conduct (which might be privileged).<sup>186</sup>

The report went on to say that it is not in the public interest to curtail freedom of speech in Parliament “without compelling evidence that such curtailment is absolutely necessary”. It added: “No such evidence has been produced: indeed, there is no evidence that parliamentary privilege has been a barrier to the successful prosecution of any criminal case”.<sup>187</sup>

**4.9.2 Bribery and corruption offences in NSW:** As discussed in e-brief 11/2013 [Corruption Offences](#) by Lenny Roth, in NSW corruption offences are the subject of the common law and of statutory law. The main common law offences are extortion, bribery and misconduct in public office. In NSW the specific mischief identified by the 1999 Joint Committee, uncertainty over whether MPs could be prosecuted for the common law offence of bribery, has not been an issue of concern. This is because, as Gerard Carney observes, “It would appear that in Australia both members of parliament and ministers are public officers within the definition given in *R v Whitaker*”.<sup>188</sup>

As e-brief 11/2013 explains, by the early 17<sup>th</sup> century, the courts recognised an offence of bribery, which was only applicable to judicial officers.<sup>189</sup> In the 18<sup>th</sup> century, the offence was extended to public officials in general. This was recognised by the NSW Supreme Court in a decision in 1875 (the case involved a bribe being paid to a Member of Parliament, and the Member was considered to be a “public official”).<sup>190</sup> In a 1992 decision, the NSW Court of Appeal approved the following statement of the common law offence of bribery, which appeared in the 1964 edition of *Russell on Crime*:

...the receiving or offering of an undue reward by or to any person in a public office, in order to influence that person's behaviour in that office, and to incline that person to act contrary to accepted rules of honesty and integrity...<sup>191</sup>

Statutory offences also apply, notably under the ICAC Act, where the term “public official” is defined to include Members of the NSW Parliament, and where s 8(2) of that legislation includes bribery as one instance of “corrupt

<sup>186</sup> [2013 Joint Committee Report](#), para 145.

<sup>187</sup> [2013 Joint Committee Report](#), para 155.

<sup>188</sup> [1914] 3 KB 1283 at 1296; G Carney, *Members of Parliament: Law and Ethics*, Prospect Media, 2000, p 357. In *R v Whitaker* a public officer is defined as: “an officer who discharges any duty in the discharge of which the public are interested, more clearly so if he is paid out of a fund provided by the public”. Carney cites in support the decision in *R v White* (1875) 12 SCR (NSW) 322, which was affirmed by a majority of the High Court in *R v Boston* (1923) 33 CLR 386 at 392-393, 401-402 and 408; see also *Sneddon v State of NSW [2012] NSWCA 351 at paras 218-222*. P Hall, *Investigating Corruption and Misconduct in Public Office: Commissions of Inquiry – Powers and Procedures*, LawBook Co, 2004, p 25.

<sup>189</sup> P Finn, *Abuse of Official Trust: Conflict of Interest and Related Matters*, Integrity in Government Project, Second Report, ANU, 1993, p 19.

<sup>190</sup> *R v White* (1875) S.C.R (NSW) 322

<sup>191</sup> *R v Allen* (1992) 27 NSWLR 398 at 402; and see also *R v Glynn* (1994) 33 NSWLR 139.

conduct". However, by s 9 of the ICAC Act the scope of "corrupt conduct" is limited by the requirement that it must, for example, constitute a "criminal offence" or a breach of the Members' code of conduct. The criminal offences that would apply to Members may still tend to be the common law offences and not, for the most part, the statutory "corruption" offences under Part 4A of the *Crimes Act 1900*.

This is because several of those offences refer to "agent" and "principal" and section 249A(c) states that agent includes "any person serving under the Crown", a definition that would seem to exclude Members of Parliament per se, but not in their capacity as a Minister of the Crown. For example, in its 2013 report, *Investigation into the conduct of Ian MacDonald, Ronald Medich and others*, the ICAC observed that:

An offence under section 249B(1)(a)(ii) of the Crimes Act requires the "agent" to solicit or receive a benefit from a person as a reward for "showing favour" to any person in "relation to the affairs or business of the agent's principal". The definition of "agent" includes "any person serving under the Crown (which in this case is referred to in this Part as the person's principal)". As the minister for energy, Mr Macdonald was a person "serving under the Crown".<sup>192</sup>

But note that s 249D, which creates offences in relation to corrupt inducements for advice, does not use the terms "principal" and "agent" and would therefore apply to Members of Parliament. Subsection (1) provides:

If a person corruptly gives a benefit to another person for giving advice to a third person, being advice which the person giving the benefit intends will influence the third person:

- (a) to enter into a contract with the person who gives the benefit, or
- (b) to appoint the person who gives the benefit to any office,

and, at the time the benefit is given, the person who gives the benefit intends the giving of the benefit not be made known to the person advised, the person who gives the benefit is liable to imprisonment for 7 years.

Subsection (2) creates a similar offence for corruptly receiving a benefit for giving advice to another person which is likely to influence the other person to do one of the two things listed above, and where the person who receives the benefit intends the giving of the benefit not to be made known to the person to be advised. Subsection (4) creates a similar offence for corruptly offering or soliciting a benefit for the giving of advice by one person to another, intending the advice to influence the person advised to enter into a contract with anyone or to appoint anyone to any office, and intending that the benefit not be made known to the person advised.

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<sup>192</sup> ICAC, *Investigation into the conduct of Ian MacDonald, Ronald Medich and others*, July 2013, p 36. Note that s 249A(e) states that agent includes a councillor within the meaning of the Local Government Act (and a reference to the agent's principal is a reference to the local council).

As discussed in e-brief 11/2013, the need to review this area of the law was recognised in the Exposure Draft Crimes (Corruption) Amendment Bill 1992. Under this proposal, the definition of “public official” would have expressly included Members of Parliament.<sup>193</sup>

#### 4.10 Members of Parliament and the Crown

The status of Members of Parliament as public officials was reviewed recently in [\*Sneddon v State of NSW\*](#),<sup>194</sup> a case concerning the employment relationship between an electorate officer and a former Member (Milton Orkopolous). One issue on appeal was whether the State of NSW should be held liable for the former Member’s conduct including under the *Law Reform (Vicarious Liability) Act 1983*. Ms Sneddon contended, among other things, that a Member of the Legislative Assembly, carrying out his functions as such, is an officer of the Crown, for whose conduct, carried out in that capacity, the State was responsible. In the course of the trial it was accepted that the tortious actions of Mr Orkoplous were undertaken in his capacity as an MP and not as a Minister.

Section 8(1) of the *Law Reform (Vicarious Liability) Act 1983* provides:

- (1) Notwithstanding any law to the contrary, the Crown is vicariously liable in respect of the tort committed by a person in the service of the Crown in the performance or purported performance by the person of a function (including an independent function) where the performance or purported performance of the function:
  - (a) is in the course of the person’s service with the Crown or is an incident of the person’s service (whether or not it was a term of the person’s appointment to the service of the Crown that the person perform the function), or
  - (b) is directed to or is incidental to the carrying on of any business, enterprise, undertaking or activity of the Crown.

For its part, the State denied liability for torts committed by Members of Parliament towards their electoral staff, despite the fact that such staff are “Crown employees”. As Basten JA observed, “The underlying assumption appears to have been that ...the *Vicarious Liability Act* impose liability on the State only in respect of the torts committed by members of the executive arm of the government, and not its legislative arm”.<sup>195</sup> The State further argued, *inter alia*, that imposition of liability on itself in these circumstances would have a tendency to interfere with the internal workings of Parliament and with parliamentary privilege.<sup>196</sup>

The argument as to privilege was not expanded upon. In the event, the conclusion reached by a majority of the court (Meagher JA dissenting) was that the State of NSW was liable for the tortious conduct of Mr Orkoplous whilst he

<sup>193</sup> NSW Government, *Reform of the criminal law relating to official corruption – bribery and extortion*, Discussion Paper and Exposure Bill, December 1992 (copy in Library)

<sup>194</sup> [2012] NSWCA 351 at paras 222-223.

<sup>195</sup> [2012] NSWCA 351 at para 53.

<sup>196</sup> [2012] NSWCA 351 at para 67.

was acting “in the service of the Crown” pursuant to s 8(1) of the *Law Reform (Vicarious Liability) Act 1983*.<sup>197</sup> Macfarlan JA arrived at this conclusion on the basis that, in supervising and controlling Ms Sneddon’s employment in his electorate office, Mr Orkoplous was acting as the delegate of the Speaker; and further that in employing the electorate officer the Speaker was acting as part of the Executive Government, from which it followed that Mr Orkoplous, as the Speaker’s delegate, also acted as part of the Executive Government of the State in this matter. It was a line of reasoning that led Macfarlan JA to conclude that “It was in the course of Mr Orkopoulos’ service with the Crown, or an incident of that service, that he committed the tortious acts”.<sup>198</sup>

On the other hand, Macfarlan JA emphasised that he did not find that:

in discharging his legislative and parliamentary duties as a non-ministerial Member of the Legislative Assembly, Mr Orkopoulos was acting as part of the Executive Government of the State. I agree with Meagher JA’s conclusion that he was not and was therefore not then acting in the “service of the Crown”. Mr Orkopoulos was however doing so when he acted as a representative of Ms Sneddon’s employer, the Speaker, in supervising and controlling her employment.<sup>199</sup>

In the event, the significance of the case for the law of parliamentary privilege is only slight at best. What it does underline is the varied and difficult nature of the relationship between Members and the Executive, which suggests in turn the many contexts in which issues of privilege can arise.

## 5. CONCLUSION

What emerges from the UK debate about parliamentary privilege is how uncertain aspects of the law remain, especially in the context of judicial activism that has accompanied recent developments, not least the passing of the *Human Rights Act 1998*. Hardly reassuring were the historically wayward comments of Lord Steyn in [\*Jackson and others v Her Majesty’s Attorney General\*](#) that parliamentary supremacy was:

a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism.<sup>200</sup>

It may be that such reasoning will prove to be a high (or low) point in this line of judicial thinking. Maybe not. Either way the events of recent years and the analysis that has occurred in their wake suggest a continued need to refine our understanding of parliamentary privilege, based on an appreciation of constitutional first principles. The 2013 Joint Committee report is critical of

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<sup>197</sup> [2012] NSWCA 351 at para 73 (Basten JA)

<sup>198</sup> [2012] NSWCA 351 at paras 169-170.

<sup>199</sup> [2012] NSWCA 351 at para 173.

<sup>200</sup> [2005] UKHL 56 at para 102.

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certain recent judicial developments but it also recognises the need for Parliament to question and analyse the rationale for the privileges it enjoys. It remains to be seen whether the 2013 report proves to be as influential as its 1999 predecessor.

In a NSW context, by contrast, while issues of practice regularly arise relatively little has found its way into litigation over recent years. In broad terms, in an Australian context the relationship between Parliament and the courts was articulated recently by Chief Justice Robert French. He noted first the extent to which that relationship is defined by Commonwealth and State constitutional and common law and then went to say:

To work that relationship also requires the respect of each for the limits of its own function and the proper functions of the other. It requires courtesy and civil discourse between the institutions. These are necessary aspects of any working relationship however tightly defined by law.<sup>201</sup>

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<sup>201</sup> R French, "The courts and Parliament" (2013) 87 *ALJ* 820 at 830.

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