2. Parliamentary privilege—The powers and immunities of the Assembly

Overview

2.1. Parliaments in the Westminster system possess non-legislative powers and immunities which have evolved incrementally over centuries as a result of constitutional struggles between the English parliament—particularly the House of Commons—and the executive, and also between parliament and the courts.[1]

2.2. These non-legislative powers and immunities are collectively referred to as parliamentary privilege.

2.3. A central purpose of parliamentary privilege is to protect parliamentary proceedings from outside interference,[2] enabling the parliament to perform its constitutional functions.[3] *Erskine May* defines parliamentary privilege, in the context of the English parliament, as:

> … the sum of certain rights enjoyed by each House collectively … and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals.[4]

2.4. By virtue of their Westminster inheritance, parliamentary privilege is an inherent characteristic of Australian parliaments, with all jurisdictions drawing, to some extent, on the privileges of the House of Commons. Section 24(3) of the Self-Government Act provides that, to the extent that the ACT Legislative Assembly has not made specific laws in relation to its privileges, it has the same privileges as the House of Representatives.[5] The Assembly has not, to date, made specific laws in relation to its privileges.

2.5. While in common parlance the word 'privilege' may be taken to refer to an advantage or benefit that is reserved for a particular person, class or office,[6] in the parliamentary context it is important to stress that privileges do not relate

1 *May*, pp 242-254, 321.

2 Gerard Carney, *Members of Parliament: law and ethics*, 2000, Prospect, Sydney, p 162.

3 Enid Campbell, *Parliamentary Privilege*, 2003, Federation Press, Sydney, pp 1-2. Chiefly, the functions of parliament are to: provide a forum for the formation of government; make laws; authorise the government to spend public money; scrutinise government activities; inquire into matters of public importance; and provide a forum for debate on issues of public importance.

4 *May*, p 239.

5 The House of Representatives privileges with respect to a given matter correspond to the privileges of the House of Commons if the House of Representatives has not declared its privileges on the matter (see the Commonwealth Constitution, s 49).

6 *Australian Oxford Dictionary*, Second Edition, p 1027.

to the personal prerogatives of members. Instead, they are intrinsically linked to the institution of parliament and to the electors from whom the parliament's legitimacy is derived. A House of Commons Select Committee on Parliamentary Privilege put it in the following terms:

> … the word "privilege" has in modern times acquired a meaning wholly different from its traditional Parliamentary connotation. In consequence its use could convey to the public generally the false impression that Members are, and desire to be, a "privileged class". It is out of keeping with modern ideas of Parliament as a place of work and of the status of its Members as citizens who have been elected to do within that place of work their duty as representatives of those who elected them. [The] Committee cannot too strongly emphasise the fundamental principle that "privileges" are not the prerogative of Members in their personal capacities. Insofar as the House claims and Members enjoy those rights and immunities which are grouped under the general description of "privileges", they are claimed and enjoyed by the House in its corporate capacity and by its Members on behalf of the citizens whom they represent.[7]

2.6. The specific elements that make up parliamentary privilege can be separated into *immunities* and *powers.*

2.7. The Assembly's immunities include the following:

- freedom of speech (this particular immunity is enjoyed by the Assembly collectively and also by its members individually and anyone who participates in parliamentary proceedings, such as witnesses). It is arguably the most widely known immunity, which protects parliamentary proceedings, including the words spoken and acts done in the course of the proceedings, from being impeached or questioned in a court or tribunal;
- freedom from arrest or detention in civil causes;
- exemption from jury service; and
- exemption from compulsory attendance as a witness.

2.8. The Assembly's powers include the following:

- regulating its proceedings by standing orders or ad hoc resolutions and orders;
- disciplining its members (for example, by suspending a member);

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7 United Kingdom, House of Commons, Select Committee on Parliamentary Privilege, Report, HC 34, 1967, p vii, cited in Canadian *House of Commons Procedure and Practice* (3rd edition, 2017). See also *House of Representatives Practice*, p 733. Historically, privilege did attach to a very broad range of activities of members of parliament and their households, particularly when parliament was meeting. For example, interference with the property interests of a member of the House of Lords could constitute a breach of privilege of that House:

> Complaint being made to the House, and Oath made at the Bar, 'That Richard Wilkinson, [and others], Fishermen, have fished in that Part of the River of Burnham, … belonging to the Right Honourable Charles Lord Fitzwalter, … during the Time of Privilege of Parliament, in Breach of the Privilege of this House:' House of Lords Journal, Vol 20, 1 June 1715.

- conducting inquiries;[8] and
- punishing contempts of the Assembly.[9]

2.9. These non-legislative powers and immunities are explored in more detail in this chapter.

Sources of the Assembly's non-legislative powers and immunities

2.10. Section 24 of the Self-Government Act sets out the non-legislative powers[10] of the Assembly, its members and committees. Section 24(3) of the Self-Government Act bestows on the Assembly the same powers as the House of Representatives and its members and committees until the Assembly legislates its non-legislative powers. The power of the Assembly to declare its own non-legislative powers is subject to two important limitations, namely that:

(1) any Assembly declared powers must not exceed the powers 'for the time being of the House of Representatives or of its members or committees';[11] and

(2) neither the bestowed nor declared powers of the Assembly include power to impose imprisonment or a fine on any person.[12]

2.11. Just as the Assembly derives its power from the House of Representatives, the House of Representatives' powers and privileges are derived from those of the United Kingdom House of Commons and its members and committees. At the establishment of the Commonwealth of Australia in 1901, s 49 of the Commonwealth Constitution provided that:

> The powers, privileges and immunities of the Senate and House of Representatives and of the members and the committees of each House shall be as are declared by the Parliament of the Commonwealth and, until declared, shall be the same as those of the Commons House of Parliament of the United

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8 Parliaments have power necessary to undertake inquiries, including the power to call witnesses and order the production of documents (under compulsion if necessary).

9 Parliaments have the powers necessary to protect themselves from improper interference and obstruction, including the power to examine and punish instances of contempt or offences against the parliament. The Assembly does not, however, have the power to imprison or fine a person (see the Self-Government Act, s 24(4)).

10 The reference to 'powers' in this section of the Act is not a reference to legislative powers of the Assembly (which are dealt with under parts V and VA of the Act) but instead refers to the 'privileges and immunities' of the Assembly.

11 Self-Government Act, ss 24(2)-(3).

12 As indicated in the explanatory memorandum to the Australian Capital Territory (Self-Government) Bill 1988, the Assembly could, under s 24, pass a law providing for the imposition of custodial or financial penalties in cases of contempt of the Assembly. However, the enforcement of that law would be a matter for the courts, rather than the Assembly itself (explanatory memorandum, p 12). The House and the Senate retain the power to impose such penalties.

Kingdom, and of its members and committees, at the establishment of the Commonwealth.[13]

2.12. In 1987, the Commonwealth Parliament enacted the *Parliamentary Privileges Act 1987*—'An Act to declare the powers, privileges and immunities of each House of the Parliament and of the members and committees of each House, and for related purposes'. The bill for the Act was introduced with two main purposes:

(1) to undertake changes to the law as recommended by the 1984 Joint Select Committee on Parliamentary Privilege; and

(2) to avoid the consequences of certain judgments in the Supreme Court of New South Wales relating to the right to freedom of speech in parliament.[14]

2.13. Key features of the Parliamentary Privileges Act include:

- the affirmation and amplification of the application of the provisions of Article 9 of the Bill of Rights 1688 (see below in this chapter under the heading 'Freedom of speech—immunity from impeachment or questioning') to the Parliament of the Commonwealth;
- the definition of the term 'proceedings in Parliament' (s 16(2));
- the imposition of restrictions on the use of the records of parliamentary proceedings by courts and tribunals (ss 16(3)-(4));
- limiting the penal jurisdiction of the Houses (and removing impediments to judicial review) by defining the essential elements of offences that are punishable by the Houses (s 4);
- preserving the powers, privileges and immunities of the Senate and the House of Representatives immediately before the commencement of this Act (except to the extent that the Act expressly provides otherwise) (s 5);
- abolishing the contempt of defamation of a House or a committee or a member, except when words were spoken or acts done in the presence of a House or a committee (s 6);
- prescribing the penalties that can be imposed by a House (s 7);
- abolishing the power of the Houses to expel a member (s 8);[15]

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13 *Quick and Garran*, pp 501-502, list what are among the principal powers, privileges and immunities of each House of the Commonwealth Parliament and of the members of each House, drawn from the law and custom of the House of Commons as at 1901. The list is reproduced in *House of Representatives Practice*, First Edition, p 645, though it should be read having regard to Australian developments such as the enactment of the Parliamentary Privileges Act.

14 For a discussion of these cases, see *Odgers',* pp 47-51.

15 The justification for this change was that the disqualification of members is dealt with in the Commonwealth Constitution and electoral legislation and that, beyond this, the fitness of a member who is otherwise qualified for election should be a matter for the electorate to determine. The change was opposed in the Senate. See *Odgers'*, pp 77-78.

- providing for the defence of qualified privilege for the publication of reports of parliamentary proceedings (s 10); and
- creating criminal offences and providing for penalties in respect of interference with parliamentary witnesses (s 12) and unauthorised disclosure of in camera[16] evidence taken by a House or a committee (s 13).

2.14. By operation of s 24 of the Self-Government Act, the Parliamentary Privileges Act is definitive of the powers, privileges and immunities of the Assembly.[17]

Immunities

Freedom of speech—immunity from impeachment or questioning

2.15. Arguably, the most significant privilege of parliament is the immunity of parliamentary proceedings from impeachment or questioning. This aspect of privilege is central to parliamentary discourse because it guarantees free speech in parliamentary processes. The immunity provides that the legislature, its committees, its members and associated individuals cannot be the subject of legal action for anything said or done in the course of parliamentary proceedings. It has been described as 'the only privilege of substance enjoyed by Members of Parliament'.[18] The original statutory expression of the privilege is to be found in Article 9 of the *Bill of Rights 1688,*[19] which declares:

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16 In camera (meaning 'in chamber') evidence is evidence received privately. While such evidence is recorded and transcribed by Hansard, it is not made available to anyone but members of the committee and the witness who provided the evidence. For more information, see Chapter 17: Committees, under the heading 'Publication of evidence and other documents'.

17 Professor Enid Campbell, *Parliamentary Privileges*, Research Paper No 1, 2000-01, Parliamentary Library, Parliament of Australia, p 2. In 2001, the ACT Government Solicitor provided advice to the Clerk of the Assembly about the application of relevant provisions of the Parliamentary Privileges Act to the Assembly. The advice confirmed the extent of the Assembly's powers, privileges and immunities as outlined above, subject to two qualifications:

- to the extent that the Parliamentary Privileges Act is inconsistent with the Self-Government Act, the former will not apply; and
- only those provisions which may properly be described as 'powers, privileges and immunities of the House of Representatives and its committees and members' will apply to the Assembly and its committees. Those parts that empower the House of Representatives to imprison or fine a person or relate to those powers (ss 7 and 9) do not apply.

The advice reasoned that, by operation of s 24(4) of the Self-Government Act, any part of the Parliamentary Privileges Act which empowers the House of Representatives to imprison or fine a person (namely, ss 7 and 9) does not apply to the Assembly. Further, the advice concluded that those provisions of the Parliamentary Privileges Act which can be more accurately described as matters which relate to enforcement or administrative detail (such as, for example, ss 12 and 13, which create offences relating to interference with witnesses and unauthorised publication of documents) would not apply to the Assembly. It was noted that further legislation would be required if there is to be any power to impose penalties or prosecute persons for offences. Section 15 of the Parliamentary Privileges Act, which deals with the application of certain laws, in force in the ACT, to a House of the Commonwealth Parliament also has no relevance to the Assembly.

18 Memorandum by Mr L A Abraham CB CBE in the *Report from the Select Committee on Parliamentary Privilege* of the House of Commons, HC 34 (1967-68) p 91.

19 The *Bill of Rights 1688*, I Will. & Mary (UK) was in force in NSW at the time of the establishment of the ACT, and by virtue of the *Seat of Government Act 1908* (Cth) had effect in the ACT. It was converted into

> That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.[20]

2.16. There are two aspects to the immunity:

(1) members and other participants in proceedings in parliament, such as witnesses giving evidence before committees, are immune from civil or criminal action and examination in legal proceedings in relation to their contributions to proceedings (usually known as the right of freedom of speech); and

(2) parliamentary proceedings are immune from impeachment or question in the courts.[21]

2.17. The freedom of speech protection is absolute in its operation and provides complete immunity from all legal action. *House of Representatives Practice* states:

> Absolute privilege exists where no action may lie for a statement, even, for example, if made with malice; it is not limited to action for defamation but extends also to matters such as infringement of copyright or other matters which could otherwise be punished as crimes (for example, contempt of court or breach of a secrecy provision).[22]

2.18. Section 16(1) of the Parliamentary Privileges Act affirms that Article 9 of the Bill of Rights applies to the Parliament of the Commonwealth. The purpose of the section is to avoid the consequences of the narrow interpretation of Article 9 set out in the separate judgments of Justices Cantor and Hunt of the Supreme Court of New South Wales.[23] Section 16(2) of the Parliamentary Privileges Act gives the

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an ACT enactment pursuant to s 34 of the Self Government Act. Although the year 1689 is sometimes attributed to the Bill of Rights, it is assigned to the year 1688 on the ACT Legislation Register. It also appears on the statute books of the United Kingdom as 1688. Editorial information on the Bill of Rights at legislation.gov.uk states that 'It is assigned to the year 1688 on legislation.gov.uk (as it was previously in successive official editions of the revised statutes from which the online version is derived) although the Act received Royal Assent on 16th December 1689. This follows the practice adopted in The Statutes of the Realm, Vol VI (1819), in the Chronological Table in that volume and all subsequent Chronological Tables of the Statutes, which attach all the Acts in 1 Will and Mar sess 2 to the year 1688'.

20 See *House of Representatives Practice*, p 737, and *Odgers'*, p 47.

21 *Odgers'*, p 45-47. This is not to say that a court does not have jurisdiction to examine whether a law has been validly enacted where the Constitution prescribes the manner in which such laws may be passed—see *Victoria v Commonwealth* (1975) 134 CLR 81 at 118 (Barwick CJ), 156, 161, 163-164 (Gibbs J), 180 (Stephen J) and 181 (Mason J) (contra 135 (McTiernan J)), which considered, among other things, whether the relevant law had been validly enacted in compliance with s 57 of the Constitution, which is a unique provision that has a limited field of operation.

22 *House of Representatives Practice*, p 738. See also Michael Gillooly, *The Law of Defamation in Australia and New Zealand,* The Federation Press, 1998, pp 169-173. See also the heading later in this chapter, 'Qualified privilege'.

23 See *R v Murphy* [1985] NSW Supreme Court (unreported) per Cantor J; *R v Murphy* (1986) 5 NSWLR 18 at 38 per Hunt J. As discussed at pp 9-11 of the explanatory memorandum to the Parliamentary Privileges Bill 1987, in June 1985 Justice Cantor:

> … gave a judgment to the effect that Article 9 of the Bill of Rights did not prevent the cross-examination of persons in court proceedings on the evidence they had given to a parliamentary

term 'proceedings in Parliament' broad operation, amplifying the meaning and effects[24] of the Article 9 immunity. It provides that:

> For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, proceedings in Parliament means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:
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> (a) the giving of evidence before a House or a committee, and evidence so given;
>
> (b) the presentation or submission of a document to a House or a committee;
>
> (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
>
> (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

2.19. Members of, or witnesses appearing before, the Legislative Assembly and its committees cannot be held liable in a court for words spoken in the course of proceedings. Anything they say in the course of proceedings is absolutely privileged from suit or prosecution. In addition, parliamentary proceedings cannot be used as the basis for a prosecution (or a defence) in court proceedings. It is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purposes of:

(a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;

(b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or

(c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.[25]

2.20. Further, unless a House or a committee has published, or authorised the publication of, a document or a report of oral evidence, a court or tribunal shall not:

> committee, that the test of a violation of Article 9 was whether there was any adverse effect on parliamentary proceedings, and that the protection of parliamentary proceedings must be 'balanced' against the requirements of court proceedings. In April 1986, Mr Justice Hunt had given a judgment which held that Article 9 prevented only parliamentary proceedings being the actual subject of criminal and civil action but allowed the use of parliamentary proceedings as evidence of an offence to impeach the evidence of witnesses or the accused or to support a cause of action …

A summary of the background to the bill is given at *Odgers'*, pp 47-48.

24 Enid Campbell, *Parliamentary Privilege*, 2003, Federation Press, Sydney, p 11.

25 Parliamentary Privileges Act, s 16(3).

(a) require to be produced, or admit into evidence, a document that has been prepared for the purpose of submission, and submitted, to a House or a committee and has been directed by a House or a committee to be treated as evidence taken in camera, or admit evidence relating to such a document; or

(b) admit evidence concerning any oral evidence taken by a House or a committee in camera or require to be produced or admit into evidence a document recording or reporting any such oral evidence.[26]

Defamation

2.21. As noted, one of the consequences of the freedom of speech immunity is that no legal liability attaches to speech that forms part of 'proceedings in Parliament', even where that speech might be defamatory. This position is also reflected in model defamation legislation across Australia,[27] which states in non-exhaustive terms the circumstances in which 'defamatory matter' is covered by absolute privilege. For instance, s 137 of the *Civil Laws (Wrongs) Act 2002* provides that the defence of absolute privilege is available where defamatory matter is published in the course of the proceedings of a parliamentary body. This is taken to include but is not limited to:

- the publication of a document by order, or under the authority, of the body;
- the publication of the debates and proceedings of the body by or under the authority of the body or any law;
- the publication of matter while giving evidence before the body; and
- the publication of matter while presenting or submitting a document to the body.

2.22. Where absolute privilege exists, it is a complete defence against defamation and operates irrespective of whether a defendant was motivated by malice.[28] However, as is noted in *House of Representatives Practice*, 'The repetition by Members out of the House of statements they have made in the House has not been found to be protected by absolute privilege'.[29]

2.23. Whereas absolute privilege arises under the statutory provisions of Article 9 of the Bill of Rights (and its amplification in subsequent legislation such as the

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26 Parliamentary Privileges Act, s 16(4).

27 New South Wales (*Defamation Act 2005*, s 27), Victoria (*Defamation Act 2005*, s 27), Queensland (*Defamation Act 2005,* s *27*), South Australia (*Defamation Act 2005,* s 25), Western Australia (*Defamation Act 2005,* s 27), Tasmania (*Defamation* Act 2005, s 27), Northern Territory (*Defamation Act 2006,* s 24) and the Australian Capital Territory (*Civil Law (Wrongs) Act 2002,* s 137 as amended by the *Civil Law (Wrongs) Amendment Act 2006*).

28 The common law doctrine of absolute immunity has been expressed as 'the policy of the law … against inquiry whether certain words or acts are malicious': *Mann v O'Neill* (1997) 191 CLR 204 at 238 per Justice Gummow.

29 *House of Representatives Practice*, p 738.

Parliamentary Privileges Act), qualified privilege as a defence in defamation action has long been recognised in the common law.[30] In outlining the difference between absolute and qualified privilege, *Odgers'* states:

> Qualified privilege is not a diluted extension of the absolute parliamentary immunity. The law relating to qualified privilege is a completely separate branch of the law, related to parliamentary immunities only because it has application in respect of reports of proceedings in Parliament. It also applies to other transactions totally unrelated to parliamentary matters, for example, relations between private societies and their members. The law relating to qualified privilege is determined by the ordinary law of defamation of states or territories.[31]

2.24. The defence of qualified privilege takes on significance in the context of parliamentary law as it can be advanced to avoid legal liability in relation to reports of parliamentary proceedings by the media or others. In contrast to absolute privilege, qualified privilege may be lost if it can be demonstrated that the person or organisation publishing a defamatory imputation was motivated by malice or some other improper consideration. Since 2006, the defence of qualified privilege has been codified in relevant state and territory defamation law. In amendments to the Civil Laws (Wrongs) Act, enacted as part of the Australia-wide reform of defamation law, the defence of qualified privilege for the publication of defamatory material is available where the defendant is able to prove that:

> (a) the recipient has an interest or apparent interest in having information on some subject; and
>
> (b) the matter is published to the recipient in the course of giving to the recipient information on that subject; and
>
> (c) the conduct of the defendant in publishing that matter is reasonable in the circumstances.[32]

2.25. The Civil Laws (Wrongs) Act sets out a number of matters that the court may consider in determining whether a person's conduct is reasonable in the circumstances.[33]

2.26. It should be noted that s 10(1) of the Parliamentary Privileges Act gives a defence against any action for defamation where 'the defamatory matter was published by the defendant without any adoption by the defendant of the substance of the matter, and the defamatory matter was contained in a fair and accurate report of proceedings'.[34]

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30 Andrew T, Kenyon, 'Lange and Reynolds, *Qualified Privilege: Australian and English Defamation Law and Practice'*, Melbourne University Law Review, Vol 28, p 410, 2004; University of Melbourne Legal Studies Research Paper No 126.

31 *Odgers',* p 75.

32 Civil Law (Wrongs) Act, s 139A(1).

33 Civil Law (Wrongs) Act, s 139A(3).

34 Parliamentary Privileges Act, s 10(1).

Broadcasting Act

2.27. Through the *Legislative Assembly (Broadcasting) Act 2001*, the Assembly has declared an immunity from the operation of the criminal and civil law for staff of the Office of the Legislative Assembly in respect of the broadcast of proceedings. The Act also provides for the defence of qualified privilege to defamation action in relation to third parties authorised under the Act to broadcast proceedings. Section 9 of the Broadcasting Act provides that:

> (1) Neither civil nor criminal proceedings may be brought against a member of the Office of the Legislative Assembly for transmitting or broadcasting proceedings of the Legislative Assembly, or a committee of the Assembly, in carrying out the member's duties.
>
> (2) It is a defence to an action for defamation for matter in a broadcast of proceedings of the Legislative Assembly, or a committee of the Assembly, made in the exercise of a right given by this Act that the defamatory matter was broadcast by the defendant without adoption by the defendant of the substance of the matter and the defamatory matter was part of a fair and accurate report of the proceedings ...

2.28. The Act defines a broadcast as including '(a) transmission to the public by radio, television, landline, the Internet or any other electronic means; and (b) rebroadcast'.[35]

Publication of documents beyond the ACT

2.29. The extent to which the freedom of speech protection applies to documents authorised for publication by the Assembly was addressed in August 2001 by the Standing Committee on Administration and Procedure, in its report on the Assembly Privileges Bill 1998. The bill had been introduced following concerns about the protection available to the authorised publication of an Assembly committee report beyond the Territory but within Australia.[36]

2.30. The committee considered advice from various sources, including the Clerk of the Senate, who argued that a document published by order of the Assembly was protected by absolute parliamentary privilege throughout Australia. The basis of his argument was that the Self-Government Act conferred upon the Assembly

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35 Broadcasting Act, dictionary.

36 Assembly Debates, 20 May 1998, pp 368-370. There had been concern for some time as to the extent of the immunity available to the publication of Assembly documents beyond their publication to members (and particularly their publication beyond the Territory), advice from the Government Solicitor having concluded that the authorised publication of Assembly documents beyond the Assembly was protected by only qualified privilege, no matter who publishes them or authorises their publication. A primary purpose of the bill was, therefore, to restate a number of the existing powers, privileges and immunities that operate by virtue of s 24 of the Self-Government Act, to preserve those powers, privileges and immunities and to resolve a possible uncertainty in the law by extending absolute privilege to the authorised publication of Assembly proceedings and related documents. See Legislative Assembly (Privileges) Bill 1988, explanatory memorandum, p 3.

the same powers and immunities as the Commonwealth Houses, subject to the exception contained in s 24(4) (no other exception or limitation being specified). The Senate and the House of Representatives have the power to publish documents with absolute privilege throughout Australia and, by virtue of s 24, this power also adheres undiminished to the Assembly. If the Commonwealth Parliament had intended to limit that power in any way, including by limiting it to the Territory, it would have explicitly specified the limitation, as it had specified a limitation in s 24(4).[37]

2.31. The Senate Clerk's advice also argued that this interpretation of the legislation was supported by two other considerations. Under modern conditions, if a document is published, it is effectively published throughout Australia and cannot be restricted to the boundaries of a particular state or territory. In addition, the public interest in legislative proceedings is not restricted to the particular state or territory of the legislature but extends throughout Australia.[38]

Not all documents are 'proceedings in Parliament'

2.32. An issue that arises occasionally is the status of a document prepared for another purpose which is subsequently tabled in the Assembly or received by a committee (for example, as part of a submission or correspondence to a committee). In such cases, the actual document provided to the committee or the Assembly receives the protection of parliamentary privilege as a 'proceeding in Parliament'. However, privilege would not attach to publication of other copies of the document for other purposes unrelated to proceedings. It is a misunderstanding of parliamentary privilege to assume that privilege attaches to all copies of a document once a particular copy of that document has been tabled in the Assembly or received by a committee.

2.33. In April 2002, counsel sought, and was granted, leave to appear as amicus curiae, or 'friend of the court', for the purposes of making submissions on behalf of the Speaker as to the possible application of parliamentary privilege to a report that a plaintiff had sought to lead as evidence before the court.[39] The matter before

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37 Advice to the Clerk of the Assembly by the Clerk of the Senate, 17 December 1999.

38 There have been a number of examples where matters canvassed within the Assembly have become the subject of nationwide interest; for example, debates on legalised heroin trials, the publication on a website of an exposure draft of Commonwealth antiterrorism legislation in 2005 by the Chief Minister, and legislative proposals to advance same-sex marriage.

39 It is of note that the Speaker had earlier advised members of his intention to intervene in the matter, see Assembly Debates, 19 February 2002, pp 309-311. On 24 December 2001, Justice Crispin made an order restraining the Chief Minister from laying the Report into Disability Services, a copy of that report or any part thereof before the Assembly, or otherwise transmitting a copy of the report or any part of the report, to the public. Advice was sought on the ramifications of the order and the advice received considered that the matter did not fit easily within the provisions of the Parliamentary Privileges Act, but, rather, was to be examined according to what was the common law and parliamentary practice relating to parliamentary privilege. The situation was not seen as one in which there was a possibility that 'proceedings in Parliament' might be impeached in a court or tribunal, rather it was a situation in which a court had ordered that information not be presented to the Assembly until a full hearing took

the court concerned the conduct of the Board of Inquiry into Disability Services. Four public servants had commenced actions asserting that they had been denied procedural fairness in the course of that inquiry. The Board of Inquiry's report was presented in the Assembly by the Chief Minister, pursuant to s 14A of the *Inquiries Act 1991*.[40] The Speaker's concerns related to the potential use of the report by the court; whether the report was a 'proceeding in Parliament'; and, what, if any, use could be made of the report.[41]

2.34. Ruling on the matter, Justice Crispin held that, while it was possible that the copy of the report was prepared for the purposes of, or incidental to, the transaction of the business of the Assembly, there was simply no evidence to that effect.[42] Therefore, privilege had not been established and a copy of the report could be admitted into evidence.[43] In his judgment, by way of illustration, Justice Crispin stated that:

> Privilege may be attracted by the retention of [a] document for a relevant purpose, but that is because the retention for such a purpose is itself an act forming part of the proceedings. The privilege thereby created does not attach to the document and any copies for all purposes. It applies only to the words used and acts done in the course of, or for purposes of or incidental to, the transaction of business of the Assembly including the retention of a document for a purpose of that kind. Hence, if a Member obtains a document that has been prepared for some reason unrelated to the business of the Assembly but elects to retain it for such a purpose, subs 16(3) would prevent the admission of any evidence of that retention or any subsequent use for such a purpose ... However, privilege would not attach to copies of the document which were not prepared or used for such a purpose. It is for this reason that the tabling or retention of copy of a newspaper can not prevent the continued circulation of the paper or the receipt in evidence of another copy ...[44]

2.35. Further, Justice Crispin noted:

> … privilege may not prevent even documents that have been tabled from being admitted into evidence if they were not prepared for purposes of or incidental to business of the Parliament and their subsequent production would not

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place or other order of the court was made. As such, it was seen as potentially a more fundamental interference with the work of the Assembly. Advice to the Clerk of the Assembly from Clayton Utz Lawyers, dated 18 January 2002, considered among other things that the injunction was not enforceable against the Chief Minister insofar as it prevented him from tabling the report. In any event, no action was required as the original order, and a later order on the matter, were vacated by consent. There was in fact a variation in the order on 10 January 2002 (the Speaker had not been notified of the further proceedings).

40 *Inquiries Act 1991*, s 14A(1).

41 For a background to the concerns of the Speaker, see *Privilege and the Supreme Court*, paper presented by Mr Wayne Berry MLA, Speaker, Legislative Assembly for the Australian Capital Territory, 33rd Conference of Australian and Pacific Presiding Officers and Clerks, Brisbane, July 2002.

42 *Szwarcbord v Gallop* (2002) 167 FLR 262 at [21] and [24].

43 *Szwarcbord v Gallop* (2002) 167 FLR 262 at [24].

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

> reveal words used or acts done that might fairly be regarded as falling within the concept of "proceedings in Parliament". For example, a Member of Parliament sued for defamation in respect of the publication of a letter for purposes unrelated to Parliamentary business could not effectively prevent the maintenance of the proceedings against him by the simple expedient of tabling the only copy of the offending letter …[45]

2.36. Similarly, where a document is received by an Assembly committee that has an independent 'life of its own' (that is, it has been prepared and circulated for some purpose unrelated to 'proceedings in Parliament'), privilege would not extend to copies of the document for these other purposes.

Records and correspondence of members

2.37. The House of Representatives Standing Committee of Privileges addressed the question of whether the records and correspondence of members fell within the scope of 'proceedings in Parliament'. In its November 2000 report, citing Justice McPherson in *O'Chee v Rowley* (1997) 150 ALR 199 at 209, it concluded that:

> In determining whether documents have the status of 'proceedings in Parliament', the question to be answered has been outlined as: has an act been done [by a member or his or her agent] in relation to the records or correspondence 'in the course of, or for purposes of or incidental to' the transacting of the business of a House [or a committee]?[46]

2.38. The committee observed that:

> The Court of Appeal in Queensland held that if documents came into the possession of a member of parliament who retained them with a view to using them, or the information contained in them, for questions or debate in a House of Parliament, then the procuring, obtaining or retaining of possession were acts done for the purposes of, or incidental to, the transacting of the business of that House, pursuant to s 16(2) of the Parliamentary Privileges Act.

2.39. While it was clear to the committee 'that some of the records and correspondence of members would attract parliamentary privilege', there would also be material that 'would fall outside of the definition of "proceedings in Parliament"'. The boundary between those records that fell within the definition and those that did not is not always readily apparent. The committee observed that 'there will always be uncertainty' and that 'further consideration of this area by the courts would offer greater clarification'. The committee recommended that there should be no additional protection, beyond that provided by the current law, given to the records and correspondence of members.[47]

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45 *Szwarcbord v Gallop* (2002) 167 FLR 262 at [23].

46 House of Representatives Standing Committee of Privileges, *Report of the inquiry into the status of the records and correspondence of members*, November 2000, p 11.

47 At pp 22-23, the report of the committee addressed the defence of qualified privilege in defamation actions, noting that there have been no reported cases in Australia in which a member's records and correspondence were considered to be protected by qualified privilege; the committee stated that

2.40. It is also of note that:

- On two earlier occasions (in 1992 and 1994), the House of Representatives Standing Committee of Privileges considered complaints arising from action, or threatened action, against members after they had sent letters to ministers. On each occasion the committee accepted that the correspondence did not form part of 'proceedings in Parliament'.[48]
- Members have no explicit immunity against subpoenas or orders for discovery of documents issued by courts or tribunals or by search warrants. The use that a court or tribunal may make of material so obtained is restricted by the law of parliamentary privilege. However, there may be effective immunity from processes for compulsory production of documents where the documents are so closely connected with proceedings in parliament that their compulsory disclosure would involve impermissible inquiry into those proceedings.[49]
- In the London Electricity Board case in 1957 (more generally known as the Strauss case), the House of Commons rejected a motion agreeing with a report of the House of Commons Committee of Privileges that found that a member, in writing to a minister criticising certain alleged practices of the Board, was engaged in a 'proceeding in Parliament' and that, in threatening a libel action against the member, both the Board and its solicitors had acted in breach of the privilege of parliament.[50]
- In 1939 the House of Commons agreed that a notice in writing of a question to be asked in the House was 'protected by privilege'.[51]

2.41. *Odgers'* states that the fact that the Parliamentary Privileges Act did not explicitly extend the immunity of freedom of speech to activities of members that were not related to their participation in proceedings of the Houses and committees reflected a considered view that the extension of the immunity to such matters is not warranted and, in relation to correspondence of members, also conformed with the decision of the United Kingdom House of Commons in the Strauss case.[52]

2.42. Whether particular information is covered by parliamentary privilege would depend on the circumstances of the case and whether the material was prepared or received 'for the purposes of or incidental to' proceedings in a House or a committee. Where it could be demonstrated, for instance, that the correspondence or records of a member were for the purposes of, or incidental to, a committee inquiry, the asking of a question during question time, or participation in an Assembly debate, under the terms of s 16(2) of the Parliamentary Privileges Act,

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members should not seek to rely on any such protection in respect of their records.

48 *House of Representatives Practice*, pp 739 and 758.

49 *Odgers'*, p 61.

50 *House of Representatives Practice*, p 740.

51 *House of Representatives Practice*, p 740.

52 *Odgers'*, p 58.

there is every prospect that the material would be regarded as being protected by the Article 9 immunity, under s 16(2) of the Parliamentary Privileges Act.

2.43. Indeed, a three-step test, first developed by the Standing Committee on Parliamentary Privileges and Ethics,[53] has been used to assess whether or not information held by, or belonging to, a member is to be regarded as being a 'proceeding in Parliament' and, therefore, protected by parliamentary privilege. The test, a variation of which is referred to in the Assembly's continuing resolution 4A (see under the heading 'ACT Integrity Commission—privilege claims' below in this chapter), proceeds as follows:

> **STEP 1**: Were the documents brought into existence in the course of, or for purposes of or incidental to, the transacting of business of a House or a committee?
>
> YES—falls within "proceedings in Parliament".
>
> NO—move to step 2.
>
> **STEP 2**: Have the documents been subsequently used in the course of, or for purposes of or incidental to, the transacting of the business of a House or a committee?
>
> YES—falls within "proceedings in Parliament".
>
> NO—move to step 3.
>
> **STEP 3**: Is there any contemporary or contextual evidence that the documents were retained or intended for use in the course of, or for purposes of or incidental to, the transacting of the business of a House or a committee?
>
> YES—falls within "proceedings in Parliament".
>
> NO—report to the committee that there are documents which fail all three tests. Notes: Individual documents may be considered in the context of other documents.[54]

2.44. On 7 March 2002, the Assembly passed a resolution relating to the disposition of documents associated with an Australian Federal Police (AFP) investigation concerning the unauthorised diversion of a member's emails.[55] The resolution made provision for the Clerk or another person nominated by the Speaker (following consultation with party leaders) to examine documents, held by a member, that

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

54 Senate Committee of Privileges, *Status of material seized under warrant: preliminary report*, 163rd Report, December 2016, p 8.

55 See MoP, No 10, 7 March 2002, pp 98-100. The procedure embodied in the resolution was drawn from arrangements that had been adopted by the Australian Senate in response to an order of the Federal Court in *Crane v Gething* (2000) 97 FCR 9, see *Odgers',* pp 62-63.

had been identified by the AFP as being material subject to seizure under the warrant and to determine whether any of the documents were immune from seizure under search warrant on the grounds of parliamentary privilege.[56]

2.45. The person examining and determining the status of the documents was to have 'regard to the *Parliamentary Privileges Act 1987* in its application to the Territory, relevant court judgments relating to the interpretation and application of the Act, relevant precedents dealing with the protection of documents of senators and members of the House of Representatives and such other matters as that person considers relevant'.[57] The relevant documents were duly examined by the Deputy Clerk pursuant to the resolution and subsequently divided into two groups—those documents that were considered to be immune from seizure and those that were considered not immune from seizure. The documents that were found to be immune from seizure were returned to the member and those that were found not to be immune were forwarded to the AFP.

2.46. Relevant case law relating to the operation of Article 9 of the Bill of Rights and s 16 of the Parliamentary Privileges Act is explored in some detail in both *Odgers'* and *House of Representatives Practice*.[58]

Petitions

2.47. A petition presented to the Assembly attracts absolute privilege. However, the status of a document that is circulated in the community (ostensibly) to gather signatures prior to presentation to a parliamentary chamber has been the subject of some debate. Article 9 of the *Bill of Rights 1688*, which applies in the ACT, protects the proceedings in parliament from impeachment in any court or tribunal.[59]

2.48. Section 16 of the Parliamentary Privileges Act declares that proceedings in parliament include:

- the presentation or submission of a document to a House or a committee; and
- the preparation of a document for purposes of or incidental to the transaction of any such business.

2.49. The ambit of the phrase 'the preparation of a document' has been the subject of discussion.

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56 MoP, No 10, 7 March 2002, p 98.

57 MoP, No 10, 7 March 2002, p 98.

58 See Chapter 2 of *Odgers'* and Chapter 20 of *House of Representatives Practice.*

59 *Bill of Rights 1688 1 Will & Mary sess 2 c 2*, Article 9: Freedom of Speech—That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

2.50. The Senate Standing Committee of Privileges considered the extent of protection provided to petitions, and petitioners, following the referral of a matter by the Senate.[60] The committee concluded that 'the act of circulating a petition is not, and indeed never has been, privileged'.[61] The committee's conclusion was based on a number of considerations: that 'the circulation of a petition is not essential for its presentation'; that the granting of absolute privilege to the circulation of a petition would 'give a petitioner the means of ignoring the civil and criminal law'; and that, given the comprehensive nature of the Parliamentary Privileges Act, the absence of any 'specific provision to grant … statutory protection to the circulation of petitions' indicates that the parliament did not intend to grant such protection.[62]

2.51. The significance of the committee's first point—that circulation of a petition is not a precondition for its presentation—is that a petition may be presented with only one signature, thus obviating the need for circulation, and hence publication, of the petition's contents prior to presentation. The act of presentation would be privileged. Where the document did not comply with the Assembly's rules with regard to petitions—for example, by including material defamatory of a named person—it could not be certified by the Clerk's office (see Chapter 15: Petititons, under the heading 'Lodgement and presentation').

2.52. The right of citizens to bring matters to the attention of the Assembly is not diminished by this conclusion. A petition that the Clerk is unable to certify as complying with the standing orders can still be tabled as a paper by a minister (usually the Manager of Government Business), pursuant to standing order 83A.

2.53. As the Senate committee also pointed out, an action for defamation arising out of the circulation of a petition would require a court to interpret the reach of the Parliamentary Privileges Act, having regard to the content of the petition and the motives of the petitioner.[63] It should also be noted that various abuses of the right of petition have been dealt with as contempts.[64]

2.54. For more information on petitions see Chapter 15: Petitions.

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60 The question before the committee was 'whether the circulation of a petition containing defamatory material for the purpose of gaining signatures and subsequent submission to the Senate is or ought to be privileged and how such issues should be determined and in what form'. See Senate Standing Committee of Privileges, 11th Report, *The Circulation of Petitions,* June 1988, p 2, paragraph 5.

61 Senate Standing Committee of Privileges, *The Circulation of Petitions,* 11th Report, June 1988, p 7.

62 Senate Standing Committee of Privileges, *The Circulation of Petitions*, 11th Report, June 1988, pp 5-6.

63 It should be noted that a dissenting report was submitted by Senator Peter Durack, a former Attorney-General, regretting that the committee had not considered the specific case that gave rise to the inquiry, where it was asserted that an individual seeking to raise a genuine issue was intimidated by the threat of legal action from doing so. Consideration of the specific case would have required the committee to make a finding with regard to contempt, whereas the inquiry, as conducted, was a largely 'academic' consideration of 'whether there is or ought to be a legal immunity in respect of the circulation of a petition'. Senate Standing Committee of Privileges, *The Circulation of Petitions*, 11th Report, June 1988, pp 13-16.

64 See *House of Representatives Practice*, p 639 and *May*, pp 542-543.

Statutory secrecy or non-disclosure provisions

2.55. There may be occasions when, in exercising their inquiry powers (see under 'Power to conduct inquiries', below in this chapter), a parliament or one of its committees seeks to obtain documents or information from the executive the disclosure of which would, in other circumstances, amount to a criminal offence. Where such information is sought and supplied pursuant to a parliamentary proceeding, no legal action may be taken—as a result of the disclosure—against the person who has disclosed the information.

2.56. In the Ninth Assembly, the Standing Committee on Health, Ageing and Community Services considered the interaction between its powers to call for material and witnesses and the secrecy provisions in the *Children and Young People Act 2008*. The committee was satisfied that the relevant provisions of the Children and Young People Act did not take precedence over its powers to demand production of relevant information from the relevant arm of the executive. For more information, see Chapter 17: Committees, under the heading 'Power to send for persons, papers and records'. The Senate has long claimed that statutory secrecy provisions do not operate in such a way as to prevent the disclosure of information to its committees.[65]

Committee records and correspondence

2.57. The issue of whether committee records and correspondence are considered to be 'proceedings in Parliament' arose in June 2001 in proceedings before the ACT Magistrates Court relating to an action for damages for defamation against a minister by a former member of the Assembly. The proceedings were heard by Chief Justice Higgins of the ACT Supreme Court in 2004.[66]

2.58. The relevant documents at issue were produced in the ACT Magistrates Court under a summons for production addressed to the Chief Executive Officer of the ACT Department of Justice and Community Safety. They consisted of letters between the Attorney-General and the Chair of the Legislative Assembly Standing Committee on Justice and Community Safety, relating to a proposal to appoint the plaintiff as a lay member of the Professional Conduct Board of the Law Society of the Australian Capital Territory. The Attorney-General, as the appointing minister, had sought the views of the committee pursuant to s 4 of the *Statutory Appointments Act 1994* (repealed).[67]

2.59. Counsel intervened on behalf of the Acting Speaker, following concerns that the documents may be considered 'proceedings in Parliament' for the purposes of s 16

65 See *Odgers'*, p 68.

66 *Szuty v Smyth* [2004] ACTSC 77

67 Section 4 of the *Statutory Appointments Act 1994* (repealed) obliged a minister, having the power to appoint a person to a statutory office, to consult with a nominated committee of the Assembly and not to make the appointment until a recommendation by the committee had been received or a period of time had elapsed. This provision has been replaced by s 228 of the Legislation Act.

of the Parliamentary Privileges Act. The parties to the proceedings agreed to give the Assembly time to access the documents, to consider the possible operation of privilege and, if necessary, to prepare submissions to the court about their future use in Assembly proceedings.

2.60. Following the examination of documents, the Speaker sent letters to both parties to the proceedings pointing out the potential issue regarding parliamentary privilege and the possible proscription on their use by the court, noting that, at that stage, it was not known what use might be made of the documents. The Speaker further proposed that:

- the identified documents be separated from other documents tendered in the summons for production when the matter next went before the court; and
- the identified documents be marked with an appropriate warning as to the limitations on their use, with reference to s 16(3) of the Parliamentary Privileges Act (suggested wording for the notation was attached).

2.61. The parties followed this course.

2.62. The question of the plaintiff's appointment to the Professional Conduct Board was peripheral to the issues considered by Chief Justice Higgins in the defamation proceedings, and the status of the committee documents was not the subject of comment. It may be surmised that the Assembly's prompt intervention ensured that the parties chose to avoid a complex area of the law.

Digital submissions to committee inquiries

2.63. At the present time, the vast majority of submissions to committee inquiries are created and submitted in digital formats. In many cases, digital submissions include hypertext, alt text[68] and links to third-party websites, over which neither the submitter, nor the committee, has any control. In the event that an authorised submission links to a website containing actionable material, a question arises as to how parliamentary privilege would apply.

2.64. While there is no definitive case law on the point, advice from the Government Solicitor's Office to the Clerk concluded that parliamentary privilege would usually attach to any publication of external hypertext links or website addresses contained in an authorised submission, as the links form part of the submission itself. This will, however, depend upon the context.

2.65. In circumstances where the third-party links have been modified since the point in time at which they were included as part of the submission, privilege does not apply. Further, privilege would only attach to the Assembly's publication of the

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68 'Alternative text' is text that is included in a digital document that can be read by a computerised screen reader so that images and other pictorial information can be understood by people with visual or certain cognitive disabilities.

links, and not to any independent publication of that same material that was not for the purposes of 'proceedings in Parliament'.[69]

Use of parliamentary proceedings in legal proceedings

2.66. As outlined above, Article 9 of the *Bill of Rights 1688* provides immunity to members and other participants in proceedings in parliament (such as witnesses giving evidence before committees) from all impeachment or questioning in the courts in respect of their contributions to parliamentary proceedings. Assembly standing orders give expression to these protections, providing that:

- all witnesses examined before the Assembly, or any of its committees, are entitled to the protection of the Assembly in respect of anything that they say in evidence; and
- an officer of the Assembly,[70] or person employed by the Assembly, may not give evidence elsewhere in respect of any proceedings or examination of any witness without the special leave of the Assembly.[71]

2.67. As noted above, s 16(3) of the Privileges Act prevents the use of parliamentary proceedings in any court or tribunal. For the purposes of that Act, 'court' means a federal court or a court of a state or territory and 'tribunal' means any person or body (other than a House, a committee or a court) having power to examine witnesses on oath, including a royal commission or other commissions of inquiry of the Commonwealth, a state or a territory. The explanatory memorandum to the Parliamentary Privileges Bill 1987 sets out matters affected by the provisions. They prevent:[72]

- A statement in debate by a member or the evidence of a parliamentary witness being directly questioned for the purpose of court proceedings, or the motives of the member or the witness in speaking in parliament or giving evidence being questioned. For example, it could not be submitted that a member's statement in parliament was untrue or reckless to support a submission to a court that the member is an untruthful or reckless person.
- A member's speech in debate or a parliamentary witness's evidence being used to establish their motives or intentions for the purpose of supporting a criminal or civil action against them or against another person. Thus, a member's statements outside parliament cannot be shown to be motivated by malice by reference to alleged malice in the member's statement in parliament.

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69 Advice from the Government Solicitor's Office, 31 August 2017.

70 The use of the term 'officer of the Assembly' in this standing order is a reference to the Clerk and to parliamentary officials employed by the Office of the Legislative Assembly, rather than to Officers of the Assembly such as the Auditor-General, members of the Electoral Commission, the Integrity Commissioner and the Ombudsman. For more information, see Chapter 5: The Speaker and other officers.

71 Standing orders 261 and 264 reflect the equivalent standing orders in the House of Representatives (now 256 and 253) which in turn reflect resolutions of the House of Commons of 26 May 1818.

72 Explanatory memorandum, pp 12-13.

- A jury being asked to infer matters from speeches in debate by members or from evidence of parliamentary witnesses in the course of an action against the member, the witnesses or another person. This would not prevent the proving of a material fact by reference to a record of proceedings in parliament which establishes that fact. (The example given was the tendering of the *Journals of the Senate* to prove that a Senator was present in the Senate on a particular day).

2.68. The prohibitions in the Act are considered to express the limitations on the use of parliamentary proceedings imposed by Article 9, as noted in the explanatory statement to the bill:

> Basically, what they prevent is proceedings in Parliament being '*used against*' a person in the broad sense, that is, not only being made the subject of a criminal or civil action, such as where a Member sued for words spoken in debate, but also being used to *support* a civil or criminal action against a person.[73]

2.69. As noted above, s 16(4) of the Parliamentary Privileges Act prevents evidence that has been taken in camera by a House or a committee and not published (or which a House or a committee has directed to be treated as evidence taken in camera) from being used in court. It covers both documents specifically prepared for submission to a House or a committee and accepted as in camera evidence, and oral evidence given in camera.

2.70. Section 16(5) of the Parliamentary Privileges Act provides that neither s 16 nor the Bill of Rights shall be taken to prevent the admission in evidence in court of parliamentary records for the purposes of:

- determining a question arising under s 57 of the Commonwealth Constitution after a simultaneous dissolution; or
- interpreting an Act of the Parliament as provided for in the *Acts Interpretation Act 1901* (Cth).[74]

2.71. It is expected that the application of s 16 to the Assembly would not prevent the admission into evidence in a court of Assembly records, including debates, committee proceedings and tabled documents, for the purposes of interpreting an Act of the Assembly pursuant to s 142 of the *Legislation Act 2001*[75] and the Speaker referring relevant documents to the Court of Disputed Elections pursuant to s 276(b) of the *Electoral Act 1992*. Nor would it be expected that the immunities enjoyed by the Assembly would prevent the admission into evidence of a record of proceedings where a court was determining the validity of legislation enacted pursuant to s 26 of the Self-Government Act, which makes provision for a special

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73 Parliamentary Privileges Act, explanatory memorandum, p 14.

74 Section 15AB of the Acts Interpretation Act provides that consideration may be given to certain parliamentary proceedings as extrinsic materials in interpreting a provision of an Act.

75 Section 142 of the Legislation Act lists, but does not limit, material 'not forming part of the Act' that may be considered by a court in interpreting a piece of legislation passed by the Assembly.

procedure for making certain enactments. It certainly would not do so if the evidence was for the purpose of establishing a material fact.

2.72. Section 16(6) of the Parliamentary Privileges Act, which allows parliamentary proceedings to be used in court proceedings in relation to an offence against the Parliamentary Privileges Act (the offences set out in ss 12 and 13) or against an Act establishing a statutory committee in the Commonwealth Parliament, does not apply in relation to the Legislative Assembly.[76]

2.73. In February 1993, a member requested that an Assembly official (a staff member of the then Assembly Secretariat) give evidence in the ACT Supreme Court in a civil action initiated by the member for defamation arising from a broadcast report of proceedings of an Assembly committee. The member's counsel sought to introduce an uncorrected proof transcript of the committee's public hearings into evidence.[77] The request was refused, and counsel was briefed to attend the proceedings to represent the Speaker on behalf of the Assembly. Counsel representing the Speaker sought, and was granted leave, to intervene in the case.

2.74. The Chief Justice, after hearing legal argument and perusing authorities, held that there was no breach of s 16(3) of the Parliamentary Privileges Act and that evidence as to what occurred in the committee hearing in the form of an uncorrected proof transcript could be admitted.[78]

2.75. There have been other precedents:

- bodies such as the Industrial Relations Commission and the Ombudsman have been alerted to the provisions of s 16 of the Parliamentary Privileges Act when it was understood that proceedings of the Assembly and its committees may be questioned in the course of hearings and investigations;
- a member having raised, as a matter of privilege, the fact that a submission to a board of inquiry invited the inquiry to have regard to debates in the Assembly, the Speaker concluded that the matter did merit precedence and advised the Assembly that she would be alerting the board of inquiry to her concerns;[79] and

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76 Section 24(4) of the Self-Government Act precludes the Assembly from imposing a fine or imprisoning a person.

77 It transpired that counsel for the member wished to establish that nothing had been presented to the committee hearings that indicated that the plaintiff (a former minister) had spent $17 000 on travel (other ministers had been questioned at the hearing) and thus the defendant (a news organisation) could not claim that the broadcast in question was an accurate account of the proceedings of the committee.

78 *Use of Assembly records in court proceedings*, statement presented in the Assembly by the Speaker, 13 May 1993, MoP, No 61, 13 May 1993, p 345; *The use of Assembly documents in court*, paper presented to the Presiding Officers and Clerks Conference, Vanuatu, July 1993 by the Clerk of the Legislative Assembly for the Australian Capital Territory. The plaintiff and his solicitor had also requested that a letter be prepared confirming the status of the documents which they wished to use in the court.

79 Assembly Debates, 17 May 1994, pp 1549-1552. And see Assembly Debates, 19 May 1994, pp 1769-1770.

- on 25 August 1997, the Speaker wrote to the Chief Minister expressing concern regarding Instrument 29 of July 1997, appointing Major General Smethurst as a board of inquiry into, among other things, 'the circumstances, including all considerations by the Assembly, the executive, ministers, officials and agencies relating to the demolition of the Royal Canberra Hospital, since the Acton-Kingston Land Swap'.[80]

2.76. Significant precedents in Australia and elsewhere regarding the use of parliamentary proceedings by the courts are outlined in *House of Representatives Practice*[81] and *Odgers'*.[82]

Arrangements for the production of Assembly records

2.77. In the past, the Houses of the Australian Parliament, like the House of Commons, have followed the practice of requiring leave to be granted for the production of parliamentary records and for the attendance of parliamentary officials before courts. In 1818, the House of Commons resolved:

> That no Clerk, or officer of this House, or short-hand writer employed to take minutes of evidence before this House or any committee thereof do give evidence elsewhere in respect of any proceedings or examination had at the bar, or before any committee of this House, without the special leave of the House …[83]

2.78. In 1980, the House of Commons discontinued the practice of requiring the granting of leave to refer to parliamentary papers and gave leave for reference to be made in future court proceedings to the official report of debates and to the published reports and evidence of committees.

2.79. In 1984, the Joint Select Committee on Parliamentary Privilege recommended the adoption of similar provisions for the Commonwealth Parliament. The Senate abolished the practice in 1988 (though, as a residual safeguard, senators and Senate officers are required to seek the approval of the Senate before giving evidence relating to proceedings of the Senate or a Senate committee).[84] The House of Representatives has not implemented the provisions as recommended. *House of Representatives Practice* states that some authorities have held that the granting of permission is not required as a matter of law.[85]

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80 The inquiry was suspended pending the conclusion of a coronial inquest into the matter and was not reconstituted. See Chapter 11: Rules of debate and the maintenance of order, under the heading 'Sub judice rule'.

81 *House of Representatives Practice*, Chapter 20.

82 *Odgers'*, Chapter 2.

83 *House of Representatives Practice*, p 744.

84 *Odgers'*, p 47.

85 *House of Representatives Practice*, p 745.

2.80. Assembly standing order 264 provides:

> An officer of the Assembly,[86] or person employed by the Assembly, may not give evidence elsewhere in respect of any proceedings or examination of any witness without the special leave of the Assembly.

2.81. The Assembly has never formally granted leave for the production of Assembly records, or for the attendance of Assembly employees elsewhere. One request for a parliamentary officer to appear in court has been refused (see under the heading 'Use of parliamentary proceedings in legal proceedings', above in this chapter). In July 1998, during a period in which the Assembly was not meeting, the Speaker authorised a copy of certain pages of a paper presented to the Assembly to be tendered as evidence to the Supreme Court, subject to the provisions of s 16 of the Parliamentary Privileges Act. The papers were sought as evidence of the provisions of the Territory Plan, and an authenticated copy was requested so that there could be no doubt as to authenticity.[87]

ACT Integrity Commission—privilege claims

2.82. On 29 November 2018, the Assembly passed the Integrity Commission Bill 2018 thereby establishing the ACT Integrity Commission. The commission has a broad statutory function for investigating and reporting on corruption in the ACT. Members, their staff, the Office of the Legislative Assembly, and other parts of the ACT public sector fall within the commission's remit and are subject to its extensive powers. Additional information on the operation of the Integrity Commission, its powers and functions is included in Chapter 5: The Speaker and other officers.

2.83. Where the commission seeks to compel the production of a document[88] held by a member, or seeks to compel a member to answer a question, the possibility of a claim of immunity on the basis of the freedom of speech protection arises. Careful consideration has been given to the procedure that would apply in dealing with such claims.[89]

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86 The use of the term 'officer of the Assembly' in this standing order is a reference to the Clerk and to parliamentary officials employed by the Office of the Legislative Assembly, rather than to Officers of the Assembly such as the Auditor-General, members of the Electoral Commission, the Integrity Commissioner and the Ombudsman. For more information, see Chapter 5: The Speaker and other officers.

87 MoP, No 14, 25 August 1998, p 113. The extract was certified by the Acting Clerk and, the Assembly, not meeting at the time, members were informed in writing.

88 Part 1 of the dictionary to the Legislation Act defines a document as 'any record of information, and includes—(a) anything on which there is writing; or (b) anything on which there are figures, marks, numbers, perforations, symbols or anything else having a meaning for people qualified to interpret them; or (c) anything from which images, sounds, messages or writings can be produced or reproduced, whether with or without the aid of anything else; or (d) a drawing, map, photograph or plan'.

89 MoP, No 82, 29 November 2018, pp 1187-1193. See also the submission made by the Office of the Legislative Assembly to the Select Committee on an Independent Integrity Commission 2018, authorised for publication on 4 September 2018.

2.84. Section 7(1) of the *Integrity Commission Act 2018* provides that the Act does not affect the law relating to the privileges of the Legislative Assembly; or any Australian parliament or any House of any Australian parliament.[90] Section 177(2) of the Integrity Commission Act provides that claims of parliamentary privilege that arise in the exercise of the commission's functions 'must be dealt with by the Legislative Assembly'.

2.85. On 29 November 2018, the Assembly passed continuing resolution 4A, which instituted procedures for resolving claims of parliamentary privilege that arise during the exercise of the commission's powers and functions.[91] Importantly, through the resolution, the Assembly:

(a) reserves all its powers, privileges and immunities, and those of its Members, derived from all sources of law;

(b) affirms that parliamentary privilege attaches to all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of the Assembly or an Assembly committee, including to documents and information falling within the scope of "proceedings in Parliament" as provided for in article 9 of the Bill of Rights 168[8] and section 16 of the *Parliamentary Privileges Act 1987 (*Cth);

(c) acknowledges that, pursuant to the *Integrity Commission Act 2018*, statutory powers and functions have been vested in the ACT Integrity Commission to investigate and report on corruption in the ACT and that the Commission is empowered, subject to that Act, to investigate allegations of corrupt conduct involving a Member of the Legislative Assembly;

(d) notes that section 7 of the Integrity Commission Act does not affect the law relating to the privileges of the Legislative Assembly;

(e) notes that section 177 of the Integrity Commission Act provides that claims of parliamentary privilege that are made in the exercise of the Integrity Commission's functions must be dealt with by the Assembly;

(f) declares, for the avoidance of doubt, the right of the Assembly to determine claims of parliamentary privilege over material sought to be seized or accessed by the Integrity Commission regardless of the form of the material or, the means by which the Commission seeks seizure or access;

(g) acknowledges that there may be occasions where the exercise of the Commission's powers and functions gives rise to a claim of parliamentary privilege; and

(h) resolves that where such a claim is made, it will be addressed and resolved in accordance with the arrangements and principles provided for in this continuing resolution.

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90 However, s 178(2) of the Integrity Commission Act expressly waives privilege in relation to the use, by the commission, of members' declarations of interests. This provision is similar to ss 122(2)-(4) of the *Independent Commission Against Corruption Act 1988* (NSW).

91 The resolution was amended in the Tenth Assembly, see MoP, No 7, 30 March 2021, p 87.

2.86. Under the procedure, if an affected member[92] seeks to claim immunity on the basis of parliamentary privilege in the face of the exercise of the commission's powers, and subject to a number of steps having been taken,[93] the Speaker must appoint an independent legal arbiter to adjudicate the claim. The Speaker may only appoint a person who is a Queen's Counsel, Senior Counsel or a retired judge or justice of the Supreme, Federal or High Court. The Speaker must consult with the Standing Committee on Administration and Procedure prior to appointing the arbiter.

2.87. If the arbiter determines that 'Assembly information'[94] that is held by a member or another person falls within the scope of 'proceedings in Parliament', it is taken to be protected by parliamentary privilege and is returned to the member. If the Assembly information is found not to be a proceeding, parliamentary privilege is taken not to apply, and the document must be provided to the commission (subject to any other lawful requirements that may have been imposed).

2.88. Similarly, the resolution provides that a member is entitled to decline to answer a question under examination on the basis that the information that would necessarily be provided in response to the question would be protected by parliamentary privilege. In such a case, it is open to the commissioner to withdraw the question or to dispute the claim of privilege.

2.89. Disputes about privilege claims are determined by the arbiter. Where the arbiter upholds the claim, an immunity from the provision of the information that is sought by the commission is taken to apply. Where the arbiter does not uphold the claim, no immunity is taken to apply and if the member continued to refuse to answer such a question, the member would then be exposed to provisions of the Integrity Commissions Act relating to contempt of the commission.

2.90. In determining whether or not parliamentary privilege applies to a document or information that is sought, the arbiter must have regard to:

- the written claim made by the member;
- the written dispute of the claim by the commissioner;
- any transcript of an examination of a member in which a claim relating to parliamentary privilege has arisen;

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92 'Affected member' means 'a Member about whom Assembly information relates to whom the Commission addresses an inquiry pursuant to the exercise of a power or function by the Commission' (continuing resolution 4A at paragraph 3). The resolution also makes provision for the Speaker to be notified where the commission seeks information related to a former member's time as a member in order that the Speaker is able to consider whether issues of parliamentary privilege arise.

93 For instance, where the commissioner declines to dispute a claim the document the subject of the claim is returned to the member.

94 'Assembly information' includes 'all information, data, records and 'documents' that have been prepared or received by the Assembly, its members, staff of members or the Office of the Legislative Assembly in connection with the roles and functions of the Assembly, its committees and its members' (continuing resolution 4A at paragraph 4).

- any written submission made by the member or by the commissioner;
- applicable law relating to parliamentary privilege;
- the Assembly's standing orders and continuing resolutions;
- reports of an Assembly committee or of a committee of either House of the Commonwealth Parliament relating to parliamentary privilege; and
- any other matter that the arbiter considers to be relevant.

2.91. The resolution also provides that 'In some cases the question will turn on what has been done with an item of information or document, or what a Member intends to do with the document or information, rather than what is contained in the document or the substance of the information, or where the document or information is held'. The resolution makes provision for the arbiter to apply a test adapted from one that had been used by the NSW Legislative Council for assessing privilege claims in the context of the exercise of search and seizure powers by the NSW Independent Commission Against Corruption.[95]

Freedom of Information Act

2.92. The *Freedom of Information Act 2016* provides grounds for the non-disclosure of information where disclosure would infringe the privileges of the Legislative Assembly, a House of the Commonwealth Parliament, the parliament of a state, or the Legislative Assembly of the Northern Territory.[96] Accordingly, matters that fall within the definition of a 'proceedings in Parliament' that are the subject of a freedom of information (FOI) request are not disclosed.[97]

2.93. Successive Clerks of the Assembly, who are responsible for freedom of information matters, have, in consultation with the Speaker, taken the view that the Assembly should be as transparent as possible when responding to FOI requests. Accordingly, in addition to the ordinary administrative records of the Assembly, records that broadly equate to public sector agency records relating to members' activities have generally been regarded as being accessible under FOI requests; for example the use of entitlements and expenditure on staff, travel, office support and vehicle use.

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95 Stephen Frappell and David Blunt, *New South Wales Legislative Council Practice,* 2nd Edition, Federation Press, pp 124-125. See further discussion under the heading 'Records and correspondence of members' in this chapter.

96 FOI Act, s 16 and Sch 1.1.

97 Standing order 243 authorises the Speaker to permit any person to examine and copy committee documents in certain circumstances.

Self-imposed limits on freedom of speech

2.94. The Assembly has imposed upon its members a number of rules governing the content of speeches.[98] It has also, through continuing resolution 7, set general guidelines for members to consider in the exercise of their right of freedom of speech. The resolution reminds members of the need to exercise their right of freedom of speech in a responsible manner, of the damage that may be done by careless or malicious exercise of that right, and of the limited opportunities available to private citizens to respond to allegations made in the Assembly.[99] It also provides a basis for the Speaker to draw attention to the spirit and the letter of the resolution. Abuse of the right of freedom of speech and remedies available to members of the public are discussed later in this chapter under the heading 'Power to conduct inquiries'.

Other immunities

2.95. Other immunities, sometimes referred to as 'minor immunities', are:

- freedom from arrest or detention in civil causes;
- exemption from jury service; and
- exemption from compulsory attendance as a witness.

2.96. A member may only be arrested or detained in a civil cause on a day that falls outside the scope of s 14(1) of the Parliamentary Privileges Act. Section 14(1) provides that a member shall not be required to attend before a court or tribunal on a day on which the House or a committee of which they are a member meets, or on any day within five days before or after that day.[100] Section 15(2) of the *Evidence Act 1995* (Cth) also provides that a member of a House of an Australian

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98 For instance, standing order 53 prohibits the disrespectful use of the Queen's, Governor-General's or Governors' names. Standing order 54 provides that a member 'may not use offensive words against the Assembly or any member thereof or against any member of the judiciary'. Section 14(4) of the Judicial Commissions Act states that 'A Member of the Legislative Assembly must not raise in the Assembly a matter that relates or may relate to the behaviour or physical or mental capacity of a judicial officer: (a) except by way of a motion to have a specific allegation made in precise terms in respect of the judicial officer examined by a commission; and (b) unless the member has given the Attorney-General not less than 6 sitting days notice of the motion and the member has not been notified by the Attorney-General or the council within that period that a recommendation has been made that the Executive appoint a judicial commission in relation to the allegation'.

99 'Freedom of Speech', Resolution agreed by the Assembly, 4 May 1995. Paragraph (15) of the Code of Conduct for all Members of the Legislative Assembly for the Australian Capital Territory (continuing resolution 5) provides that members are to 'Take care to consider the rights and reputations of others before making use of their unique protection of parliamentary privilege consistent with the resolution of the Assembly 'Exercise of freedom of speech'.

100 This immunity extends to employees of the House and applies to any day on which the House or committee that an employee is required to attend upon meets, or which is within five days of that day. If a member receives a subpoena requiring their attendance before a court or a tribunal on a day on which they cannot be compelled to attend, the Clerk will inform the court of the relevant provisions and the exemptions that apply.

Parliament is not compelled to give evidence if the member would, if compelled to give evidence, be prevented from attending, among other things, a sitting of that House or a meeting of a committee of that House being a committee of which they are a member.

2.97. Exemption from jury service is now a legislated right arising from Part 1.3 of the Juries Regulation 2018, made pursuant to s 11 of the *Juries Act 1967*. Members of the Assembly are exempt from serving as jurors, as are advisers or private secretaries of members, the Clerk, Deputy Clerk, Clerk Assistant, Serjeant-at-Arms, Editor of Debates, and Assembly committee secretaries.[101]

2.98. In a small legislature such as the Assembly, a member might wish to invoke the exemption for compulsory attendance as a witness, but in larger legislatures competing demands may more readily be accommodated by normal pairing arrangements. However, the rationale for these immunities—the need for parliament and its committees to have first claim on the service of its members, even to the detriment of civil rights of third parties remains valid and should be upheld.

Powers

Regulating proceedings through standing orders and resolutions

2.99. Section 21 of the Self-Government Act confers on the Assembly the power to regulate its proceedings through the making of standing rules and orders with respect to the conduct of its business. The standing orders and resolutions of the Assembly govern the operation of Assembly and committee business and are matters for the Assembly, and only the Assembly, to decide. As the standing orders and resolutions of the Assembly are themselves 'proceedings in Parliament' they may not be impeached or questioned in any court or place out of parliament to the extent that they regulate the Assembly's internal proceedings.

2.100. However, there are limits on the efficacy of orders and resolutions made by parliamentary chambers. In this regard, *House of Representatives Practice* refers to the cases of *Stockdale v Hansard* (1836-1840):

> The court [of the Queen's Bench] ruled that an order of the House of Commons alone was not a sufficient cause to protect a person, carrying out that order, from the due process of the law. As a consequence of the decisions in these cases the objectives of the House in the area were effected by legislation—the Parliamentary Papers Act 1840—as it was only by legislating with the other constituent parts of the Parliament that the House could give sufficient authority to its wishes.[102]

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101 Members of the House of Commons and the House of Lords are no longer exempt from the general public duty of jury service in England and Wales; see the *Criminal Justice Act 2003* (UK), discussed in *May*, pp 285-286.

102 *House of Representatives Practice*, p 316. In this regard, see s 47 of the Acts Interpretation Act, which provides that:

Power to determine own constitution (membership)

2.101. Section 47 of the Commonwealth Constitution gives each House of the Commonwealth Parliament the power to determine 'any question respecting the qualifications of a senator or of a member of the House … or respecting a vacancy in either House … and any question of a disputed election'. These extensive powers have largely been replaced by statutory provisions. The power of the Assembly to determine its own constitution[103] or composition is of limited significance: most, if not all matters are determined by the Self-Government Act and other statutory law.

2.102. The qualification of members and regulation of the filling of casual vacancies is determined by the provisions of the Self-Government Act and the Electoral Act, as is the power to hear and determine applications disputing the validity of elections. The Assembly may refer questions relating to the eligibility of persons declared to be elected or vacancies in the membership of the Assembly to the Court of Disputed Elections (see Chapter 3: Elections and the electoral system).

2.103. The Assembly does not have the power to expel its members. This is consistent with the House of Representatives and the Senate, which lost that power upon the commencement of the Parliamentary Privileges Act, prior to the passage of the Self-Government Act.[104]

2.104. The Assembly may, of course, suspend a member in the exercise of its power to discipline members (discussed below). However, were the Assembly to suspend a member for an extended period or for the duration of the Assembly, it may be open to that member to invoke s 8 of the Parliamentary Privileges Act and invite a court to decide whether the suspension was de facto expulsion and therefore beyond the Assembly's power.

Where a resolution has been passed by either House of the Parliament in purported pursuance of any Act, then the resolution shall be read and construed subject to the Constitution and to the Act under which it purports to have been passed, to the intent that where the resolution would, but for this section, have been construed as being in excess of authority, it shall nevertheless be a valid resolution to the extent to which it is not in excess of authority.

103 For a background to the power see *Abraham*, p 94 and *May*, pp 253-254.

104 Section 8 of the Parliamentary Privileges Act provides that 'A House does not have power to expel a member from membership of a House'. The provision was inserted in the Parliamentary Privileges Act following a recommendation of the Joint Select Committee on Parliamentary Privilege (see Joint Select Committee on Parliamentary Privilege, *Report*, October 1984, pp 121-127 and the Dissent by Senators Jessop and Rae at p 167). The recommendation and the insertion of the provision met opposition in the Senate (see *Odgers'*, pp 77-78). The committee considered that, aside from the operation of existing disqualification provisions in the Commonwealth Constitution and statute, a member's fitness for membership ought to be matter for the electorate to decide, rather than the House. See also Joint Select Committee on Parliamentary Privilege, *An Exposure report for the consideration of senators and members*, June 1984, p 128.

Disciplining members

2.105. Members may be disciplined by the Assembly where they have been found in contempt. Reflecting on the powers of the House of Representatives to punish its members, *House of Representatives Practice* observes that:

> In respect of Members whom the House determines have committed contempts, the House's power to punish includes commitment or reprimand but has been considered to have a further dimension, namely, suspension for a period from the service of the House.[105]

2.106. For more detail, see under the heading 'Penalties for contempt' below in this chapter.

Power to conduct inquiries

2.107. In most democratic societies, committee inquiries have become a principal function of legislatures over recent decades. It is common to refer legislation to committees for examination, including appropriation bills, reports on public finances by Auditors-General, and matters of general public concern.

2.108. The power to 'send for persons, papers and records' is an established power of the UK House of Commons and is, by operation of s 49 of the Commonwealth Constitution and s 24(3) of the Self-Government Act, also a power of the Legislative Assembly.

2.109. It underpins the capacity of the Assembly to conduct inquiries,[106] usually through delegation of the power to its committees.[107]

2.110. In *Egan v Willis* (1998) 195 CLR 424, the High Court of Australia considered both the power of the NSW Legislative Council[108] to demand the production of papers and the power to punish a minister for failing to comply with such a demand.

105 *House of Representatives Practice*, p 767.

106 Standing order 216 provides that 'Within the terms of the resolution of establishment agreed to by the Assembly and subject to any direction of the Assembly, any standing committee may inquire into and report on any matter it considers merits investigation or which the Assembly refers to it …'.

107 There is debate over the limits to the investigatory powers and reach of committees. Discussion of the matter in *House of Representatives Practice,* pp 665-670, suggests that while limitations may exist their practical significance is not great.

108 Unlike the Legislative Assembly, the NSW Legislative Council does not have a constitutional or statutory basis for its non-legislative powers, privileges and immunities. The NSW Parliament has not legislated to comprehensively state its privileges in statute law. Instead, its privileges rest on Article 9 of the Bill of Rights (which is given effect by *Imperial Acts Application Act 1969* (NSW)), the common law doctrine of reasonable necessity, and a number of 'miscellaneous statutory provisions'. Their Honours Justices Gaudron, Gummow and Hayne held that: 'the Legislative Council has such powers, privileges and immunities as are reasonably necessary for the proper exercise of its functions' (453-454 [48]). See further Blunt, David, *Parliamentary Privilege: New South Wales at the Cutting Edge*, Paper presented by Mr David Blunt, Clerk of the Parliaments and Clerk of the Legislative Council to a seminar on Parliamentary Law, Sydney, 10 June 2016, pp 2 and 4.

The High Court vindicated the rights of the NSW Legislative Council on both matters. Justice McHugh held that:

> When the nature of parliamentary government under the Westminster system of responsible government is properly understood, it is apparent that the power [to compel the production of documents held by a minister]… is one that inheres in the very notion of a parliamentary chamber ...[109]

2.111. With respect to the Legislative Assembly, the resolution appointing standing committees in the Tenth Assembly empowered committees to, among other things, 'inquire and report on matters referred to [them] by the Assembly or matters that are considered by the committee to be of concern to the community and within the nominated areas of responsibility'. Importantly, the resolution also acknowledged that the purpose of the Assembly standing committees is to:

> … enhance the scrutiny of the Executive, to examine and suggest improvements to any bills referred to it, to enable the citizens of the Territory to engage and to participate in law-making and policy review, to enable financial scrutiny of the Executive's budget proposals and to review annual reports of taxpayer funded agencies …[110]

2.112. There is an important limitation on the inquiry power of committees—committees can only exercise the power delegated to them by the Assembly. This is set out in standing order 216, which delegates powers to committees 'within the terms of reference agreed to by the Assembly'. Thus, the actual powers of a committee, and the matters that it is permitted to inquire into, may be restricted by its resolution of appointment. For example, the resolution regarding the citizen's right of reply (4 May 1995)[111] states that the Standing Committee on Administration and Procedure, when considering a submission requesting a right of reply, 'shall meet in private session' and 'shall not publish a submission referred to it under this resolution'. For more information, see Chapter 17: Committees.

2.113. Behind the Assembly's inquiry power stands its power to punish contempts, which may be used to compel the attendance of witnesses and the provision of documents.

2.114. In practice, while the Assembly has made extensive use of committees, the limits of a committee's powers to insist on the attendance of witnesses or the production of documents have not been comprehensively tested. Continuing resolution 8B provides guidance to ministers and public servants on the process for raising claims of public interest immunity (dealt with in more detail in Chapter 17: Committees). However, the Assembly itself has not tested the extent of its power

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109 *Egan v Willis* (1998) 195 CLR 424 at 472 [93] per McHugh J.

110 MoP, No 2, 2 December 2020, pp 17-18.

111 MoP, No 4, 4 May 1995, pp 32-34.

by compelling the production of information from the executive either on its own behalf[112] or on behalf of a committee.[113]

2.115. *Odgers'* discusses possible limitations on the inquiry power, noting that the Commonwealth Parliament may be limited to inquiring into subjects in respect of which it has the power to legislate.[114] There may also be an implicit limitation on the power of a House to summon as witnesses or to compel the giving of evidence by members of the other House, a House of a state or territory legislature, or by state office holders.[115]

Production orders and public interest immunity

2.116. In accordance with the doctrine of public interest immunity (sometimes referred to as 'Crown privilege' or 'executive privilege'):

> … the Executive Government may seek to claim immunity from requests or orders, by a court or by Parliament, for the production of documents on the grounds that public disclosure of the documents in question would be contrary to the public interest.[116]

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112 See, for example, MoP, No 49, 5 May 1999, pp 412-414. In the context of a highly charged dispute about the redevelopment of a Territory-owned football stadium the Assembly adopted a motion requiring 'the Chief Minister to present to the Assembly, prior to the end of the present financial year [30 June 1999]: (1) certified copies of all the papers in the possession of the Government and its agencies' relating to 14 categories of documents and other details. The motion was substantially complied with.

113 See MoP, No 70, 25 November 1999, pp 639-640, and MoP, No 73, 9 and 10 December 1999, pp 686-687. During the conduct of the Select Committee on Government Contracting and Procurement Processes, the committee obtained, through the Assembly, copies of certain hirers' agreements between Bruce Operations Pty Ltd and other parties and an agreement between the ACT Government and the Sydney Olympic Organising Committee. See further Select Committee on Government Contracting and Procurement Processes, *Report on government contacting and procurement processes in the Australian Capital Territory*, July 2000, p 9. There have also been occasions where information has been sought by the Assembly from non-executive members, including:

(a) a resolution requiring a member to submit the contact details of certain constituents to the Chief Minister (MoP, No 8, 24 February 2009, p 100-101); and

(b) a resolution requiring the Leader of the Opposition to table certain documents relating to the investigation conducted by the opposition (MoP, No 19, 7 May 2009, pp 218-219, 221-222).

In more recent times, with the introduction of standing order 213A (providing for an independent legal arbitration process where production orders are made by the Assembly), and continuing resolution 8B (relating to public interest immunity claims that arise during committee proceedings), the Assembly has evolved the procedural basis for making and adjudicating immunity claims advanced by the executive.

114 *Odgers',* pp 79-80.

115 *Odgers',* pp 79-80. But note that the Supreme Court—Trial Division in the Canadian Province of Prince Edward Island in *Attorney General (Canada) v MacPhee* (2003) 661 APR 164 held that officers of a federal government agency had no immunity from summonses issued by the standing committee in the course of an inquiry into a matter within the legislative powers of the Legislative Assembly of the Province of Prince Edward Island (and which was necessary for the proper functioning of the Assembly).

116 *House of Representatives Practice*, p 625.

2.117. Claims of executive privilege have been made to prevent the disclosure of cabinet documents or advice tendered to ministers by their officials in the face of an Assembly order or a committee request for the production of documents.[117]

2.118. Judicial consideration of the scope of this immunity had, for many years, accepted the view that a minister's certificate, stating that the release of documents was not in the public interest, was conclusive and that certain classes of document—most particularly cabinet papers—enjoyed the protection of public interest immunity. However, recent decisions have undermined this view and support the principle that, absent express legislative provision to the contrary, no class of documents is entitled to absolute immunity from disclosure and all cases must be resolved on their own facts, having regard to competing aspects of the public interest.[118]

2.119. The power of compulsory disclosure of information held by executive government is closely guarded by both Houses of the Commonwealth Parliament. The Senate has explicitly stated that 'upon a claim of privilege … being made to any question or to the production of any documents, the Senate shall consider and determine each such claim'.[119] The House of Representatives asserts a similar 'unquestioned power' but notes that 'Because of the majority of government Members in the House, disputes over such matters … are less likely to arise and when they do, it is likely that a compromise may be reached'.[120]

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117 Courts are also on occasion required to consider public interest immunity claims and in doing so will consider both the possible harms that might come about from the compulsory production of a document as well as the impact that non-disclosure may have on the administration of justice. In *Sankey v Whitlam* (1978) 142 CLR 1, Acting Chief Justice Gibbs at 38 cites Lord Reid in *Conway v Rimmer* [1968] AC 940:

> There is the public interest that harm shall not be done to the nation or the public service by disclosure of certain documents, and there is the public interest that the administration of justice shall not be frustrated by the withholding of documents which must be produced if justice is to be done.

Gibbs ACJ notes, at 38, that where a matter of compulsory production is before the courts, it is the courts themselves that will decide which 'aspect of the public interest predominates' in a given matter (*Sankey v Whitlam* at 37).

The tensions that arise in the context of a parliamentary order for documents are slightly different in that parliament's constitutional functions to hold the executive both accountable and responsible (rather than the judicature's function of administering justice) are pitted against any immunity claim that might be advanced by the executive. As Sir Lawrence Street, in his 2001 report as Independent Legal Arbiter for the NSW Legislative Council, *Appointment of Mr Peter Scolari as Administrator of the Wellington Local Aboriginal Lands Council,* 24 October 2001, observed:

> A claim for public interest immunity is ordinarily based on the protection of the public interest respecting the confidentiality of sensitive material relating to the ordinary business of Government or otherwise justifying its non-disclosure. Its validity must be assessed by balancing the public interest in nondisclosure against the public interest in transparency and public accountability in relation to the discharge by Departments and Ministers of their public responsibilities.

118 *House of Representatives Practice*, pp 625-626; *Odgers'*, pp 645-649.

119 Resolution of the Senate, 16 July 1975, paragraph (4), extracted in *Odgers',* p 644.

120 *House of Representatives Practice*, p 626.

2.120. The Legislative Assembly has taken a similar view to the Senate[121] and has on occasion demanded the production of documents from the executive in the face of strenuous opposition, most notably in the matter of the redevelopment of Bruce Stadium. On that occasion, the Assembly sought all papers in the possession of the government and its agencies relating to 'funding, borrowing, subscriptions, tenders, corporate structures and brokers in relation to the project, contracts and arrangements with regard to the future operation of the stadium and details of the timing, amount, purpose and recipient(s) of all payments made by Territory or on behalf of the Territory', and the legislative authority for payments and guarantees.[122]

2.121. A large volume of material was provided to the Assembly, though by the nature of the demand it was difficult to say whether it was fully complied with. The handling of this issue perhaps underscores that these matters are not determined simply as questions of principle. The capacity of a legislature to press its demands will depend on the political culture of the jurisdiction, the discipline of political parties and the prevailing political reality, including whether or not the government has a parliamentary majority.

2.122. As *Odgers'* notes, the Senate has generally not used its punitive powers to enforce its demands but has exacted a 'political penalty' or a procedural penalty. For example, if a government does not have a majority in a parliamentary chamber, it may be possible to back up a demand by delaying other government business until it is complied with. Conversely, if a government has a majority, requests are unlikely to be pursued to the point of outright conflict between the legislature and the executive.[123]

2.123. The prospect of a political stand-off, or litigation relating to an Assembly production order has been greatly diminished in the Legislative Assembly since the introduction of standing order 213A.

Standing order 213A—Arbitration of public interest immunity claims

2.124. Standing order 213A establishes an arbitration process for determining privilege claims[124] made by the executive in the face of an order of the Assembly requiring the production of documents. The standing order was adopted to satisfy

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121 See Standing Committee on Administration and Procedure, *The Use of Commercial-in-Confidence material and In-Camera Evidence in Committees* (August 2001). The committee notes, at p 11, that 'The debate over public disclosure is not, it would seem, one of principle but of the appropriate limits of disclosure'.

122 MoP, No 49, 5 May 1999, pp 403-405, 407-409, 417-420.

123 Unlike the House of Representatives, the Assembly has been typified by non-government majorities, and successive governments have not always succeeded in defeating motions ordering the production of documents.

124 While the precise nature of the privilege that is able to be claimed is not specified in the standing order, on the five occasions when the procedure has been utilised, chief ministers have advanced their claims under the broad rubric of executive privilege.

commitments made as part of a parliamentary agreement the government had entered into with the crossbench.[125]

2.125. Under this standing order, if the Assembly orders that documents held by the executive are to be tabled, it is open to the Chief Minister to make a claim of privilege. The claim may be disputed by any member. If a claim is disputed, the Speaker is required to appoint an independent legal arbiter (who must be a retired Supreme Court, Federal Court or High Court Judge) to determine the claim.

2.126. This Assembly procedure was adapted from a standing order of the NSW Legislative Council,[126] which followed decisions of the NSW Court of Appeals[127] and the High Court[128] relating to several matters of law that arose in connection with an order of the Legislative Council requiring the Treasurer (who was also the Leader of the Government in the Council) to produce certain documents, the Leader's refusal to comply with the order, and subsequent action that was taken by the Council.

2.127. The Hon Keith Mason, former President of the NSW Court of Appeal, who has been appointed as independent arbiter for both the NSW Legislative Council and the ACT Legislative Assembly, described the role that the arbiter plays in the Legislative Council in the following terms:

> Some propositions are clear, in my view. First Standing Order 52 [upon which the Assembly's standing order 213A is based] is not the source of the House's power to compel production of State papers, nor do its terms limit the power of the House to regulate or modify the circumstances under which members of the public may access documents after they are required to be tabled. Secondly, the arbiter evaluates and reports independently of the House and is in no sense the delegate of the Parliament of the House. Thirdly, the arbiter's role is to report the outcome of his or her "evaluation" as to the "validity" of any (still) disputed claim of privilege that is (still) pressed, taking into account of the contents of the documents and any submissions duly received. Fourthly, it is then up to the House to decide what steps to take it not being bound to accept the report of the arbiter (which is not to say that the House has the liberty to disregard privilege, only that *it* must decide what to do). Fifthly, the burden of demonstrating that particular (documented) information is privileged lies upon the body asserting privilege, this being of the essence of an immunity or privilege. Sixthly, information may conceivably attract privilege at one point of time but not at another.[129]

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125 Adopted in 2009 as a temporary order: MoP, No 7, 12 February 2009, pp 89-90, 95-97. Adopted as a standing order in 2012 (MoP, No 141, 22 March 2012, p 1820) and amended in 2017 (MoP, No 34, 21 September 2017, pp 445-446).

126 Standing order 52 of the NSW Legislative Council.

127 *Egan v Willis and Cahill* (1996) 40 NSWLR 650.

128 *Egan v Willis* (1998) 195 CLR 424.

129 The Hon Keith Mason AC QC, *Report under standing order 52 on disputed claim of privilege Westconnex Business Case*, 8 August 2014, p 5.

2.128. Not all of these propositions hold under the arrangements provided for in the Assembly's standing order 213A. Under the practice of the NSW Legislative Council, documents ordered for production are made available to members of the Council irrespective of any claim of immunity that might be put by the executive. The arbiter's role is to evaluate the executive's immunity claims and report to the Council. Where an immunity claim is accepted by the Council, the publication of the relevant documents will not proceed but its members nonetheless retain access. In contrast, the practice in the ACT is that, where the arbiter determines that a privilege claim is upheld in relation to certain documents, those documents are neither published nor disclosed to members. In this sense, the arbiter is very much the delegate of the Assembly and their determination has been regarded as final.[130]

2.129. Among other requirements, if the Assembly orders the production of a document, standing order 213A requires that:

- The Clerk communicate the order for the document or documents, to the Chief Minister's Directorate.
- Upon a return under the order by the directorate (that is, if the documents that are subject of the order are produced) where no claim of privilege is made by the Chief Minister, the documents be laid on the table by the Clerk.[131]
- A return be accompanied by an indexed list of all the documents that have been provided and relevant details, including the name, author, creation date and description of each document.
- If privilege is claimed by the Chief Minister, a return be prepared with details of the documents and the reasons for the claim.
- If any member wishes to dispute the validity of a claim of privilege relating to a particular document, they may do so by writing to the Clerk. The Clerk is to advise the Chief Minister's Directorate that the claim has been disputed and provide all disputed documents to the independent legal arbiter appointed by the Speaker.
- The Clerk make available to the arbiter any submissions from members about claims of privilege regarding the documents that are the subject of the order.
- The arbiter consider the claims and lodge a report with the Clerk, which is only made available to members.[132]

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130 While it is open to the Assembly to suspend standing order 213A as a means by which to enforce a production order without reference to an independent arbiter, such a precedent would arguably undermine the arrangement over the longer term.

131 Out-of-session tabling is permitted in the event that the Assembly is not sitting and no claim of privilege has been lodged (standing order 213A(d)).

132 A report by the arbiter must not be copied or published without an order of the Assembly.

- If an immunity claim is upheld, the documents the subject of the order be returned to the Chief Minister's Directorate.
- Where a claim is not upheld, the relevant documents be provided.

2.130. The Assembly's process arguably permits a judicious examination of the merits or otherwise of particular immunity claims, which is at arm's length from, and unencumbered by, the political exigencies that often swirl around such disputes.

2.131. In many respects, the arrangement represents a settlement between the legislative and the executive arms of government: that independent legal reasoning, applied under the authority of the Assembly, will produce a more principled and consistent application of immunity, public interest, and related doctrines than the application of raw political or procedural power alone.

2.132. While arbiters have tended to adopt general principles of legal reasoning, with reference to relevant case law in making assessments, there are no particular evaluative criteria prescribed in the standing order as to how the arbitration task is to be performed.[133]

2.133. To date, there have been five occasions on which a legal arbiter has been appointed to arbitrate immunity claims in response to an Assembly production order, which are summarised below.

The Review of ACT Public Sector and Services

2.134. On 12 February 2009, the Assembly ordered that the government table a document relating to a functional review of government operations.[134] Following the order, a claim of executive privilege was asserted by the Chief Minister primarily on the grounds that the document in question was prepared solely for executive government and its disclosure would reveal the internal deliberations of cabinet. The Hon Sir Lawrence Street AC QC, former Chief Justice of the NSW Supreme Court, was appointed by the Speaker to adjudicate the claim. This was the first time that the procedures, provided for under standing order 213A, were utilised.

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133 In his report, *Report of the Independent Arbiter Public Housing Renewal Steering Committee Agenda Pape*r, the Hon Mr Richard Refshauge SC highlighted the distinction between 'class claims' and 'content claims' that may arise in claims of public interest immunity. Mr Refshauge SC observed that:

> Class claims are made where the class of document is one that is privileged. The best known example is the class of what are often called "Cabinet documents" which are always privileged: *Commonwealth v Northern Land Council* at 614 … Similarly, documents that are communications between departmental heads or departmental heads and ministers or diplomatic communications are, as a class, privileged: *Australian National Airlines Commission v Commonwealth* (1975) 132 CLR 582 at 590.

More usually, claims are 'content claims' where the claim is based solely on the content of the particular documents or documents because the content would be damaging to the interests of the state.

134 MoP, No 7, 12 February 2009, p 97.

2.135. In his report, Sir Lawrence directed attention to *Commonwealth v Northern Land Council (1993)*:

> It has never been doubted that it is in the public interest that deliberations of Cabinet should remain confidential in order that the member[s] of Cabinet may exchange differing views and at the same time maintain the principle of collective responsibility of any decisions which may be made … Despite the pressures which modern society places upon the principles of collective responsibility, it remains an important element in our system of government … [135]

2.136. Sir Lawrence concluded that within the scope and content of the document were topics which raised 'considerations at the very heart of the functioning of executive government, and with that, collective ministerial responsibility'.[136] On that basis, Sir Lawrence determined that the document was protected by executive privilege from having to be produced to the Legislative Assembly.[137]

AECOM infrastructure report

2.137. On 11 May 2017, the Assembly ordered that the government table the *ACT Health Infrastructure Asset and Condition Report and Minor Works Priorities*. The Chief Minister asserted immunity on the grounds of executive privilege.[138] The Hon Keith Mason AO QC was appointed by the Speaker to adjudicate the claim.

2.138. Mr Mason received a submission from the shadow Minister for Health setting out the opposition's interest in receiving the document 'in the context of concerns about safety issues at The Canberra Hospital … stemming from a switchboard fire on 5 April 2017 which caused severe disruption to the Emergency Department and to elective surgery'.[139]

2.139. In his report, Mr Mason outlined the principles involved in considering immunity claims in the face of a production order of the parliament. He noted that:

> … parliamentary access to information is a vital aspect of responsible government. One consequence is that privilege claims by the Executive must rest on something more than inconvenience to the working of government as the Executive branch would prefer, prior assurance of confidentiality, or the mere invocation of categories of public interest immunity privilege or client legal privilege that could be invoked in the different context of adversary litigation in the courts. In *Egan v Chadwick*

135 The Hon Lawrence Street, *Disputed Claim of Privilege Review of ACT Public Sector and Services Report of Independent Legal Arbiter*, p 3, tabled 7 May 2009.

136 See Chapter 6: The ACT Executive under the heading 'Cabinet'.

137 MoP, No 19, 7 May 2009, pp 216-217.

138 MoP, No 16, 11 May 2017, p 192.

139 The Hon Keith Mason AC QC, *Report of the Independent Legal Arbiter RE AECOM Infrastructure Report*, p 1, tabled 3 August 2017; MoP, No 22, 3 August 2017, p 319.

> (1999) 46 NSWLR 563, the New South Wales Court of Appeal ruled that neither public interest immunity nor legal professional privilege provided a basis for withholding documents the production of which were "reasonably necessary for the proper exercise by the Legislative Council of its functions" according to the principle expounded in *Egan v Wills.*

2.140. Mr Mason noted that while the production of a cabinet document 'may be in a different category' arising from 'the need to recognise Cabinet confidentiality as an aspect of the collective responsibility of ministers', the interest that is protected is 'the need to avoid disclosure of the actual deliberations of and within cabinet as distinct from the decisions themselves which must, of necessity be capable of and review by Parliament under the principles of responsible government itself'.[140]

2.141. The Chief Minister's submission contended that the report had played a role in the formulation of health policy and decisions about funding:

> … the Report was prepared solely for submission to Cabinet and decision by Cabinet. It was presented to Cabinet in circumstances of complete confidentiality and its contents underpinned the choices presented to Cabinet and the substantive reasoning upon which the decisions of Cabinet were based. Disclosure of the Report will inevitably disclose the reasoning that Cabinet adopted in making its decisions.[141]

2.142. In determining the matter, Mr Mason concluded that while 'access to the report could, to a degree, disclose the longer term strategies of the present government regarding health … this in itself is not enough to generate a relevant basis for privilege in the current context'.[142]

2.143. Mr Mason pointed to the lack of a specific nexus between the document in question and the internal deliberations of the cabinet that could form grounds for immunity by way of cabinet confidentiality, noting:

> I have not been shown nor do I detect any basis for the submission that the Report is expressly stated to be "connected to Cabinet", nor to any part of the Report that reveals, directly or indirectly, the deliberations of Cabinet in the limited sense that I understand the term.[143]

2.144. The claim of privilege was not upheld and the document was tabled in the Assembly.[144]

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140 Mr Mason drew on the majority in *Egan v Chadwick* (1999) 46 NSWLR 563 as well as *Commonwealth v Northern Territory Land Council* (1993) 176 CLR 604 in drawing this distinction.

141 The Hon Keith Mason AC QC, *Report of the Independent Legal Arbiter RE AECOM Infrastructure Report*, p 2, tabled 3 August 2017; MoP, No 22, 3 August 2017, p 319.

142 The Hon Keith Mason AC QC, *Report of the Independent Legal Arbiter RE AECOM Infrastructure Report*, p 2, tabled 3 August 2017; MoP, No 22, 3 August 2017, p 319.

143 The Hon Keith Mason AC QC, *Report of the Independent Legal Arbiter RE AECOM Infrastructure Report*, pp 2, 6, tabled 3 August 2017; MoP, No 22, 3 August 2017, p 319.

144 MoP, No 20, 1 August 2017, p 293.

Public Housing Renewal Steering Committee agenda papers

2.145. On 7 June 2017, the Assembly ordered the production of seven agenda documents associated with meetings of the Public Housing Renewal Steering Committee. The government had tasked the steering committee with preparing 'recommendations in relation to public housing redevelopments beginning with, but not limited to, the redevelopment of sites on Northbourne Avenue'.[145] On 21 June 2017, the Chief Minister made a claim of executive privilege in relation to the production of the documents, which a member of the opposition disputed on 26 June 2017.

2.146. The Speaker appointed former ACT Supreme Court Justice the Hon Richard Refshauge SC as independent legal arbiter on 26 June 2017.

2.147. Both the Chief Minister and the relevant member of the opposition provided detailed submissions to the arbiter outlining the cases for and against the validity of a claim for executive privilege in relation to the documents. Mr Refshauge undertook a balancing exercise in his report, exploring a range of considerations, including whether the documents in question attracted immunity on the grounds that they were cabinet documents (a 'class of documents' claim); whether or not the documents revealed the deliberations of cabinet; the risk that disclosure may result in public servants being unable to furnish frank and fearless advice; and the general public interest in the matters the subject of the documents.

2.148. Mr Refshauge ultimately upheld the claim of executive privilege made by the Chief Minister, noting that:

> The disclosure and transparency of government activity is a vitally important value underpinning responsible government. Nevertheless, there is a proper place for executive privilege and, on occasion, it, too, should be respected.[146]

2.149. The documents were returned to the Chief Minister's directorate.

Icon Water contracts with ActewAGL

2.150. On 23 August 2018, the Assembly ordered, on a motion moved by the opposition leader, the tabling of Icon Water contracts with ActewAGL (the Corporate Services Agreement and the Customer Services and Community Support Agreement).[147]

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145 The Hon Richard Refshauge SC, *Report of the Independent Arbiter Public Housing Renewal Steering Committee Agenda Papers*, tabled on 3 August 2017, p 4; MoP, No 22, 3 August 2017, p 319.

146 The Hon Richard Refshauge SC, *Report of the Independent Arbiter Public Housing Renewal Steering Committee Agenda Papers*, tabled on 3 August 2017, p 19; MoP, No 22, 3 August 2017, p 319.

147 MoP, No 70, 23 August 2018, p 977.

2.151. On 20 September 2018, the Manager of Government Business told the Assembly that he had been advised that the ACT Executive did not have possession of the relevant documents and was, therefore, unable to comply with the order. A subsequent motion was moved by the Manager of Government Business noting that Icon Water is a registered company under the *Corporations Act 2001* (Cth) and is also subject to the *Territory Owned Corporations Act 1990* and that the documents in question were not 'created by the Executive, owned by the Executive or held by the Executive'.[148]

2.152. The motion sought to recognise that standing order 213A did not contemplate circumstances where the Assembly would seek information or documents from persons or entities that are not part of executive government. It called on the Assembly to direct Icon Water to produce the documents and for the adoption of a process for evaluating any subsequent public interest immunity claim in a manner similar to that provided for in standing order 213A. The motion was passed by the Assembly.[149]

2.153. On 4 October 2018, the documents were provided to the Clerk in accordance with the resolution of 20 September 2018 and the arbiter considered the claims and counterclaims.

2.154. In his report, having undertaken a balancing exercise, Mr Refshauge upheld the claim of public interest immunity in respect of large sections of the subject contracts, determining that where there was information that was commercial-in-confidence, it should not be disclosed.[150]

2.155. However, he expressed a concern that:

> … the 'precise claims for immunity made … seem more widely drawn than can be justified as truly claims of commercial-in-confidence'… In particular, some of the specific clauses for which immunity is claimed seem to me to be nothing more than the kind of clauses that would be found in any such commercial contract, especially where there are no time periods, or other matters that would make the term special or likely to affects costs in the contracts substantially or in a way special to the contract. In the absence of any specific claim or explanation by Icon Water, I see no reason to uphold the claim of immunity for these clauses.[151]

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148 MoP, No 73, 20 September 2018, p 1029.

149 MoP, No 73, 20 September 2018, p 1031.

150 The Hon Richard Refshauge SC, *Report of the Independent Arbiter – Icon Water Contracts with ActewAGL – Disputed Claim of Privilege*, paragraph 93, tabled on 27 November 2018. As noted below in this chapter, commercial-in-confidence claims have not generally been accepted as proper grounds for the refusal, by executive government, for the production of information to the parliament.

151 The Hon Richard Refshauge SC (2018), *Report of the Independent Arbiter – Icon Water Contracts with ActewAGL – Disputed Claim of Privilege*, paragraphs 94-95, tabled on 27 November 2018.

2.156. Accordingly, Mr Refshauge determined that a number of clauses—schedules in both the Customer Services and Community Support Agreement and the Corporate Services Agreement—were not subject to an immunity from production[152] and those sections of the contracts were made available to members.

SPIRE Project[153]

2.157. In the Ninth Assembly, the Assembly ordered the tabling of 'the options paper for the SPIRE Project discussed by officers of Major Projects Canberra and Canberra Health Services in November 2019 and referred to in the public release of documents under the Freedom of Information Act'.[154] The SPIRE Project related to a major government infrastructure initiative to upgrade a range of facilities at The Canberra Hospital.

2.158. An independent legal arbiter was appointed to determine the claim. However, immediately prior to the arbiter's report being made available, the government wrote to the Clerk advising that cabinet had considered the matter and decided to make the paper available via a government website.[155] The arbiter's report was presented in the Assembly on 2 April 2020, upholding the claim of public interest immunity.[156]

Procedure for making claims of public interest immunity in committee proceedings

2.159. Committees also have the power to call for papers and require answers to questions. Assembly committees generally negotiate with the executive to gain access to material. Documents may be received in confidence and evidence taken in camera if claims of confidentiality are contested. If a committee requires the presentation of evidence and the request is denied on grounds that the committee considers to be insufficient, the committee may report the matter to the Assembly and ask that its request be reinforced by an order of the Assembly. To date, this has not happened. However, on one occasion a minister refused to answer questions in a committee hearing, and the committee reported this to the Assembly as a possible contempt. This matter was later investigated by a privileges committee.[157]

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152 The Hon Richard Refshauge SC (2018), *Report of the Independent Arbiter – Icon Water Contracts with ActewAGL – Disputed Claim of Privilege*, paragraph 96, tabled on 27 November 2018.

153 A government project to deliver major health infrastructure through a Surgical Procedures, Interventional Radiology and Emergency Centre.

154 MoP, No 124, 12 February 2020, p 1849.

155 Correspondence to the Clerk, 16 March 2020.

156 MoP, No 129, 2 April 2020, p 1920.

157 Select Committee on Estimates, *Appropriation Bill 2003-2004, Report No 1* (June 2003). The minister declined to provide information to the committee though he acknowledged that the information was available: 'the government will make decisions when it announces and releases things'. The committee asked the Assembly to consider whether the minister's refusal should be referred to a privileges committee (p 19). The Select Committee on Privileges subsequently made a finding of contempt

2.160. In May 2010, the Select Committee on Privileges recommended that the Assembly adopt a resolution clarifying its position in relation to 'claims of immunity from answering questions or providing documents made by witnesses, stating that claims of immunity must be made by ministers or the appropriate senior officer of other public agencies and territory owned corporations …' The committee recommended that such claims must be accompanied by 'details of the harm that might be caused by providing the information'.[158] In response to the recommendation, the Assembly passed a continuing resolution on 30 June 2011, which provides 'Ministers and public officials with guidance as to the proper process for raising public interest immunity claims in the course of a proceeding of a committee'.[159] The procedure is summarised as follows.

- If a committee requests information from a directorate, agency or Territory-owned corporation and the officer of the organisation believes that it may not be in the public interest to disclose the information or document to the committee, the officer is to be given a reasonable opportunity to refer the request to a superior officer or to a minister.
- If a minister concludes that it would not be in the public interest to disclose the information or document, the minister shall provide the committee with grounds for the conclusion, specifying the harm to the public interest that could arise were the information disclosed.
- A minister is to indicate whether the public interest would be harmed only if the information or document was published or whether it would equally or in part be harmed if provided as confidential evidence.
- If the committee concludes that the statement does not sufficiently justify withholding the information from the committee, the committee is to report the matter to the Assembly.[160]

Other claims

2.161. There are a range of other claims that have been advanced to resist requests for evidence or documents by the Assembly or its committees. Claims in relation to

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against the minister but recommended that no further action be taken: Select Committee on Privileges, *Minister's refusal to answer questions in a committee hearing*, November 2003. The Assembly noted the report and agreed to a resolution expressing 'grave concern in the Minister' for having been found to be in contempt by the committee. MoP, No 78, 18 November 2003, pp 995-996. The minister apologised to the Assembly and the committee; Assembly Debates, 18 November 2003 pp 4166 and 4172-4173.

158 See Select Committee on Privileges, *Evidence of Mr Mark Sullivan to the Select Committee on Estimates 2009-10*, May 2010, p v.

159 Continuing resolution 8B was established in response to a recommendation of the Select Committee on Privileges 2010 that 'the Legislative Assembly adopt a resolution clarifying its position with regard to claims of immunity from answering questions or providing documents made by witnesses, stating that claims of immunity must be made by ministers or the appropriate senior officer of other public agencies and territory owned corporations and that details of the harm that might be caused by providing the information must be included in the claim,' Select Committee on Privileges, *Evidence of Mr Mark Sullivan to the Select Committee on Estimates 2009-10*, May 2010, p v.

160 Continuing resolution 8B.

'commercial in confidence' or legal professional privilege have been two of the more common.

2.162. A claim of commercial-in-confidence is sometimes made on the basis of an explicit confidentiality clause in a document or on a general principle—for example, details of tenders submitted in pursuit of a contract or the final contract should remain confidential, at least until the tendering process is finalised.[161] However, the obligations of public accountability cannot be overridden by confidentiality clauses in a contract. Given the proliferation of public-private partnership arrangements for the construction and operation of infrastructure and the delivery of services, it is vital that the public interest in disclosure be upheld over claims of commercial confidentiality.

2.163. Similarly, moving public activities outside the constraints of the directorate structure while retaining full or part public ownership, such as the use of statutory authorities and government business enterprises, should not diminish public accountability. The general principle that should be applied is that where expenditure of public funds is involved, irrespective of the mechanism used, the executive is responsible to the legislature to provide information on that expenditure.

2.164. Legal professional privilege seeks to protect the communication between a legal practitioner and a client and is in a sense comparable to claims of privilege for advice tendered to ministers by their public servants. In both cases it is argued that the ability to give 'frank and fearless' advice will be inhibited if there is an apprehension that the advice will be subject to public scrutiny. In practice, parliament may treat these claims in exactly the same way that it treats claims of public interest immunity.

2.165. Another ground that has been advanced to resist parliamentary requests for information is that an FOI request for the same information has been, or could be, refused under freedom of information legislation. This has not been accepted as being a legitimate basis upon which to resist production.[162] In the absence of an express legislative provision, a general exemption from production in certain statutory contexts does nothing to alter or diminish the Assembly's inquiry powers.

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161 The Senate has a long history of conflict with the executive over the provision of information. See *Odgers',* pp 662-670. With regard to claims of commercial confidentiality for government contracts, in 2001 the Senate adopted a continuing order requiring all government contracts to the value of $100,000 or more to be published on the internet with statements of reasons for any confidentiality clauses or claims. In the ACT, s 39(1)(a) of the *Government Procurement Act 2007* provides that the responsible territory entity for a reportable contract must give the relevant Legislative Assembly committee a list of reportable contracts that became notifiable contracts and those that had confidential text changed during the relevant period. Further, s 39(5) of that Act provides that the entity 'must, if asked by the committee, give the committee the information the committee requires about the decision to agree to the inclusion of confidential text in the contract'.

162 See, for example, *Odgers',* p 669.

Power to summons witnesses

2.166. The power of the Assembly and its committees to summons witnesses is derived from the Assembly's underlying power of inquiry. Standing order 255 provides that 'Witnesses, not being Members, may be ordered to attend before the Assembly by summons under the hand of the Clerk of the Assembly, or before a committee of the Assembly under the hand of the secretary to the committee'. However, the power to issue a summons has rarely been used: the Assembly has never issued a summons for a witness to appear before it, and, to date, there have only been two occasions when a committee has issued a summons.[163]

2.167. More information on the use of the power of Assembly committees to summons a witness is explored in Chapter 17: Committees and Chapter 18: Witnesses.

Right to administer oaths to witnesses

2.168. The Houses of the Commonwealth Parliament, as a result of s 49 of the Commonwealth Constitution, have the right to take evidence under oath from witnesses appearing before either the Houses themselves or committees. However, neither House has a requirement in its standing orders that witnesses be heard under oath. The practice of administering oaths to witnesses, common in the 1970s and early 1980s, is a matter for individual committees and has largely fallen into disuse in the Commonwealth Parliament.[164] As *Odgers'* states, 'The swearing in of a witness has no effect on the witness's obligation to provide truthful answers'.[165]

2.169. As the practice of swearing in witnesses was in decline at the time of the granting of self-government to the ACT, it was never adopted by the Legislative Assembly. Assembly committees have used various formal opening statements, read at the commencement of hearings, explaining witnesses' rights and responsibilities, including a reminder of their obligation to tell the truth and that failure to do so may be punishable as a contempt of the Assembly.[166]

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163 Standing Committee on Justice and Community Safety, *Inquiry into the delay in the commencement of operations at the Alexander Maconochie Centre*, November 2005, p 5. Standing Committee on Public Accounts, *Tender for the Sale of Block 30 Dickson,* Report No 11, May 2020, p 124.

164 However, the Parliamentary Privilege Resolution agreed to by the Senate on 25 February 1988 provides, at paragraph 2(6), that 'Witnesses shall be heard by the [privileges] committee on oath or affirmation', reflecting a view that the privileges committee has a quasi-judicial function. See *Odgers',* p 572.

165 *Odgers'*, p 571.

166 It has been the practice that, prior to a witness giving evidence before an Assembly committee, the chair will ask witnesses if they have read and understood the 'Privilege Statement', which is made available to witnesses prior to their appearance at a hearing. The statement advises, among other things, that 'Witnesses must tell the truth: giving false or misleading evidence will be treated as a serious matter and may be considered a contempt of the Assembly'. For an example, see Standing Committee on Economy and Gender and Economic Equality, *Inquiry into annual and financial reports 2019-2020 and ACT budget 2020-2021*, Transcript of Evidence, Canberra, 22 February 2021, pp ii and 2.

Power to punish contempts

2.170. The Assembly has the power to punish breaches of privilege or contempts. The power of parliaments to punish contempts is longstanding and comparable to the powers of courts to find a person in contempt. Seeking to both discourage and punish improper interference in the functions of the parliament and its members is at the heart of the contempt power. Standing order 277(a) states that 'A person shall not improperly interfere with the free exercise by the Assembly or a committee of its authority, or with the free performance by a Member of the Member's duties'.[167]

2.171. *May* describes contempt of parliament in the following terms:

> Generally speaking, any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any Member or office of such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results may be treated as a contempt even though there is no precedent of the offence. It is therefore impossible to list every act which might be considered to amount to a contempt, the power to punish for such an offence being of its nature discretionary.

2.172. The following is a summary of matters that constitute a contempt as outlined in standing order 277:

- improper influence of a member;
- members seeking benefits;
- interference with members[168]—'A person shall not inflict any punishment, penalty or injury upon, or deprive of any benefit, on a member on account of the member's conduct as a member';
- disturbance of the Assembly;
- service of writs—'A person shall not serve or execute any criminal or civil process in the precincts of the Assembly on a day on which the Assembly meets except with the consent of the Assembly or of a person authorised by the Assembly to give such consent';
- false reports of proceedings;
- disobedience of orders—'A person shall not, without reasonably excuse, disobey a lawful order of the Assembly or of a committee';

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167 Assembly standing order 277(a) replicates much the same language as s 4 of the Parliamentary Privileges Act, which codifies the essential elements of offences against the Houses.

168 The standing orders were amended in the Tenth Assembly to remove references to contempts relating to the 'Molestation of Members' and 'Molestation of witnesses' and replacing such references to 'Interference with Members' and 'Interference with witnesses'.

- obstruction of orders—'A person shall not interfere with or obstruct another person who is carrying out a lawful order of the Assembly or of a committee';
- interference with witnesses—'A person shall not, by fraud, intimidation, force or threat of any kind, by the offer or promise of any inducement or benefit of any kind, or by other improper means, influence another person in respect of any evidence given or to be given before the Assembly or a committee, or induce another person to refrain from giving such evidence … [and] a person shall not inflict any penalty or injury upon, or deprive of any benefit, another person on account of any evidence given or to be given before the Assembly or a committee';
- offences by witnesses—'A witness shall not, without reasonable excuse, refuse to make an oath or affirmation or give some undertaking to tell the truth when required to do so … without reasonable excuse, refuse to answer any relevant question put to the witness when required to do so … or give any evidence which the witness knows to be false or misleading';
- refusal or failure to attend or to produce document—'A person shall not, without reasonable excuse … fail to attend before the Assembly or a committee when ordered to do so or … refuse or fail to produce documents, or to allow the inspection of documents, in accordance with an order of the Assembly or of a committee';
- wilfully avoiding service of an order of the Assembly or a committee;
- destroying, damaging, forging or falsifying any document required to be produced by the Assembly or a committee; and
- unauthorised disclosure of evidence.[169]

2.173. Many matters that are breaches of privilege of the Assembly are also crimes under statute law. For example, an attempt to bribe or intimidate a member of the Assembly is a contempt, but it is also an offence against the *Criminal Code 2002.* For the purposes of Chapter 3 of the Criminal Code, which creates offences for, among other things, abuse of public office (s 359) and dishonestly influencing a public official (s 333), 'public official' is defined to include members, ministers and Assembly staff.

2.174. In view of the limited remedies available to the Assembly, in serious cases of contempt which are also criminal offences, the Speaker may choose to advise the Attorney-General of the details of the matter, with a view to initiating a prosecution.[170]

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169 This is a non-exhaustive list of matters that may give rise to a contempt of the Assembly.

170 *House of Representatives Practice*, p 764, states that 'it would be open to a House to request government law officers to prosecute an alleged offender'. See also *May*, p 231: 'In cases of breach of privilege which are also offences at law, where … the House has thought a proceeding at law necessary, either as a substitute for, or in addition to, its own proceedings, the Attorney-General has been directed to prosecute the offender'.

2.175. Pursuant to standing order 278, the Assembly must take into account the following criteria when determining whether or not a possible contempt should be referred to a privileges committee and whether a contempt has been committed:[171]

(a) the principle that the Assembly's power to adjudge and deal with contempts should be used only where it is necessary to provide reasonable protection for the Assembly and its committees and for members against improper acts tending substantially to obstruct them in the performance of their functions, and should not be used in respect of matters which appear to be of a trivial nature or unworthy of the attention of the Assembly;

(b) the existence of any remedy other than that power for any act which may be held to be a contempt; and

(c) whether a person who committed any act which may be held to be a contempt:

(i) knowingly committed that act, or

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

Storage of Assembly information in the cloud

2.176. In the Ninth Assembly, a resolution was passed authorising the storage and processing of Assembly information, including information 'captured by standing order 277(p)' (relating to possible contempts associated with the unauthorised disclosure of evidence) by a cloud service provider.[172] The resolution was passed to recognise and authorise the migration of Assembly information to cloud storage services by the Assembly's ICT service provider.

2.177. Continuing resolution 1A requires that where there is a lawful request for the disclosure of the Assembly's information by the provider:

(a) the Clerk will be notified by the Territory's information and communications technology agency (the agency) of any warrant or subpoena received by the provider or the agency unless legally prohibited from doing so;

(b) the agency will request the Clerk to authorise any lawful release of Assembly information unless legally prohibited from doing so;

(c) the Clerk will be notified by the agency of any suspected or actual unauthorised access or disclosure of Assembly information managed by the provider or the agency; and

(d) the Clerk will be notified by the agency of any significant changes to the Assembly's data storage, including hosting arrangements.

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171 A privileges committee is also required to take these criteria into account in considering the matters.

172 MoP, No 79, 1 November 2018, pp 1118-1119.

Conduct of privilege inquiries

2.178. As noted, the Assembly has the power to determine and, if necessary, punish actions which constitute breaches of members' privileges, or contempt of the Assembly. With the passage of time, Australian legislatures, while still jealously guarding their privileges, have become more circumspect in pursuing matters of contempt. It is generally accepted that the dignity of a legislature is better served by this approach than by the aggressive pursuit of possible contempts.

2.179. Speakers of the Assembly have followed the example of the Commonwealth Parliament in their reluctance to invoke privilege or contempt procedures unless it has been considered imperative to do so to protect the Assembly, its members and its committees.[173] Speakers have made various alternative suggestions to ensure that the Assembly operates successfully, including dealing with an issue by way of an apology[174] and reminding members of the need to adhere to the rules and standing orders of the Assembly; that fair and proper processes are followed; and that confidentiality is maintained.[175]

2.180. On one occasion, there was a question about whether a minister had offered a member a position on a proposed select committee in return for her vote to secure a government chair on the committee. The Speaker reminded members that, in coming to a decision as to whether a matter merited precedence, he had to distinguish between the ordinary cut and thrust of political life in a legislature and attempts to influence members improperly in the way that they perform their duties.[176]

2.181. The Assembly has also considered the possible consequences of acting in defence of its privileges and community attitudes on the use of the legislature's powers. On one occasion, a committee inquiring into a possible breach of privilege declined to call departmental officers to give evidence even though there was a high probability that the officials could have thrown some light on the matter under investigation. The committee commented that:

> Whilst it felt it had a legitimate right to obtain this information, that right had to be balanced against the possibility that the Committee's inquiry could be viewed as a witch hunt and if successful could damage careers ...[177]

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173 Assembly Debates, 12 September 1990, p 3160.

174 Assembly Debates, 18 September 1991, pp 3462-3465. The member who was the subject of a complaint made a statement by leave, as did the member who raised the matter, and the Speaker considered the issue resolved.

175 Assembly Debates, 16 February 1999, pp 152-153.

176 Assembly Debates, 7 April 2005, p 1485.

177 Standing Committee on Administration and Procedures, *Report on the Government Response to the Report of the Select Committee on Estimates 1993-94 on the Appropriation Bill 1993-94,* April 1994, paragraph 28.

2.182. This measured approach to considering questions of privilege is reflected in the number of matters that have lapsed after an explanation has been offered by the relevant member, or the matter has been thoroughly debated. Nonetheless, privileges committees have, at various times, recommended that contempt findings be made in relation to MLAs, public servants, and a staff member of an MLA.[178]

2.183. Matters of privilege and, more particularly, contempt still arise and have to be examined by the Legislative Assembly. Standing order 276 provides that:

> Upon a matter of privilege arising:
>
> (a) a Member shall give written notice of the alleged breach to the Speaker as soon as reasonably practicable after the matter has come to the Member's attention;
>
> (b) if the matter arises from a statement published in a newspaper, book or other publication, the Member is required to provide the Speaker with a copy of the newspaper, book or publication …[179]

2.184. It is then the Speaker's responsibility to determine if the matter merits precedence.[180] If the Speaker so decides, the matter is given priority over all other business of the Assembly and the member who raised it is given the opportunity to move a motion to refer it to a select committee for examination and report. Should the Speaker grant precedence, the member who raised the matter is not obliged to move a motion of referral, and on occasion, motions have not been moved. It is not uncommon for a matter to have been resolved between the giving of written notice to the Speaker and the Speaker making a decision.[181] In March 2008, the

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178 Appendix 14 summarises the 42 matters of privilege that have been raised in the Assembly to the end of the Ninth Assembly. Twenty-two were found by the Speaker to merit precedence; after debate no further action was taken on twelve of those matters, while five were referred to privilege inquiries. Sixteen matters were adjudged by the Speaker not to merit precedence, though one was nevertheless referred back to the standing committee where the issue originated, and one was referred to the Standing Committee on Administration and Procedure. In three cases, a member moved for the establishment of a Select Committee on Privileges without reference to the procedures set out in standing order 276 (in each case, the motion was negatived).

179 Standing order 276.

180 Two members have given separate notices concerning the same matter. The notices being similar, the Speaker considered them together. See Assembly Debates, 17 October 1990, pp 3735-3737. Standing order 81A requires that a notice of motion proposing the establishment of a privileges committee shall be provided to the Speaker for circulation to all members 90 minutes prior to the time at which the motion is proposed to be moved.

181 For example, see Assembly Debates, 13 February 1990, pp 17-18. The matter related to the premature release of a committee report. The member who raised the matter (the presiding member of the committee) advised that he had consulted with his colleagues on the committee and formed the view that no major damage was done nor was the committee's performance unduly affected (see Assembly Debates, 17 October 1990, pp 3735-3737 and Assembly Debates, 18 September 1991, pp 3462-3465). In these cases, the Speaker suggested the matter could best be dealt with by way of an apology; see also Assembly Debates, 17 May 1994, pp 1549-1552 and Assembly Debates, 19 May 1994, pp 1769-1770. The matters concerned submissions made to a board of inquiry inviting the board to have regard to debates in the Assembly. In advising the Assembly on each occasion, the Speaker stated that she would be alerting the board to her statements: see also Assembly Debates 25 September 1997, pp 3329-3330. The

Assembly adopted new standing orders 277, 278 and 279. They set out what constitutes a contempt and the criteria the Speaker will use to determine if a matter merits precedence. The Assembly also adopted new standing order 280 establishing procedures for the protection of witnesses before a privileges committee.

2.185. In the early years of the Assembly, privilege matters were referred to the Standing Committee on Administration and Procedures (as it was then called). However, this proved unsatisfactory as on occasion members of the committee were themselves the subject of complaints about possible contempt. In 1995, the standing orders were amended to create the current process: investigations are now undertaken by select committees on privileges rather than by the standing committee. This ensures that the Assembly is able to appoint members to the committee who are not involved in the matter under examination.

2.186. While privilege matters have generally been raised using the procedures set out in former standing order 71,[182] it is open to the Assembly to establish a privileges inquiry directly by motion. In 2002, it came to light that a minister's emails were being interfered with, and an inquiry was undertaken by the police.[183] At the completion of the inquiry, the Director of Public Prosecutions advised that no criminal charges would be laid.

2.187. The minister affected by the interference then moved a motion to establish a select committee on privileges to examine the matter, 'notwithstanding the provisions of standing order 71'. In moving the motion, the minister noted that:

> It has been explained to me there is no[thing] … in the statutes that would allow a criminal charge to be undertaken. That brings the matter back into this Assembly, because I think it is pretty clear that an offence has been committed – not just to me but to the whole Assembly.[184]

2.188. The motion was debated at length and passed. It is a useful reminder that contempt of the Assembly is separate from offences under the ordinary criminal law.

2.189. If the Speaker decides that a matter does not merit precedence, they must inform the member who raised the issue, in writing, of this decision. The Speaker may also advise the Assembly of the decision, and this has generally occurred. On one occasion after the Speaker informed the Assembly that a matter did not merit precedence, the Assembly granted leave to a member to move a motion to refer

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member who raised the matter stated that he would not be moving a motion as the member complained of was not present to defend himself. He was absent on Assembly business: see also Assembly Debates, 9 August 2001, pp 2828-2836.

182 New standing order 276.

183 Information technology services in the Legislative Assembly (and ministers' offices) are provided by a service provider operating under the executive arm of government. The breach of the email system was reported to the service provider, who took the view that it was matter for a police inquiry. Acting on this advice and with the concurrence of the minister whose email was affected, the Clerk of the Assembly called in the police to investigate.

184 Assembly Debates, 6 June 2002, p 2012. For the debate on the motion, see pp 2011-2014 and 2049-2062.

the matter to the Standing Committee on Administration and Procedures.[185] On a later occasion, a motion proposing the appointment of a select committee to examine a matter was moved pursuant to notice.[186]

2.190. Many possible contempt issues arise in committees, particularly with regard to the release of confidential material, including draft reports. Before invoking privilege procedures, House of Representatives practice is to ask a committee, in the first instance, to examine whether the matter complained of has had a substantial impact on its work. This can be seen as a further demonstration of that House's desire to avoid invoking privilege in a heavy-handed way.[187]

2.191. The Standing Committee on Administration and Procedures recommended the formal adoption of such a practice, based on House of Commons and House of Representatives precedents.[188] However, consideration of that report was adjourned and the matter lapsed at the expiration of the Second Assembly. The standing orders were later amended[189] to adopt the practice whereby committees themselves consider the extent to which an unauthorised disclosure of its proceedings or documents has the tendency to substantially interfere with the work of the committee or the Assembly, or actually caused substantial interference. Where a committee concludes that a potential or actual interference has occurred, it may be raised with the Speaker in accordance with standing order 276.

Proceedings in committee

2.192. When considering matters referred to them, select committees on privileges are governed by the same standing orders as committees generally, and they must have regard to any specific terms in their resolutions of appointment. Privileges committees usually inquire into the behaviour of a person or persons. They have the capacity to make findings and to recommend the imposition of penalties that may have an adverse effect on the individuals concerned, and as a result must

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185 Assembly Debates, 12 September 1990, pp 3159-3164. The motion was negatived. An earlier motion in similar terms had been considered and negatived (see Assembly Debates, 16 August 1990, pp 3018-3022).

186 The motion (alleging improper influence of a witness in respect of evidence to be given to a standing committee) was agreed to (Assembly Debates, 25 May 2000, pp 1776-1794 and 1834-1847). However, the resolution on the referral was later rescinded and the original motion was amended to refer the matter to the committee in question (Assembly Debates, 25 May 2000-26 May 2000, pp 1897-1924).

187 A motion to appoint a Select Committee on Privileges to examine a matter that had arisen in a committee was agreed to after debate (MoP, No 91, 25 and 26 May 2000, pp 879-880 and 882-883; Assembly Debates, 25 May 2000, pp 1776-1794 and 1834-1846). Later, the motion was rescinded and reconsidered. The Assembly resolved that the Standing Committee on Planning and Urban Services should inquire into matter (MoP, No 91, 25 and 26 May 2000, pp 891-893).

188 Standing Committee on Administration and Procedures, *Report on Article in the Canberra Times dated 12 November 1993 concerning the Draft Report of the Select Committee on Estimates 1993-94*, 16 December 1993, paragraph 28, recommendation 2.

189 Standing order 242 now provides that 'the committee concerned should come to a conclusion as to whether the disclosure had a tendency to interfere substantially with the work of the committee or the Assembly, or actually caused substantial inteference'.

ensure that their proceedings are conducted with a maximum of procedural fairness.[190]

Penalties for contempt

2.193. A select committee on privileges may form the view that a contempt of the Assembly has occurred in a given matter. The committees may also recommend penalties. The Select Committee on Privileges inquiry into the unauthorised diversion and receipt of a member's emails[191] made a finding of contempt and recommended that the person involved be required to make a 'prompt and unreserved apology' to the Assembly. Between the tabling of the report and completion of debate on it, that person resigned his position as an adviser to a Member of the Legislative Assembly. The Assembly did not pursue the matter of the apology.

2.194. The general tendency of Assembly privileges committees has been to avoid recommending the imposition of penalties, even where they have made findings of contempt. For example, a committee inquiring into the conduct of estimates committee hearings[192] made findings of contempt against a minister for refusing to answer questions in the hearing while releasing the relevant material publicly shortly thereafter. The committee also made an adverse finding against two departmental officers. In both cases, the committee accepted that the apologies and, in the case of the officials, departmental disciplinary action were sufficient responses.

2.195. A privileges committee examining the actions of a committee chair[193] made a finding of contempt against that chair. Again, the Assembly imposed no penalty.[194] It is worth quoting the committee's reasons for this, as they embody what has been the attitude of the Assembly to the issue of punishment of contempt:

> [The Chair] has admitted her "'mistake" in confusing her roles in both the committee and the Assembly and did disqualify herself from further involvement in the … [committee's] inquiry.
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> This admission … together with the ordeal of having to undergo this privileges inquiry has prompted this committee to recommend no further action be taken …[195]

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190 See Chapter 17: Committees, under the heading 'Examination of witnesses and witnesses' right to advice'.

191 Select Committee on Privileges, *Unauthorised diversion and receipt of a Member's e-mails*, 13 November 2002.

192 Select Committee on Privileges, *Possible unauthorised dissemination of committee material, standing order 71 (Privilege), Minister's refusal to answer questions in committee hearing and distribution of ACT Health document*, 3 November 2003.

193 Select Committee on Privileges, *Report on whether the actions of the Chair of the Standing Committee on Planning and Environment with regard to the distribution of a flyer in her name at the Belconnen Markets did constitute a contempt of the Assembly,* 19 March 2004.

194 However, the member was subsequently removed as chair by members of the relevant committee.

195 Select Committee on Privileges, *Report on whether the actions of the Chair of the Standing Committee on*

2.196. These recommendations reflect a trend in the Assembly's handling of privileges matters. It is to avoid imposing punitive penalties, particularly where the person in question makes a prompt apology. In part, this reflects an acceptance that most inquiries that result in findings of contempt against individuals indicate that they did not have a clear understanding of the issues involved. There may also be an appreciation on the part of the Assembly that the community would be unlikely to support harsh penalties for what often appear to be obscure or technical breaches.

2.197. Privileges committees are not restricted to the specific issue of breach of privilege or contempt in conducting their investigations. A number of committees have made recommendations or comments on the need for a better understanding of parliamentary privilege and contempt by both members of the Assembly and witnesses, particularly public servants, appearing before Assembly committees. For example, in 1993 a committee investigating the leaking of a committee draft report recommended that:

> … at the new Members seminar conducted at the commencement of each Assembly new Members (and their staff) be advised of their obligations and responsibilities as a member of a committee, with particular regard to the confidentiality of draft reports.[196]

2.198. In response to a later report, *Possible unauthorised dissemination of Committee material*, the government department involved in the matter initiated training for its officers 'on appropriate committee preparation, behaviour and service from the department'. The committee recommended that the Assembly make seminars on this subject a continuing part of training for departmental officers.[197]

2.199. Privilege committees have also made recommendations with regard to other matters that have contributed to the issues that they have considered. For example, the Select Committee on Privileges that investigated the unauthorised diversion and receipt of a member's emails identified the management of the Assembly's information technology services as an important contributing factor to the breach of email security and recommended that they be reviewed. The committee also recommended that the status, rights and obligations of volunteers working in members' offices be clarified and that the code of conduct for members' and ministers' staff be strengthened.

2.200. The range of penalties that the Assembly may impose where a finding of contempt is made does have limits. As noted above in this chapter, the Self-Government Act excludes the imposition of fines or custodial sentences (s 24(4)). The most

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Planning and Environment with regard to the distribution of a flyer in her name at the Belconnen Markets did constitute a contempt of the Assembly, March 2004, p 15.

196 Standing Committee on Administration and Procedures, *Report on article in the Canberra Times dated 12 November 1993 concerning the Draft Report of the Select Committee on Estimates 1993-94*, 16 December 1993, p 6.

197 Select Committee on Privileges, *Possible unauthorised dissemination of committee material, standing order 71 (Privilege), Minister's refusal to answer questions in committee hearing and distribution of ACT Health document*, 3 November 2003, pp 12-13.

serious penalty that can be imposed on a member is suspension from the service of the Assembly.[198] The Assembly could ban a person, including a member, from the precincts of the Assembly. This would be a serious punishment in the case of members' staff or public servants whose responsibilities require regular access to the executive or the Assembly and its committees.

2.201. When considering the appropriate penalty to apply, the committee examining the unauthorised diversion of a member's emails was aware that to exclude a staff member from the Assembly precincts would make it extremely difficult for the person to continue in their position. Indeed, the committee was aware that the practical impact of a finding of contempt against an MLA's staff member would be severe, irrespective of any additional penalty imposed:

> In view of the adverse effect that this finding of contempt will have on [the person's] professional reputation the committee makes no further recommendation for the imposition of a penalty …[199]

Proceedings following reports of privileges committees

2.202. The Assembly has a number of options when a committee report is tabled. The current practice is to move that the Assembly 'note' a committee report.[200] This allows the report to be debated. It does not imply support for the findings or recommendations of the report or require any action on the part of the Assembly or any other party.[201]

2.203. In the case of a privileges committee report which recommends that penalties be imposed, a motion to take note of the report would be insufficient to ensure that any further action was taken. A person against whom a penalty was recommended might, with justice, argue that the Assembly had reached no decision on either the substance of the contempt or the merit of the penalty[202] and, until it did so, decline to respond to the committee report. Where the Assembly wishes to ensure that the committee's recommendations are implemented, a motion 'That the report be

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198 As a consequence of s 8 of the Parliamentary Privileges Act, the Assembly cannot expel a member. Were the Assembly to suspend a member for an extended period or for the duration of the Assembly, it would be open to that member to invoke s 8 and invite a court to decide whether the suspension was de facto expulsion and therefore beyond the Assembly's power.

199 Select Committee on Privileges, *Unauthorised diversion and receipt of a Member's e-mails,* 13 November 2002, p 27.

200 Standing order 254 provides four options when presenting a committee report: that the report be noted, that the recommendations be adopted, that the report be adopted or that consideration of the report be made an order of the day for the next sitting (when a specific motion without notice in connection therewith may be moved). See Chapter 17: Committees.

201 Where committee reports make recommendations with regard to the ACT Executive, standing order 254B requires a response within four months (except in the case of responses to reports of the Assembly's scrutiny committee).

202 There is no requirement on the Assembly to agree with the findings of a committee. In the Strauss case in Britain, the House of Commons declined to accept the conclusion of its privileges committee that a member's correspondence with a minister constituted a proceeding in parliament.

adopted' or a specific motion either 'That the recommendation be adopted'[203] or 'That [person or persons 'x'] be required to apologise to the Assembly' would be required.

2.204. In 1993, two related matters arising from the Select Committee on Estimates were referred to the Standing Committee on Administration and Procedure as potential breaches of privilege. The committee produced a report in response to each reference. Neither report made a finding against any named person and both reports recommended administrative action on the part of the Assembly and the executive. The motion with regard to the first report was that it be adopted, whereas the motion relating to the second was merely that it be noted. The records do not reveal any reason for these different approaches.

2.205. In the case of the second report, the executive did in fact respond to the recommendations relevant to it, but this was in line with standard executive practice to respond to all relevant committee reports. It was not a response to any demand from the Assembly.

2.206. As noted above, the Assembly rarely imposes penalties. In the only recent case where one has done so, the matter was resolved by the resignation of the person in question.[204] Thus, the question of enforcing a penalty has not arisen. Were an individual to decline to accept the penalty imposed, the Assembly would have to consider further action, such as bringing the person before the bar of the chamber.

2.207. In practice, serious offences against the Assembly, its members and committees that may involve penalties beyond admonishment or apology are likely to be dealt with by the ordinary law. Intimidation or corruption of members, witnesses or Assembly staff and serious disruption of the Assembly's proceedings[205] could all constitute criminal offences.

2.208. Advice from the ACT Government Solicitor on the application of the Parliamentary Privileges Act argues that only those parts of the Act 'which may properly be described as declaratory of the "powers, privileges and immunities of the House of Representatives and its committees and Members"' would apply to the Assembly'. Sections which 'relate to enforcement or administrative detail' would not apply. Thus, for example, ss 12 and 13 of the Act, which create

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203 For example, in 2019 the Standing Committee on Administration and Procedure recommended amending a number of standing orders and the committee provided amended texts. The motion before the Assembly, that the report be adopted, was put and passed and as a result the relevant standing orders were amended; MoP, No 110, 22 August 2019, p 1620.

204 Select Committee on Privileges, *Unauthorised diversion and receipt of a Member's e-mails,* 13 November 2002.

205 For example, the Precincts Act and the *Crimes Act 1900*, s 154. The former Act applies to the Assembly precincts and provides extensive authority for the removal of persons from the Assembly precincts. Section 154 creates offences of obstruction, behaving in an offensive or disorderly manner and refusal to leave premises when requested to do so. The *Criminal Code 2002,* Chapter 3, includes members, ministers and Assembly staff within its definition of 'public official' and includes offences relating to abuse of public office and intention to dishonestly influence a public official.

offences in relation to interference with witnesses and unauthorised publication of documents would not, on this view, apply to the Assembly. However, it is open to the Assembly to legislate to make provision for similar penalties in the ACT.

Records of privileges committees

2.209. After a select committee has reported to the Assembly and disbanded, all of its records pass into the custody of the Clerk of the Legislative Assembly. This is also the case for select committees that inquire into privilege matters.

Abrogation of privilege

2.210. Where parliament wishes to abrogate its privileges, it must do so through express statutory provision. *New South Wales Legislative Council Practice* states that:

> It is a well-established principle that parliamentary privilege is not affected by a statutory provision except by express words. The principle was judicially recognised by the House of Lords in Duke of Newcastle v Morris in 1870, in which Lord Hatherley observed that privilege could not be destroyed 'unless there was some special clause in the Act striking at and distinctly abolishing it'. In 2002, McPherson JA of the Queensland Supreme Court affirmed 'the general interpretive rule that express words (or, as would probably now be said, unmistakable and unambiguous language) are required to abrogate a parliamentary privilege'.[206]

2.211. In a similar vein, *Odgers'* quotes, with approval, the joint 1985 opinion of the then Commonwealth Attorney-General and Solicitor-General:

> Whatever may be the constitutional position, it is clear that parliamentary privilege is considered to be so valuable and essential to the workings of responsible government that express words in a statute are necessary before it may be taken away … In the case of the Parliament of the Commonwealth, s. 49 of the Constitution [which establishes the constitutional basis for the privileges of the Commonwealth Parliament] requires an express declaration.[207]

2.212. Given that s 24(3) of the Self-Government Act confers the same powers and immunities on the Assembly as the House of Representatives until the Assembly makes a law with respect to its powers, privileges and immunities,[208] it is an unremarkable observation that express statutory provision is required to limit or alter their continuing operation.[209]

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206 Lynn Lovelock and John Evans, *New South Wales Legislative Council Practice,* Federation Press, 2008, p 108.

207 *Odgers'* p 69. See also *May*, pp 241-242, 273-274.

208 Self-Government Act, s 24(1)—'powers' includes 'privileges and immunities'.

209 The Assembly has not yet legislated to comprehensively state its powers and immunities and has instead been content to rely on the substantive protections of the Commonwealth Parliamentary Privileges Act. The 2001 committee examining statutory codification of the Assembly's privileges ultimately

2.213. It is also important to point out that the privileges of the Assembly may not be 'waived' by the Assembly other than by enactment. Indeed, *House of Representatives Practice* notes that its Committee of Privileges has expressed the view that 'as a matter of law there is no such thing as a waiver of Parliamentary Privilege'.[210]

2.214. There are two areas where the Assembly has, by statute, legislated to diminish the operation of its privileges.

2.215. The first is in relation to the contempt power of the Assembly which has been by modified by the *Public Interest Disclosure Act 2012*. Section 35(a)(iv) of that Act provides that if a public interest disclosure is made in relation to a Member of the Legislative Assembly, it is not a contempt of the Assembly. The provision operates in such a way as to circumscribe the Assembly's contempt power and proceeds on the basis of the public policy objective that the contempt power ought not to operate as a disincentive for whistleblowers to disclose alleged disclosable conduct on the part of an MLA.

2.216. The second is in relation to the application of privilege to certain documents that might otherwise be regarded as being protected by the freedom of speech immunity. Section 178 of the Integrity Commission Act provides that declarations made by members about their pecuniary interests or other matters (in compliance with the Assembly standing orders) may be used by the Integrity Commission for investigating corrupt conduct and that 'the Legislative Assembly is taken to have waived any parliamentary privilege that may apply to the relevant determination'. This provision is modelled on a similar provision in the *Independent Commission Against Corruption Act 1988* (NSW)[211] and proceeds on the basis that the declarations, even though made pursuant to a resolution of the Assembly, are not inherently connected to 'proceedings in Parliament' in as much as they simply disclose the private interests of a member and their immediate family members.

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recommended that the Assembly not proceed to declare certain of its powers, privileges and immunities, but to retain the immunities provided in the Parliamentary Privileges Act. See Standing Committee on Administration and Procedures, *Legislative Assembly (Privileges) Bill 1988*, Report No 9, 21 August 2001, pp 27-28.

210 *House of Representatives Practice*, p 745.

211 *Independent Commission Against Corruption Act 1988* (NSW), s 122.