International Journal of Legal Information 48.1, 2020, pp. 20–26. © The Author(s) 2020
doi:10.1017/jli.2020.3

Parliamentary Privilege in New South Wales[1]

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Introduction

The law of parliamentary privilege in New South Wales is the sum of certain immunities, rights, and powers enjoyed by the individual Houses of the Parliament of New South Wales, together with their members and committees, as constituent parts of the Legislature. The law is complex. It is liberally interspersed with uncertainty and ambiguity. It is also distinctly different from the law of privilege in other Australian jurisdictions, including the Commonwealth, and also from overseas jurisdictions. It is singular in the degree to which it relies on the common law, without recourse to statutory expression or to the historical privileges of the Houses of Parliament in the United Kingdom. Nevertheless, in some respects, the Parliament of New South Wales has been remarkably successful through the courts, and through its own procedures, in asserting the powers and rights of members under the banner of parliamentary privilege, notably in relation to orders for the production of State papers.

The Basis of Parliamentary Privilege in New South Wales

Parliamentary privilege in New South Wales is complex. It derives from three sources: certain privileges founded on the common law test of necessity (or "reasonable necessity" as it is sometimes known, although nothing appears to turn on the word "reasonable"); certain statutes, notably the *Parliamentary Evidence Act 1901* (NSW); and from the statutory adoption of Article 9 of the English *Bill of Rights 1689*.

The inheritance of parliamentary privilege in New South Wales reflects this complexity. New South Wales was established in 1788 as a British penal colony. It was not until 1823 that it became a full colony under the British statute known as the *New South Wales Act 1823*, and it was not until 1843 that the first partially elected Legislative body, the Legislative Council, was formed.

It is open to interpretation whether British law, including the law of privilege, applied in New South Wales from 1788, 1823 or later. One view is that it was only with the passing of the *Australian Courts Act 1828*, which provided for the application in New South Wales and Van Diemen's Land (now Tasmania) of "all Laws and Statutes in force within the Realm of England at the Time of the passing of this Act … so far as the same can be applied", that British law, including Article 9 of the *Bill of Rights 1689*, clearly applied in the colony.

Regardless, the most significant year for the law of parliamentary privilege in New South Wales is 1856, when New South Wales attained self-government under the *Constitution Act 1855* according to a system of "responsible government." Significantly, however, unlike the constitutions of other Australian colonies adopted at around that time and subsequently, the new constitution of New South Wales did not include an express grant of privilege from the Imperial Parliament in Britain to the Houses of the Parliament of New South Wales, for example one based on the privileges of the House of Commons at a particular date.[3]

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[2] The views in this paper are those of the author and do not necessarily reflect those of the two Houses of the Parliament of New South Wales or their members.

[3] An amendment to the draft Constitution bill to achieve that effect was negatived in the colonial Legislative Council.

As a result, at the advent of responsible government in New South Wales in 1856, the privileges of the Houses of the Parliament of New South Wales fell back on the common law test of "necessity"—that is, that the Houses have such privileges as are necessary for their existence and functions. To this day, "necessity" remains the source of the majority of the powers enjoyed by the Houses of the Parliament of New South Wales.

Necessity as a test of the existence of a privilege had previously been articulated by Lord Denman in the famous English case of *Stockdale v Hansard*[4] in 1839. However, in 1842, in the seminal decision of *Kielley v Carson*,[5] the Judicial Committee of the Privy Council adopted the same test of "necessity" for determining the privileges of local legislatures established in British colonies, such as the Parliament of New South Wales.

In *Kielley v Carson*, the Judicial Committee of the Privy Council established that local legislatures in former British colonies such as the Parliament of New South Wales, had only such powers and immunities as were "necessary to the existence of such a body" and "reasonably necessary for the proper exercise of their functions and duties." As such, at least in the nineteenth century, the privileges of local legislatures were deemed to be significantly more limited in scope than those enjoyed by the British Parliament by virtue of the *lex et consuetudo parliamenti*—the law and custom of Parliament.

Subsequent decisions of the Privy Council following *Kielley v Carson* further established the limits of "necessity." It was held that local legislatures such as the Parliament of New South Wales did not possess powers that are punitive in nature, such as the power to impose fines or to arrest and imprison members or non-members as punishment for contempt. Rather, such local legislatures were deemed to possess protective and self-defensive powers only. Of note in New South Wales was the 1886 decision in *Barton v Taylor*. The case concerned a member of the Legislative Assembly of the New South Wales Parliament who had entered the chamber twice within a week of the House having passed a resolution that he be suspended from its service. The member was removed from the chamber and prevented from re-entering it. In his judgment delivered on behalf of their Lordships, Lord Selborne observed:

> Whatever, in a reasonable sense, is necessary for these purposes, is impliedly granted whenever any such legislative body is established by competent authority. For these purposes, protective and self-defensive powers only, and not punitive, are necessary.[6]

While as indicated the *Constitution Act 1855* did not include an express grant of privilege to the Parliament of New South Wales based on the privileges of the Imperial Parliament, there was nothing in the *Constitution Act 1855* to prevent the Parliament from passing such a law. Indeed, in the first months of "responsible government" after 1856, parliamentary privilege was a matter of constant debate. Between 1856 and 1912, there were six legislative attempts to adopt comprehensive privileges legislation, based on the privileges of the British House of Commons. All failed, primarily due to opposition in the conservative Legislative Council. Ultimately, the only significant legislation adopted by the Parliament of New South Wales with respect to parliamentary privilege was the *Parliamentary Evidence Act 1881*, subsequently replaced in almost identical terms by the *Parliamentary Evidence Act 1901*. These acts were only passed after the Houses and their committees were frustrated in their attempts to compel the attendance of witnesses to give evidence. They implemented provisions to enable the Houses and their committees to send for and examine persons, and punitive powers to punish non-attendance and the giving of false evidence. In modern times, some of the punitive provisions of the *Parliamentary Evidence Act 1901* appear out of keeping with expectations of procedural fairness and natural justice.

Beyond the common law test of "necessity" and the adoption of the Parliamentary Evidence Acts of 1881 and 1901, the third fundamental pillar of parliamentary privilege in New South Wales is the statutory adoption as law in New South Wales of Article 9 of the English *Bill of Rights 1689*. Using modern wording, this famous article declares:

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

Although the reference to "Parliament" in the *Bill of Rights 1689* is of course a reference to the English Parliament, to the extent that it has been adopted and applied in New South Wales, it is interpreted as referring to the Parliament of New South Wales.

[4] (1839) 112 ER 1112 at 1169 per Lord Denman CJ.
[5] (1842) 12 ER 225.
[6] *Barton v Taylor* (1886) 11 AC 197 at 203 per Lord Selborne.

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The equivalent provision to Article 9 in the United States Constitution is the Speech or Debate Clause (Article I, Section 6, Clause 1), which provides that members of both Houses of Congress:

> shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their attendance at the Session of their Respective Houses, and in going to and from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

As noted above, Article 9 likely became law by application in New South Wales in 1828 with the passage of the *Australian Courts Act 1828*. However, at that time, it was of no legal or judicial notice whatsoever, and continued as such for over 150 years. In *Gipps v McElhone*[7] in 1881, a defamation case concerning a member of the New South Wales Legislative Assembly, the privilege of freedom of speech was found to be based on "necessity," without any reference to Article 9. Windeyer, J., stated: "This privilege is based not on *lex et consuetudo* of Parliament, but upon necessity."[8]

In 1971, the *Australian Courts Act 1828* was replaced by the *Imperial Acts Application Act 1969*, which continued Article 9 in force in New South Wales by virtue of section 6 and schedule 2. Nevertheless Article 9 continued to escape judicial attention. David McGee, the former Clerk of the New Zealand Parliament, has written that one is hard-pressed to find any judicial citation of Article 9 at all before 1972 when it suddenly appeared in the English High Court case of *Church of Scientology v Johnson-Smith*.[9]

It is only in recent times that there has been an explosion of interest in Article 9, in New South Wales and elsewhere, such that today, the immunities enjoyed by members of Westminster-type parliaments, including the Parliament of New South Wales, are often seen almost exclusively through the prism of Article 9. However, it is important to emphasize that Article 9 is simply an expression of the broader relationship between parliaments and the courts in common law jurisdictions according to which the courts will not allow examination of the internal proceedings of parliament. This principle of non-intervention by the courts in parliamentary proceedings reflects the constitutional separation of powers between the legislature and the judiciary.

In summary, parliamentary privilege in New South Wales derives from a complex inheritance of those privileges that stem from the common law test of "necessity," from certain statutes, notably the *Parliamentary Evidence Act 1901*, and from the statutory adoption as law in New South Wales of Article 9 of the English *Bill of Rights 1689*. The privileges of the Houses of the Parliament of New South Wales are not those of the Parliament of the United Kingdom, and indeed in some cases have moved away from or beyond the privileges of the Parliament of the United Kingdom.

The Current Privileges of the Parliament of New South Wales

The current privileges of the Houses of the Parliament of New South Wales and their members may be summarized as follows:

- The immunity that attaches to parliamentary action without external review in the courts or tribunals, notably the immunity of freedom of "speech and debates" in the Houses of the Parliament and their committees, but also the immunity that extends and attaches to participation in certain other "proceedings in parliament" such as voting in the Houses and the presentation of petitions.
- The rights of the two Houses of the Parliament, such as the right to control their own proceedings and certain limited rights to the attendance and service of their members.
- The powers of the two Houses, including certain residual powers to determine their membership, notably through the expulsion of members, the power to maintain order, including suspending members and removing and excluding visitors, the power to order the production of State papers and the power to conduct inquiries and compel evidence from witnesses.

Looking first at the immunity that attaches to parliamentary action in New South Wales, the most obvious immunity, and the one of greatest importance, is the immunity that attaches to members' participation in speech and debates in the Houses and their committees. While often now seen through the prism of Article 9 of the *Bill of Rights*

[7] (1881) 2 LR (NSW) 18.

[8] *Gipps v McElhone* (1881) 2 LR (NSW) 18 at 25 per Windeyer J.

[9] [1972] 1 All ER 378. See D. McGee, "The Scope of Parliamentary Privilege," *New Zealand Law Journal*, (March 2004), p. 84.

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1689, the immunity predates Article 9, and is in fact part of the wider compact between the legislative and judicial branches of government reached over several centuries in England, according to which the courts will not allow examination of the internal proceedings of Parliament.

This immunity is wide in scope. It prevents "speech and debates" in the Houses and their committees from being questioned or impeached in any way in a court or "place outside of parliament." The immunity is also absolute. Unlike qualified privilege under defamation law, it is not abrogated by the presence of malice or of fraudulent purpose or falsity.

In 1985 and 1986, the immunity attaching to freedom of "speech and debates" in the Australian Parliament as it had previously been understood was not upheld in two cases in the New South Wales Supreme Court concerning Justice Lionel Murphy, a justice of the Australian High Court and a former Australian senator, and Attorney-General. In these two cases, the prosecution and defence both used evidence previously given to Senate committees by Mr Murphy, including *in camera* (confidential) evidence. In both cases, the courts rejected argument that Article 9 prevented this course of action, although for different reasons.[10]

In response, the Australian Parliament enacting the *Parliamentary Privileges Act 1987* (Cth), which reasserted the traditional interpretation of the words "impeached" and "questioned" in Article 9 of the *Bill of Rights 1689*. Section 16(3) of the Act relevantly provides:

> In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:
>
> (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
> (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
> (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

In 1995 in *Prebble v Television New Zealand Ltd*, on appeal from the New Zealand Court of Appeal to the Privy Council, Lord Browne-Wilkinson stated that section 16(3) of the *Parliamentary Privileges Act 1987* (Cth), "contains … the true principle to be applied" as to the effect of Article 9 and the admissibility of evidence.[11] Section 16(3) has since become a model for other jurisdictions—including Queensland, the Australian Capital Territory, and New Zealand—seeking to codify in statute the meaning of Article 9.

The Parliament of New South Wales has not adopted a similar provision to section 16(3). Nevertheless, it is routinely referred to in New South Wales case law interpreting the application of Article 9 in New South Wales.

While freedom of speech in Parliament in New South Wales remains sacrosanct, the Houses may themselves impose limitations on the freedom of speech of members, including the rules of debate and the *sub judice* convention. In addition, the Houses themselves have the power to discipline members who, by their spoken word, offend the House. The New South Wales Legislative Council adopted such an approach in 1997 and 1998 in relation to a statement made in the House by the Hon Franca Arena. The statement and allegations therein made by Ms Arena were deemed to be of such gravity as to warrant the waiving of privilege by legislation and external investigation.

It is also notable that the immunity that attaches to parliamentary action articulated in Article 9 is expressed as extending beyond "freedom of speech and debates" to other "proceedings in Parliament." Today, the proportion of parliamentary business that falls under this category of "proceedings in Parliament" is considerably greater than at the time Article 9 was first adopted in England. However, the meaning and scope of other "proceedings in Parliament" remains the greatest area of uncertainty concerning the immunities of the Houses of Parliament in New South Wales. For example, does the immunity extend to members' pecuniary interest disclosures? The answer to this question in New South Wales is far from clear.[12]

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[10] Unreported and (1986) 5 NSWLR 18.

[11] [1995] 1 AC 321 at 333 per Lord Browne-Wilkinson. Note, however, that the constitutionality of section 16(3) of the *Parliamentary Privileges Act 1987* (Cth) was critically considered by two Australian State courts: first by Queensland's Court of Appeal in *Lawrance v Katter* (1996) 141 ALR 447, and then by the Full Court of the Supreme Court of South Australia in *Rann v Olsen* (2000) 159 FLR 132.

[12] The parliament has passed legislation waiving privilege over the members' interest disclosure regimes for the purposes of investigations by the State's Independent Commission Against Corruption.

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Looking next at the rights of the Houses of Parliament in New South Wales, as mentioned previously it is well established that privilege in New South Wales is not founded on the *lex et consuetudo parliamenti*—the law and custom of Parliament in England. Nevertheless, the courts in New South Wales have effectively adopted the same principle as the courts in England that there is a sphere concerning the internal proceedings of the Houses of the Parliament of New South Wales relating to the conduct of their business where the jurisdiction of the Houses is absolute and exclusive. Within this sphere, each House has the absolute and inherent right to control its own proceedings and determine what it debates free from outside influence or control. As McHugh J stated in the 1998 High Court decision in *Egan v Willis*:

> The history of the procedures of the House of Commons and its effect upon our Westminster system makes it clear that it is a matter for the Council as to the way in which it conducts business and the order of its business … Of all the great privileges of the House of Commons, none played a greater role in the Commons achieving influence than its capacity to control its own business and to set its own agenda.[13]

Symbolically, the right of the Houses in New South Wales to control their own proceedings is expressed at the opening of each session of Parliament through the reading of a "pro forma" bill. In practice, one of the most important procedural manifestations of this right is the right of the Houses to determine their own sitting times and patterns, including their recall at the request of a majority of members.

The Houses of the Parliament of New South Wales also control their own proceedings through the adoption of standing orders. Section 15 of the New South Wales *Constitution Act 1902* provides that the Houses shall, "as there may be occasion," prepare and adopt standing rules and orders "regulating," amongst other things, the "orderly conduct" of business, subject to the approval of the Governor. It is well established by case law that the standing orders are for the internal regulation of the proceedings of the Houses only.

The corollary of the right of the Houses to control their internal proceedings is the inherent right and superior claim of the Houses to the attendance and service of their members and officers. Subject to certain exceptions, members' attendance and service may not be impeded by the requirements of legal proceedings before a court. Members are ineligible for jury duty, immune at common law from attendance by compulsion before a court or tribunal when the House or a committee to which the member belongs is meeting, and exempt from the service of criminal or civil process within the precincts of Parliament when the House is sitting.

Finally, to return to the subject of "necessity" and the powers of the Houses of the Parliament of New South Wales, this is perhaps the most interesting and dynamic aspect of parliamentary privilege in New South Wales, resting as it does largely on the common law. The case can certainly be made that New South Wales is in many ways in a better position than many other Australian jurisdictions that link their powers to those of the House of Commons at an arbitrary date, such as federation in 1901. Practitioners of privilege in New South Wales do not have to spend their time searching through the relevant edition of *Erskine May* to try to ascertain the powers of the Houses of the Parliament of New South Wales, based on those of the House of Commons at a date over a century ago. The common law test of necessity is far more flexible than that! However, this must be balanced against the limitations of "necessity."

As noted previously, the Houses of the Parliament of New South Wales are unique amongst Australian Parliaments in lacking a punitive power to punish contempt, except that relating to witnesses under the *Parliamentary Evidence Act 1901*. At least that is the position that must be adopted on a conventional reading of the common law test of "necessity" adopted by the Privy Council in *Kielley v Carson* in 1842 and subsequently developed further in later case law.[14]

The absence of a punitive contempt power in New South Wales, based at least on a conventional reading of the common law test of "necessity," means that the Houses of the Parliament in New South Wales do not have the power to fine or imprison either members or non-members. For example, there is no common law power of the Houses to sanction members for misconduct in public office for example by way of fine. At common law, such a power has not been considered necessary to the existence and proper exercise of the functions of the Houses.

[13] (1998) 195 CLR 424 at 478 per McHugh J.

[14] In passing, there is some judicial support for the proposition that the powers of the Houses of Parliament in New South Wales, no longer being a local legislature of a British colony, have moved beyond those restrictions—notably the "protective" or "self-defensive" restrictions—deriving from the test of necessity. At the very least, it is well established that the powers of the Houses in New South Wales have changed to fit their changing role and operation.

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This limitation with respect to members is significant, at a time when members' conduct in public office is subject to greater scrutiny than ever before. Conversely, however, many would argue that such a restriction on the contempt power with respect of members of the public is no bad thing. Often cited in this regard, at least in the Australian context, is the House of Representatives' imprisonment of Messrs Fitzpatrick and Browne for 90 days in 1955.[15]

However, the Houses in New South Wales are not in an entirely defenceless position. The Houses do have an inherent power to expel members for conduct unworthy of a member of Parliament, if the power is exercised in a manner that is necessary to the defense of the institution. The Houses also have a power to suspend members guilty of disorderly conduct in the House or otherwise obstructing proceedings, or to suspend members as a means of inducing them to comply with an order of the House. The Houses also have the inherent power to admonish visitors and to order their removal from the chamber for disturbing the proceedings.

Another power of the Houses of the Parliament of New South Wales is the inquiry power. In recent times, the New South Wales Legislative Council has been resolute in asserting the fundamental common law principle, deriving from the 1870 decision of the House of Lords in *Duke of Newcastle v Morris*,[16] that so-called statutory secrecy provisions—that is, provisions in statutes which prohibit in general terms the disclosure of certain categories of information—have no effect on the law of privilege (in this case, the power of the Houses to compel the giving of evidence and the answering of questions), unless they do so expressly or by necessary implication. This position has recently been accepted by the New South Wales Solicitor-General and the Crown Solicitor.

Another particularly interesting inherent power of the Houses of Parliament in New South Wales is the common-law power of the Houses to compel the Government to produce State papers for inspection and publication. In this, the New South Wales Legislative Council remains an Australian, if not world leader.

The power to order the Government to produce State papers was used routinely by the New South Wales Legislative Council between the advent of "responsible government" in 1856 and the early part of the twentieth century. Subsequently, the power fell into disuse during much of the twentieth century. However, the Legislative Council revived it in the late 1990s, and took the unprecedented step of suspending the Leader of the Government in the Legislative Council for failing to produce required State papers. The Government of the day subsequently took the New South Wales Legislative Council to court.

In the 1996 decision of the New South Wales Court of Appeal in *Egan v Willis and Cahill* [17] and the 1998 decision of the High Court in *Egan v Willis*,[18] both courts found that the production of State papers by the Government to the Legislative Council is "necessary" for the performance by the Legislative Council of its functions. In the further 1999 decision of the New South Wales Court of Appeal in *Egan v Chadwick*,[19] an argument by the Government that it could withhold documents from the Legislative Council on the basis of common law claims of privilege—legal professional privilege and public interest immunity—was dismissed.

In enforcement of the power to order the production of State papers through the suspension of the Leader of the Government in the House, the New South Wales Legislative Council went where few other Houses of Parliament have dared to go. It was duly rewarded. As the former Clerk of the Australian Senate, the esteemed Harry Evans wrote, the *Egan* cases represent "a major shift in favour of parliament and against the executive." Mr Evans continued:

> It is also a more satisfactory state of affairs than at the Federal level, where the Senate has been defied by governments … in disputes over the production of documents. The Council has reaped the reward of being more courageous than its Federal counterpart, and, indeed, than any other comparable house. It is a world leader in this area.[20]

The majority of Houses of Parliament in common law Westminster jurisdictions around the world have not solved the problem of gaining access to information from the Government under compulsion where it is necessary in the interests of good and transparent government to do so.

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[15] Their subsequent appeal to the High Court for a writ of *habeas corpus* was dismissed in *R v Richards; Ex parte Fitzpatrick and Brown* (1955) 92 CLR 157.

[16] (1870) LR 4 HL 661.

[17] *Egan v Willis and Cahill* (1996) 40 NSWLR 650.

[18] *Egan v Willis* (1998) 195 CLR 424.

[19] *Egan v Chadwick* (1999) 46 NSWLR 563.

[20] H. Evans, "Lively, analytical history of the NSW Parliament," *Constitutional Law and Policy Review*, vol. 9, no. 1, May 2006, pp. 17-20.

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Since the *Egan* decisions, orders for State papers have again become a central feature of the work of the New South Wales Legislative Council. Close to 400 orders have been made since the late 1990s, and all have essentially been complied with.

Two areas of contention in relation to this power remain. One is the power of the New South Wales Legislative Council to compel the production of cabinet documents. The decision of the New South Wales Court of Appeal in *Egan v Chadwick* in this regard was essentially obiter, but also inconclusive. By comparison, the courts in Australia clearly have the power to order the production of cabinet documents, even if the power is used only in exceptional circumstances. This was confirmed by the High Court in *Commonwealth v Northern Land Council*.[21] It is not clear why, if the courts have such power, the Houses of the Parliament in New South Wales should not. The decision in *Egan v Chadwick* in this regard has been strongly criticized by the Hon Sir Anthony Mason, former Chief Justice of Australia.[22] The Legislative Council has also strongly asserted that it has the power to compel the production of cabinet documents. In 2018, the House again moved to suspend the Leader of the Government in the House, this time for failing to produce "cabinet documents." In the event, the relevant document were produced "voluntarily."

The other significant area of contention in relation to orders for the production of State papers in New South Wales is the question of whether the power extends to committees of the Houses, in the absence of a statutory provision to that effect. The New South Wales Solicitor General has indicated that such power would likely be found to exist if the matter went before the courts and the Legislative Council has since adopted a sessional order re-asserting the power. However, the matter cannot be free from doubt and the Government of the day certainly does not concede the power.

CONCLUSION

The law of parliamentary privilege in New South Wales is a complex field of law, replete with uncertainty. It rests upon a complex interaction between the common law principle that the Houses possess such privileges as are "necessary" for their effective functioning, certain statutes, notably the New South Wales *Parliamentary Evidence Act 1901*, and the statutory adoption as law in New South Wales of Article 9 of the English *Bill of Rights 1689*.

The case can certainly be made that in some areas the law of parliamentary privilege in New South Wales is in need of reform. For example, there is a good case that the scope of the immunities under Article 9 is unclear and should be clarified. Certain limitations on the powers of the Houses, including the inability of the Houses to punish members for misconduct in public office or other conduct unworthy of a member (other than through the extreme punishment of expulsion) are also arguably in need of attention. However, in other areas, it may equally be argued that the Houses of the Parliament of New South Wales, and particularly the Legislative Council, in exploring what is "necessary" at common law, are opening up new areas of parliamentary privilege such as the power to order the production of State papers, which are highly desirable if the Parliament is to remain relevant and effective into the future.

[21] *Commonwealth v Northern Land Council* (1993) 176 CLR 604.

[22] A. Mason, "The Parliament, the Executive and the Solicitor-General," in G. Appleby, P. Keyzer and J. Williams (eds), *Public Sentinels: A Comparative Study of Australian Solicitors-General*, (Ashgate, 2014), p. 63.

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