

Justified Immunity or Unfinished Business? The Appropriateness of Parliamentary and Executive Immunities in the 21st Century*

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It was a bracing experience to engage in discussion with the late great Harry Evans about parliamentary privilege. You were never left wondering what he thought after he had delivered one of his typically pungent opinions. If politics were merely the art of compromise, Harry Evans was not much of a politician. If good politics, however, requires a solid foundation of principle, Harry Evans was a leading exponent of the political process. It is not only our elected representatives who comprise the practice of politics, of course. This country was served splendidly by Harry Evans as a scholar, champion and practitioner of the law relating to the powers and procedures of the Senate. His contribution lives on, and my remarks have been stimulated by re-reading his writings on several topics. I am keenly aware of the further advantage I hold by reason of my memories of our several discussions on some of those topics. A real regret is being left wanting more of those challenging conversations.

The powers and immunities of the Senate as one of the Houses of Parliament are made known in a number of ways. Three of them are obvious from our most formal written instruments. But the content, even of them, is not so straightforwardly set out in prescriptive writing—and I think that is a good thing for our democracy. Let me explain.

Section 49 of the Constitution sets the pattern by providing initially for the powers, privileges and immunities of the Senate and House of Representatives, and the members and committees of each House, to be those of the House of Commons at Westminster as they were on New Year's Day 116 years ago. Not such a straightforward prescription, as any student of the successive editions of the magisterial *Erskine May* will know. The process of summary and selection from the problematic record of House of Commons practice that is the hallmark of *Erskine May*, together with the intimate involvement of the long line of Clerks in its compilation and composition, necessarily produce a normative character to its

* This paper was presented at the annual Harry Evans Lecture at Parliament House, Canberra, on 1 December 2017. The Harry Evans Lecture commemorates the service to the Senate of the longest serving Clerk of the Senate, the late Harry Evans. It examines matters Harry Evans championed during his tenure as Clerk, including the importance of the Senate as an institution, the rights of individual senators and the value of parliamentary democracy.

apparently historical description. This is no cause for alarm, but rather a proper recognition of the adaptation of tradition to felt present forces. As the distinguished editors of the 22nd edition of *Erskine May* noted in 1997, quoting Justice Mahoney, then the President of the New South Wales Court of Appeal, from his reasons in the 1996 decision of *Egan v Willis*,¹ the verities of one era become the footnotes of the next.

The second source, obviously, is such legislation as the Commonwealth Parliament makes or ‘declares’, to use the language of section 49, concerning the privileges of the Houses. The *Parliamentary Privileges Act 1987*, importantly, left in place the House of Commons equivalency except to the extent of express provision otherwise in the Act.² As time passes, we might expect an esoteric market in Australia for the 10th edition (1893) and 11th edition (1906) of *Erskine May* so as to enable a fair beginning to the historical researches called for by our Constitution.

A major focus of political and scholarly concern with respect to parliamentary privilege is the scope and operation of Article 9 of the 1689 Bill of Rights.³ In this country, we have tended rather grandly to assume for our various legislative chambers in the Federation the panoply of protections obtained by the Glorious Revolution against the supposed Stuart pretensions—‘Parlyament’ being taken by post-colonial extension not to refer only to Westminster.⁴ Article 9 is certainly now an essential tenet of the Australian law of parliament in a country that simply did not import the ancient *lex et consuetudo parliamenti* [the law and custom of parliament] in the course of getting its political organs of so-called inferior legislatures.⁵ Notwithstanding this radically different source of parliamentary privilege, the tradition in this country since 1855 has been to stress the so-called common law preceding Article 9 as somehow lending a normative majesty to its provisions for the establishment and protection of Australian parliamentary privilege.

Some may see a continuing post-colonial or post-imperial flavour in a noteworthy obiter comment by the Judicial Committee of the Privy Council advising on an appeal from the New Zealand Court of Appeal in a significant defamation dispute. Their Lordships noted the cagey opening words of subsection 16(1) of our Parliamentary Privileges Act, ‘For the avoidance of doubt’, set out the provisions of

¹ *Egan v Willis* (1996) 40 NSWLR 650 at 676A-B.

² *Parliamentary Privileges Act 1987*, section 5, www.legislation.gov.au/Details/C2016C00951.

³ For example, ‘That the Freedom of Speech, and Debates of Proceedings in Parlyament, ought not to be impeached or questioned in any Court or Place out of Parlyament’.

⁴ For example, subsection 16(1) of the Parliamentary Privileges Act; *Egan v Willis* (1998) 195 CLR 424 at 444–445 [22], [23]; *Arena v Nader* (1997) 71 ALJR 1604.

⁵ See, for example, Sir Donald Limon and W.R. McKay (eds), *Erskine May’s treatise on the law, privileges, proceedings and usage of Parliament*, 22nd edn, Butterworths, London, 1977, p. 65, footnote 3.

subsection 16(3), and proceeded to describe its declaration of the effect of Article 9 as containing what ‘in the opinion of Their Lordships, is the true principle to be applied’.⁶ Whether that endorsement enhances the merit of an Australian statutory provision is very doubtful, not least because it seems to result in an enactment envisaged by section 49 producing no difference whatever to the pre-existing position.

I think the more momentous aspect of the delicately advanced exegesis, so to speak, of Article 9 by section 16 of the Parliamentary Privileges Act is the explicit prescription by subsection 16(2) of conduct and circumstances which will fall within the zone of immunity created by the expression ‘proceedings in Parliament’ in Article 9. Of course, it is to be remembered that all these provisions of section 16 express the effect that Article 9 ‘is to be taken to have, in addition to any other operation’. As I have said, there will continue to be an intellectual market for old English law books for those of us engaged with these topics. Probably the most practically significant provision in subsection 16(2) is paragraph (c), providing that proceedings in parliament extend to ‘the preparation of a document for purposes of or incidental to the transacting of any such business’, meaning ‘the business of a House or of a committee’. It seems clear to me that these are provisions, with or without the imprimatur of the Privy Council as merely declaratory of the pre-existing law, that require the character of protected activities to be those ‘which are recognizably part of the formal collegiate activities of Parliament’,⁷ or have a sufficiently close preliminary connexion to them. Is the making of notes by a senator of representations from a constituent or, indeed, from any person concerned to raise a matter with a senator, that may or may not eventually be used, say, to inform a parliamentary question, within that statutory protection? I think it would be, but there is an unavoidable need for case-by-case determination whether such records, with merely potential later deployment in the chamber or in a committee, fit the description of having been prepared ‘for purposes of or incidental to the transacting’ of Senate business.

An illustration of the care that may be required by a senator who asserts Article 9 privilege based on paragraph 16(2)(c) emerges from the differing approaches of the three judges in the Queensland Court of Appeal decision of *O’Chee v Rowley*,⁸ and especially the nuanced fact finding by Justice McPherson.⁹ Unfortunately, the rather formulaic affidavit claiming privilege was so bare that the case does not cast any light on the difficulty of merely potential use of such documents for Senate business.

⁶ *Prebble v Television New Zealand* [1994] 3 NZLR 1 at 7–8.

⁷ *The Joint Committee on Parliamentary Privilege Report of 1999* [UK], HL Paper 43–1, HC 214–1 quoted in *R v Chaytor* [2011] 1 AC 684 at 709 [55].

⁸ *O’Chee v Rowley* (1997) 150 ALR 199.

⁹ *O’Chee v Rowley* (1997) 150 ALR at 206, 208–210.

I would argue that, as in science, material that is discarded is as genuinely valuable as that which is used, but I am not confident this view will necessarily succeed in a forensic contest.

Incidentally, I know of only one reference in the published writings of Harry Evans to the reasons for judgement of that very learned lawyer Justice McPherson in *O'Chee v Rowley*. In my opinion, the historical and purposive exposition by his Honour should be to the forefront of serious attempts to understand Article 9.¹⁰ I wonder whether the late Clerk had formed a slightly jaundiced view of jurisprudence about parliamentary privilege north of the Tweed River, on the basis of some other reasons for judgement about which he certainly did, forthrightly, publish his views.

Harry Evans, I think, meant to commend Justice McPherson's learning and conclusion with his somewhat acid comment invoking them in criticising a judgement in 2000 in another defamation action by Mr Rowley concerning similar issues. The Clerk's letter to the Committee of Privileges reproduced in its 92nd report, to put it mildly, excoriates what he (I think correctly) regarded as obvious fallacies in the judicial reasoning in question. I should disclose that I too gave an opinion to the Committee of Privileges on the same matter. I am afraid I was also quite sharply critical of the conclusion in *Rowley v Armstrong* that the protection for proceedings in parliament did not extend to 'an informant...making a communication to a parliamentary representative'.¹¹ Of course, as Harry Evans pointed out, the universe of such communications could not possibly attract parliamentary privilege—but manifestly there will be some such communications that do so and certainly should. I hope that *Rowley v Armstrong* will not be regarded as good authority. But it may be that there is unfinished business to finish it off.

The third formal source of law concerning the Senate's parliamentary privilege has already been mentioned. That is the case law, whether in relation to constitutional law, so-called common law or the statute law on the topic. The famous staking out of pre-eminent judicial territory by John Marshall in *Marbury v Madison*¹²—'It is emphatically the province and duty of the judicial department to say what the law is'—is reflected, in the case of Australian parliamentary privilege, in the classical division of function between the courts and the Houses seen in the High Court's (probably Dixonian) formulation that 'it is for the courts to judge the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise'.¹³ The immunity

¹⁰ *O'Chee v Rowley* 150 ALR at 210–214.

¹¹ *Rowley v Armstrong* (2000) QSC 088 at [34]

¹² *Marbury v Madison* 5 US (1 Cranch) 137 (1803) at 5 US 177.

¹³ *R v Richards; ex parte Fitzpatrick & Browne* (1955) 92 CLR 157 at 162.

from judicial review is the more telling for the fact that a term of three months' imprisonment had been imposed by the House on those contemnors.

I regret to say that judicial pronouncements on the existence and scope, or extent, of parliamentary privilege (including the question of the powers of the Houses) have been of very mixed quality in this country for a long time. Fortunately, as I later explain, the occasions have not been very numerous. Also fortunately, and this is not a paradox, it has been even rarer for the High Court or other appellate benches to have considered critical matters of parliamentary privilege. There remains a somewhat dispiriting array of single-instance decisions, most of which were reviewed unfavourably by Harry Evans.

One of the cultural problems in this area of discourse, I think, may be a muffled and distorted echo of the mighty institutional conflict between the House of Commons and the common law courts during the 19th century, of which *Stockdale v Hansard* remains an emblematic milestone.¹⁴ As I see it, modern parliamentarians are really quite polite about the role of the courts of law in relation to parliamentary privilege—even Michael Egan.¹⁵ Sometimes, the deference strikes observers like me as excessive. On the other hand, not all judges take the same level-headed and, with great respect, wise approach to the gravity of the matter as did all the judges, both in the New South Wales Court of Appeal and in the High Court of Australia, who decided the case of which the 20th anniversary arrives in 2018, a case I hope I will not forget, namely *Egan v Willis*.¹⁶

By way of foreign example, I draw to attention the unseemly sneer, as it strikes me, by quotation and repetition, in the reasons of Lord Rodger of Earlsferry in *Chaytor*. True, there was provocation—members accused of cheating on their expenses had the temerity to plead Article 9 and exclusive cognisance as a complete answer to ordinary criminal charges of fraud. His Lordship, unworthily I think, stated:

An invocation of parliamentary privilege is apt to dazzle lawyers and judges outside Parliament... Lord Brougham LC warned courts of justice against acceding to claims of privilege 'the instant they hear that once magical word pronounced'... Lord Denman CJ remarked that the privileges are 'well-known, so it seems, to the two Houses, and to every member of them, as long as he continues a member; but the knowledge is as incommunicable as the privileges to all beyond that pale'. Happily, it is

¹⁴ *Stockdale v Hansard* (1839) 9 Ad & El 1.

¹⁵ See also David Clune, 'The Legislative Council and Responsible Government: *Egan v Willis* and *Egan v Chadwick*', *New South Wales Legislative Council Oral History Project*, August 2017, pp. 30–31, www.parliament.nsw.gov.au/lc/roleandhistory/Documents/Booklet%20Part%20III.pdf.

¹⁶ *Egan v Willis* (1998) 195 CLR 424.

unnecessary on this occasion to penetrate too deeply into these mysteries – if mysteries they be.¹⁷

That is no doubt a smart comment, but best kept within private clubs. It reflects no credit on Lords Brougham, Denman or Rodger. Their jobs, in the judicial department, were to delineate, not to deprecate.

There is not room here, nor do I really have the heart, to catalogue all the cases that Harry Evans frowned on, or even the slightly fewer judgements I myself most respectfully doubt. But it has to be said that there have been some beauties. It is remarkable how they have been permitted to fall out of sight in reviews of authority. It has been a kind of mercy. The worst of them is *Attorney-General (Cth) v MacFarlane*,¹⁸ somewhat surprisingly given the excellent calibre of all counsel. Nonetheless, it is a puzzle that the Commonwealth Solicitor-General set out, successfully unfortunately, to persuade Mr Justice Forster that a major reason for the then Legislative Council of the Northern Territory not possessing the so-called grand inquest power or function, like that of the House of Commons, was that the Commonwealth Parliament itself had no such ‘inquisitorial function’. I say nothing of the particular resolution, which boldly set up a parliamentary ombudsman, in effect, that is, in relation to general administrative actions. I mean no disrespect to the distinguished lawyers involved in confessing that the argument and reasons (*ex tempore*, apparently) seem far more distant than 1971—especially in the clear implication of the continued substantive inferiority of even the federal parliament compared with our Westminster progenitor.¹⁹

A very different example is provided by the Queensland Court of Appeal decision in *Laurance v Katter*.²⁰ The strictures variously found in the reasons concerning the operation of section 16 of the Parliamentary Privileges Act, as its provisions would affect a defamation action, certainly do not exhibit any element of cultural cringe. The judges involved—Justices Fitzgerald, Davies and Pincus—were simply incapable of any such deficiency. But there are evocative discussions in their several reasons of a matter not yet conclusively determined, I think, in this country. What is the effect, if any, of Article 9 in its section 16 elaboration on the familiar case of a defamation action based on statements outside the House which repeat or involve reference to

¹⁷ *R v Chaytor* [2011] 1 AC at 722 [101].

¹⁸ *Attorney-General (Cth) v MacFarlane* (1971) 18 FLR 150. Enid Campbell described it as ‘unusual’ in her *Parliamentary Privilege* (Federation Press, Sydney, 2003, p. 156). An understatement. See her earlier descriptions of the conclusion as ‘reading-down of the plain words of section 49’, and of the reasoning as ‘unsound’ and involving ‘question begging’ in ‘Parliament and the Executive’ in *Commentaries on the Australian Constitution: A Tribute to Geoffrey Sawer*, Leslie Zines (ed.), Butterworths, Sydney, 1977, pp. 92, 94 and 95.

¹⁹ *Attorney-General (Cth) v MacFarlane* (1971) 18 FLR at 156–7.

²⁰ *Laurance v Katter* (1996) 141 ALR 447.

what has been said under absolute privilege inside the House? In such a case, does an allegation of dishonesty or bad faith made good against the member who defames outside the House, unlawfully involve impeaching or questioning the freedom of speech, debates or proceedings in parliament?

Some of the reasoning in *Laurance v Katter* has been superseded, or at least may need revisiting, in light of what I will compendiously call the High Court's proportionality method in relation to the so-called freedom of political communication. But what remains of continuing significance is their Honours' careful and constructive demonstration that Article 9's protection of parliamentary business should not be allowed to abrogate essential liberties of discussion and criticism by those of us who elect our representatives or are affected by their votes in parliament. Obviously, Article 9 does not mean, in Australia nowadays, that any of us are restrained by parliamentary privilege, rather than by the ordinary laws of defamation, concerning what we say about what goes on in this parliament. At least, if any individual entertains hope of disciplining the populace from questioning proceedings in parliament, by stifling or punishing vigorous criticism of parliamentarians and their conduct, good luck with that.

It is a serious black-letter question, which Justice Pincus in particular discussed, when a trial of a defamation published outside the House seems to require, perhaps as a matter of fairness, reference to statements inside the House.²¹ I am not sure that *Laurance v Katter*, or any later decision, has finally settled the matter. It is not one of those aspects of parliamentary privilege where public benefit may be derived from uncertainty. Not without some doubt, I think the better view is that the implied impeaching or questioning of statements made inside the House in cases based on statements made outside the House does not contravene Article 9, as concluded in *Buchanan v Jennings*, another New Zealand Privy Council decision.²²

It might be said that the present state of the law based on these three sources of parliamentary privilege doctrine has few bright lines. If that is so, it is partly because good courts of law are astute not to hedge such important organs as the Senate around with niggardly or cramped privileges. It is also because, as observed by Chief Justice Gleeson in *Egan v Willis*, 'conventions and political practices are as important as rules of law' in the context of the powers of a parliamentary House, such as compelling the production of state papers and in appropriate cases coercing members who are ministers to do so.²³ In the argument of that case, at first instance in the Court of Appeal, we had exhaustively proved and had attempted to analyse the historical

²¹ For example, *Laurance v Katter* (1996) 141 ALR at 483–486.

²² *Buchanan v Jennings* [2005] 1 AC 115 [13].

²³ *Egan v Willis* (1996) 40 NSWLR at 663 D–E.

practice of the Legislative Council in New South Wales, avowedly as an acceptable method of showing in law the extent of the relevant powers that were in question in that case. We started from parliamentary political conduct and not from abstract judicial statements. Both of those modes of proving a power admit the possibility of change, of course, but the former has hugely superior capacity to produce an appropriate flexibility in response to changing perceptions of what responsible government in a representative democracy needs.

It follows, I think, that in relation to bright lines and certainty of doctrine, we should be careful what we wish for. This is also why, in my opinion, parliamentary chambers should be wary of seeking judicial determinations of their privileges. I maintain, like Harry Evans, that the best (if not technically authoritative) views of parliamentary privilege are to be found in the records and reports of privileges committees. They are best because they are expressions from time to time of the views of those who are actually in the positions and with the duties for which these privileges are required.

One thing the history of the New South Wales Legislative Council calling for papers showed was that practice was against the interesting principle that Michael Egan valiantly maintains—that is, the government is responsible only to the popular or lower House, and not to an upper House, like the Senate, with a different kind of representation from the more or less equal electorates that characterise a popular House. As he has consistently put, enthusiastically and not unpersuasively, the government made by support in one House should not have to answer to the other House in a bicameral legislature, especially given the possibility that the other House will not be controlled, in the jargon, by the government party.²⁴ Fortunately, I think, for the beneficial role of chambers like the Senate, the majority view in the High Court in *Egan v Willis*, like that in the Court of Appeal, did not tie the scrutiny function to the function of making or breaking governments by votes of confidence, let alone deny it for a chamber not controlled by the government—the plurality thought ‘there may be much to be said for the view that it is such a state of affairs which assists the attainment of the object of responsible government...’²⁵

In short, both as to the significance of a chamber like the Senate asserting a right or power, and as to the different role of a lower chamber like the House of Representatives in making or breaking governments, the statement by Mr Egan during the debate immediately preceding his suspension in 1996 is certainly not the law. Parliamentary privilege does not arise ‘merely because the House asserts [it]’, but a history of assertion goes a long way. In relation to the power of scrutiny of the

²⁴ For example, *Egan v Willis* (1996) 40 NSWLR at 655G – 656B; Clune, op. cit., p. 30; *Egan v Chadwick* (1999) 46 NSWLR 563 at 571 [36], [37].

²⁵ *Egan v Willis* (1998) 195 CLR 453 [45].

executive, it is not the ‘key’ as a matter of ‘constitutional principle’ that the government answers, by a vote of confidence, to the lower or popular House.

Finally, I come to the question of whether the scrutiny function and powers of the Senate, as an Australian House, are impotent in the face of an executive claim of cabinet secrecy. Some may think that tradition and authority combine to render my inquiry hopelessly quixotic. I do not think so.

The authority on the question comes from another of Michael Egan’s eponymous contributions to the case law. The headnote to the report of *Egan v Chadwick* tersely records the majority holding, with respect to the production of executive documents to the Legislative Council, that ‘in respect of Cabinet documents their immunity from production is complete’.²⁶ I think the matter is not so simple, and I certainly dispute the correctness of such a view in relation to the Senate. Technically, it may be that the unique position of New South Wales concerning the source of powers of its Houses of Parliament, by the absence of any House of Commons equivalency, will be enough to distinguish *Egan v Chadwick* if the question arose in relation to any other Australian House, including the Senate. But I think that there are principled reasons against what is commonly understood to be the majority holding in *Egan v Chadwick*, which apply regardless of that Macquarie Street quirk.

The conceptual key to what I regard as the *Egan v Chadwick* error is the failure to accord to a parliamentary chamber the kind of control over its proceedings, for its functions, as the courts of law have now pronounced that they have over their own proceedings for their functions. Although it by no means appears in the reasoning of Chief Justice Spigelman and Justice Meagher, there may be an implied, if unexplained, claim of institutional superiority in that regard for the courts compared with parliamentary chambers. If so, I profoundly disagree.

In the courts of law, it is clear that there is no absolute bar against the compulsory disclosure or tender into evidence of even the most core cabinet documents, such as those recording the secret deliberations of its members. The four sets of judicial reasons in the *Northern Land Council Case* are a rich resource of learning, including germane political science.²⁷ It is noteworthy that the majority reasons in the High Court—if I may say so with respect—do not engage closely, or really much at all, with the tour de force that is the joint judgement in the Full Court of the Federal

²⁶ *Egan v Chadwick* (1999) 46 NSWLR 563.

²⁷ Jenkinson J at first instance in the Federal Court, *Northern Land Council v Commonwealth* (1990) 24 FCR 576; Black CJ, Gummow and French JJ on appeal in the Full Court of the Federal Court, *Commonwealth v Northern Land Council* (1991) 30 FCR 1; Mason CJ, Brennan, Deane, Dawson, Gaudron and McHugh JJ, and Toohey J dissenting, in the High Court on further appeal, *Commonwealth v Northern Land Council* (1993) 176 CLR 604.

Court. The only point of departure, as I read the decision, concerns what was called the threshold to be crossed before it would ordinarily be appropriate for a court to compel production to it of such documents.

Critically for present purposes, the High Court agreed with the conclusion below that there was no absolute bar against the production and use of cabinet documents in litigation, that is, for the administration of justice. Rather, it was emphatically noted that it would require ‘considerations which are indeed exceptional’ or ‘quite exceptional circumstances’ before a court should consider that the public interest in the due or proper administration of justice outweighed the public interest in the immunity from disclosure and in the confidentiality of such cabinet documents, being those ‘recording the actual deliberations of Cabinet’.²⁸ I stress that the High Court thus required that in such circumstances a court would decide for itself whether its function of administering justice justified in the particular case obtaining access to documents of a kind that, as a general rule, should be kept secret (at least, so it seems, until only historians and their readers would be interested in them). The courts award themselves or, from another point of view, impose on themselves the possibility in extreme cases of carrying out that balancing exercise.

This should be enough to render the admirably brief but quite unconvincing reasons of Justice Meagher on this point in *Egan v Chadwick* indefensible.²⁹ In that single paragraph, description of the cabinet as ‘the cornerstone of responsible government in New South Wales’ and the description of its documents as ‘essential for its operation’ led his Honour to hold that production of them could not be compelled by the Legislative Council—‘their immunity from production is complete’. His Honour thought such production could not occur ‘without subverting the doctrine of responsible government, a doctrine on which the Legislative Council also relies to justify its rights to call for documents’. His Honour expressly denied that any process could arise ‘for the courts—or anyone else—balancing interests against each other’. Finally, his Honour sought to refute an analogy with confidential government documents because ‘in the realms of Cabinet documents there is no room for holding that time will wither them’, meaning their confidential character. With great respect and also affection for a lawyer who did not lack self-confidence, I have to say that these pithy reasons are nonsense.

The High Court has no difficulty with the courts carrying out a balancing process when the administration of justice is the public interest competing against the public interest in cabinet secrecy. It is ridiculous to suppose that the Senate could not carry out a corresponding exercise when the public interest in responsible government

²⁸ *Commonwealth v Northern Land Council* (1993) 176 CLR at 618–619.

²⁹ *Egan v Chadwick* (1999) 46 NSWLR at 597 [154].

through accountability to a parliamentary chamber is involved. Furthermore, the High Court plainly regards the age of cabinet documents as relevant in holding that there is no complete immunity from their production for the purposes of administering justice—the majority in *Northern Land Council* described the relevant class of documents as those ‘recording Cabinet deliberations upon current or controversial matters...’³⁰ And as for subverting responsible government by compelling the production of cabinet documents to a chamber that can, if it considers the public interest requires it, prohibit any further publication, we should reflect on that tool of executive public relations, the cabinet leak. In light of the complacency of successive governments with their own cabinet leaks, fears of subversion by scrutiny activities of the Senate are overheated and overwrought. I predict that these reasons expressed by Justice Meagher will not be regarded as supplying authority for the majority conclusion, both because they are plainly wrong and also because his Honour otherwise agreed with Chief Justice Spigelman, whose reasons were quite different on cabinet documents.

Indeed, it seems to me that the masterly and fascinating reflection on history and political science, as they informed the relevant doctrines of constitutional and parliamentary law, found in Chief Justice Spigelman’s reasons contains much that substantially tells against his Honour’s particular conclusion in relation to cabinet documents. In summary, this emerges from the judgement as follows. First, cabinet, its attributes of collective responsibility, the need for solidarity and secrecy, and all the rest, are matters of what the plurality in *Egan v Willis* described as ‘accepted precedent’ by reason of ‘conventional practices established and maintained by the Legislative Council’.³¹ Second, those matters which come from a ‘combination of law, convention and political practice’ involve the manifestation of a concept that ‘itself is not immutable’.³² Third, that flexibility is beneficial, lest definition produce rigor mortis, in the colourful observation of Sir Victor Windeyer on the centenary of Australian colonial responsible government.³³

Those evolutionary features of parliamentary privilege go a long way to deny a legal rule that would prevent a parliamentary chamber shaping its own practices in order to fit its constitutional accountability function to the exigencies of future executive practices. Part of the healthy tension between a House and the executive comes from

³⁰ *Commonwealth v Northern Land Council* (1993) 176 CLR at 617; see also *Sankey v Whitlam* (1978) 142 CLR 1 at 43.

³¹ *Egan v Willis* (1998) 195 CLR at 454 [50], quoted (with a misprint ‘mentioned’ for ‘maintained’) in 46 NSWLR at 570 [30].

³² Per Gleeson CJ in *Egan v Willis* at 40 NSWLR at 660, quoted in *Egan v Chadwick* (1999) 46 NSWLR at 568 [18].

³³ W.J.V. Windeyer, ‘Responsible government—highlights, sidelights and reflections’ *Journal of the Royal Australian Historical Society*, vol. 42, part. 6, 1957 p. 272, quoted in *Egan v Chadwick* (1999) 46 NSWLR at 570 [31].

the unexcluded possibility that the House will exert some such exceptional power. If the rule said cabinet documents could never be compelled, it would be very different, in the institutional tussle for power, from the position if it said, as I think it should, not ‘never’ but rather ‘hardly ever’.

Next, a particular aspect of Chief Justice Spigelman’s reasons comes close to an internal contradiction in what is, on any view, a formidable exposition of judicial reasons. The Chief Justice had no doubt that documents which in a court would not be compelled to be disclosed by reason of public interest immunity or legal professional privilege could properly be compelled to be disclosed by and to the Legislative Council in its exercise of its ‘high constitutional functions’. His Honour expressly accepted my argument against an analogy of parliamentary scrutiny with courts or executive enquiries in relation to these forms of immunity, given the special ‘accountability relationship’ that obtains ‘between ministers and the Legislative Council’.³⁴ In short, documents that as a general rule are kept secret because of public interest could nonetheless be compelled to be produced in the Legislative Council, because that body was the proper body to decide case by case whether the ordinary solicitude for secrets between lawyers and clients or matters which may damage the broader public interest if published should prevail. Why was not exactly the same approach the proper one for cabinet secrecy? After all, if anything, the function of holding the executive to account as a matter of responsible government might be thought to render cabinet documents a peculiarly useful resort by the chamber in the course of such scrutiny.

The answer given by Chief Justice Spigelman rests on what his Honour regarded as the need to avoid a fundamental ‘inconsistency or conflict’ between the putative power to compel production and another aspect of responsible government, namely ‘the doctrine of ministerial responsibility, either in its individual or collective dimension’.³⁵ I do not suggest this is an easy question, or that my preferred answer is irresistibly correct—it is very much a preferred rather than uniquely correct solution. One respectful criticism of the majority approach in *Egan v Chadwick* is that it comes very close to assuming its own conclusion. That is, the question was whether normally secret documents could be compelled to be disclosed in the Legislative Council, and the answer by the majority seems to be that they could not be because they were secret.

A more pessimistic interpretation is that secrecy in relation to the heart of executive decision-making has been given an a priori importance above the role of a chamber like the Senate in holding the executive to account for, among other things, its

³⁴ *Egan v Chadwick* (1999) 46 NSWLR at 573–574 [51]–[54], 577–578 [80], [81], [85]–[87].

³⁵ *Egan v Chadwick* (1999) 46 NSWLR at 574 [55], 576 [70].

decision-making. I do hope that is too gloomy a view, because, as you will have guessed, I enthusiastically support the dissenting approach in relation to cabinet documents taken by Justice Priestley. His Honour's reasons do not lend themselves to paraphrase, and I urge their re-reading. I conclude by indulging myself with these quotations. As to legal professional privilege, his Honour said:

Possession of the power to compel production does not mean that the power will be exercised unless the House is convinced the exercise is necessary; if exercised, it does not follow that the House will do anything detrimental to the public interest; the House can take steps to prevent information becoming public if it is thought necessary in the public interest for it not to be publicly disclosed.³⁶

I interpolate that the Senate has ample powers to proceed in private session and to forbid publication of information. How could it be otherwise in the democratic parliamentary chambers of a country that has gone to war, and may do so again?

As to public interest immunity, Justice Priestley noted that courts, as a branch of government, may compel the executive to produce to the courts documents for which the executive claims such immunity, not leaving it to that branch of government to determine its own claim of immunity. His Honour then proceeded:

equally there should be no objection in the different situation that arises between the Executive and a House of Parliament to the possession by another branch of government other than the Executive, of the same power; the more so when the power is necessary for the proper carrying out of the function of that branch of government. The function and status of the Council in the system of government in New South Wales require and justify the same degree of trust being reposed in the Council as in the courts when dealing with documents in respect of which the Executive claims public interest immunity.³⁷

In relation to legal professional privilege and public interest immunity, of course, all three members of the Court of Appeal agreed that they provided no ground for denying the Legislative Council power to compel disclosure. The reasons given by Justice Priestley, however, for his dissent as to cabinet documents seem to me every bit as cogent as those that all three judges expressed on these denied claims for immunity.

³⁶ *Egan v Chadwick* (1999) 46 NSWLR at 593–594 [139].

³⁷ *Egan v Chadwick* (1999) 46 NSWLR at 594 [141], [142].

An interesting aspect of Justice Priestley's reasons on public interest immunity is his Honour's discussion of the views, both in government and in opposition, of Senator Gareth Evans, including evidence to the Senate Standing Committee of Privileges. Having described that distinguished former senator and minister as speaking 'with the experience of an academic constitutional lawyer and a longstanding Member of the Senate', Justice Priestley quoted Senator Evans' opinion that the claim for immunity was:

ultimately one for the House of Parliament to determine. That follows from first principles if you accept that is the way the Constitution works on these matters...the technical power might be absolute but the way in which it may be exercised in practice should be regarded as subject to all sorts of conventions and limitations.³⁸

We should all hope that the Constitution works on 'first principles' and I am sure, without needing to rummage through 'all sorts' of conventions and practices, the Senate will always very seriously consider the enormity of entrenching on cabinet secrecy.

I am not at all confident that the position I prefer will ever be the case in law or practice. More's the pity. As Justice Priestley said:

notwithstanding the great respect that must be paid to such incidents of responsible government as Cabinet confidentiality and collective responsibility, *no legal right to absolute* secrecy is given to any group of men and women in government, the possibility of accountability can never be kept out of mind, and this can only be to the benefit of the people of a truly representative democracy.³⁹



³⁸ *Egan v Chadwick* (1999) 46 NSWLR at 594–595 [142].

³⁹ *Egan v Chadwick* (1999) at 46 NSWLR 595 [143], emphasis in original.

Question — You touched on the sense that amongst the legal profession there is a lack of deep understanding of parliamentary privilege and the law surrounding it and that is certainly the experience we have as Senate officers when people call with questions. Why is it such a foreign country to lawyers? Is it because there isn't that ingraining in legal training of separation of powers and how those principles operate? Or is it that we are not doing a good enough job of explaining it to people?

Bret Walker — It is neither of those. If I could venture this view—our law schools are not good enough in many ways. They are also splendid in many ways, let me make that clear. I am not saying we live in decadent times. I suspect our law schools have never been better. Not only last century when I was at law school, but today statutory interpretation is barely taught. It is treated as some kind of vaguely modern intrusion into the purity of doctrine. You will not be surprised to know that having a brief which does not involve a statute would not even happen once a year. Second, the process by which law is made, which is quite useful if you are interpreting statutes, is not taught at all. I suspect that for most law students the last time they learned anything or were taught anything about that was on an excursion in primary school in New South Wales to Macquarie Street.

And the third thing, of course, is that there is a genuine character of arcana to a lot of what happens in the chambers. Now I have obviously swallowed the Kool-Aid, but I think all that is fascinating and important and ought to be well-known. I don't think it is difficult but it does require, as Harry Evans said, a lot of reading and a lot of intense reading. But it is not all that different from company law or other aspects of constitutional law or criminal law or any complex law in that regard. So, the explanation is not really peculiar to the subject matter but I do relate it to a cultural neglect of the critical role of statute in society and therefore for lawyers.

Question — The subject matter of your talk was particularly relevant to a Harry Evans lecture as Harry Evans took a particular interest in parliamentary privilege and the Parliamentary Privileges Act was very much his creation. It was very controversial at the time and many were critical of some of the provisions, including 16(3), suggesting that it went too far. You referred to the difficulties that can arise in defamation proceedings. Another area may be criminal proceedings where 16(3) may prevent a defence from being fully laid out. You referred to *Laurence v Katter*—my vague recollection of the three judgements in that case is they were somewhat diverse, but one was a suggestion that 16(3) should be read down to make it constitutional. Another was a suggestion that it cannot be read down. Do you think 16(3) goes too far and should it be reviewed?

Bret Walker — You do recollect correctly. I don't think 16(3) suffers any blot of constitutional overreaching. So whether you validate *pro tanto* [to the extent] or whether you read it down, whether it goes too far—I think all of those are wrong. It is clear that section 16 takes as its text Article 9. It says so in subsection one. It means you have to have Article 9 on your desk, certainly in your head, and you have to know something about Article 9 to understand the reach of subsection 3 of section 16, which tells us that this is what Article 9 is to be taken to mean. It is a very Harry Evans phrase—it is marvellous. I don't think any judges or majority of judges will be found in the High Court to push back against what really is a tremendously convenient, in the best 18th century sense of that word, resolution of outstanding political science questions. They are not constitutional law, they are political science questions.

As long as everyone remembers that whatever else it means, Article 9 does not mean what it says. Article 9 does not say that we cannot at barbeques, pubs, dinner parties and the theatre, even in this hallowed ground, say such and such member has made a disgrace of himself or herself by what has been said etc. It never did mean that, although in the 18th century there were abusers of Article 9 as expressed as a piece of political propaganda. There were abusers of that later who anachronistically sought to use it, as it were, as yet another tool of repression of what they would call political sedition. Those days are totally gone. The most executive minded person would not dare to run such an argument nowadays. And for those reasons it seems to me that we should regard the unfinished business to which I refer as most definitely including what will happen when a criminal accused wishes to refer to something, either said in parliament or to be found in papers, which would be covered by privilege.

I actually have a recollection, too hazy to be categorical, of a committal—I was appearing for a defendant—and it did not take more than a few hours of discussion with a very good prosecutor concerning why I wanted to see some parliamentary statements in evidence for that prosecution to go away. Now that was a happy outcome for my client, but the community never had the merits of that criminal accusation tried. And that is the pattern. There will be stays, formal or informal. Charges can be made to disappear after all. And it will be, I think, part of our British heritage that where we can fudge we will fudge—and that is a good idea with things like this, because when the stags butt each other in the glen sometimes they all end up more damaged than they want to be.

So it does seem to me that you are absolutely right, there is a lot of unfinished business concerning how parliamentary privilege may render prosecutions unfair and therefore, in my view, inappropriate to continue. I am not at all troubled by the fact that parliamentary privilege would prevent a member from being prosecuted because after all, if there is one thing we can be sure of, that is what Article 9 is for. That is

important because epithets like un-Australian are all very well as political invective but we do not want anyone ever to say that statements of a certain kind or to a certain effect by a member on the floor of the House constitute an offence for which he or she can be tried—that is exactly what Article 9 is for.

Question — In the past you have said it should be as much a political solution as a legal court solution. Where is the Senate up to on this?

Richard Pye, Clerk of the Senate — From the Senate’s perspective, the Senate very much takes the view, with regard to the resolution of disputes around access to government information, that inherently these are political disputes that will be settled in political ways. By political I do not mean to say that the powers of the Senate itself will not be used—you order a committee investigation into the withholding of information, you hold government legislation to ransom until you have the information you are looking for. So there are uses of Senate powers but they are being used in political ways. I embrace the suggestion Bret made that there are inherent dangers in seeking judicial determination of the powers and privileges of a parliamentary House and it would be all too easy to find your parliamentary chambers hemmed in by unfortunate legal decisions which are difficult to have reviewed. Fortunately the High Court has not said too much to hem in the Senate’s powers to date, not recently anyway, and should such a case go before the High Court obviously we will see if we can secure the services of Mr Walker to assist us!

Bret Walker — I have nothing to add but thank you.