ADVICES FROM THE CLERK OF THE SENATE
SINCE AUGUST 2007

Advice No. 40	**Recent Privilege Cases** (6 August 2007) and **update** (12 February 2008)**,** together with a paper, **"Parliamentary Privilege and search warrants: Will the US Supreme Court legislate for Australia?"** *Authorised by the committee for publication on 13 March 2008*
Advice No. 41	**Recent Privilege Cases** (8 October 2008) **"Committee on the Judiciary v Miers (the "fired" prosecutors case)"** and **"Habib v Commonwealth"**, **"Search warrants: members' documents,** *Authorised by the committee for publication on 5 February 2009*
Advice No. 42	**Recent Privilege Cases** (3 February 2009) **"Search warrants: members' documents"** and **"Committee on the Judiciary v Miers (the "fired" prosecutors case)"** *Authorised by the committee for publication on 5 February 2009*
Advice No. 43	**Parliamentary Privilege - use of parliamentary proceedings against members - overseas cases** (10 August 2009) *Authorised by the committee for publication on 13 August 2009*
Advice No. 44	**Potential Conflicts of Interest** (20 October 2010) *Authorised by the committee for publication on 3March 2011*
Advice No. 45	**Update on overseas and domestic developments** (7 February 2011) *Authorised by the committee for publication on 3 March 2011*
Advice No. 46	**Application of parliamentary privilege to Australian Audit Office** (12 April 2011) *Authorised by the committee for publication on 12 May 2011*
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ADVICE NO. 40

RECENT PRIVILEGE CASES

This note is to acquaint the committee with developments in recent cases concerning parliamentary privilege.

AUSTRALIAN CASES

Three Australian cases involve actions in the federal courts against the Commonwealth and attempted use of documents prepared for the purpose of Senate proceedings. Two of these cases have been resolved. Another case involves the Parliament of Western Australia and the Crime and Corruption Commission of that state. There is also a case before the Industrial Relations Commission in which a question of parliamentary privilege was raised.

Legal proceedings involving Senate-related documents

In *White v Director of Military Prosecutions* the plaintiff sued the Commonwealth in relation to matters concerning her treatment as a member of the Defence Force. In the High Court the plaintiff attempted to establish that the military justice system is unconstitutional because it confers judicial power on non-judicial bodies. In the course of submissions the plaintiff's counsel attempted to use the report of the Senate Foreign Affairs, Defence and Trade Committee on military justice to support the submissions. The Solicitor-General, appearing for the Commonwealth, referred to the parliamentary privilege point, that a document forming part of proceedings in Parliament could not be used to support the action, but mainly argued that the views of a Senate committee as to the state of the law are not relevant to the question of the constitutionality of the law to be determined by the court. The arguments of counsel for the plaintiff were somewhat confused between using the committee report as an extrinsic aid and urging the court to adopt the committee's view of the law.

The court, in a judgment handed down in June, found against the plaintiff by a majority of six to one. The parliamentary privilege point was not referred to in any of the justices' reasons. There was some unrelated reference to the parliamentary contempt jurisdiction as an example of a seemingly judicial power held by a non-judicial body.

In *CPSU v Commonwealth*, an action in the Federal Court against the Commonwealth under workplace relations legislation, a document prepared for Senate estimates hearings was admitted and referred to in evidence and argument before it was realised that, as a document prepared for the purposes of parliamentary proceedings, it should not be used in that way. The Commonwealth sought the withdrawal of the document and the evidence on the basis of parliamentary privilege. The other party accepted the claim of parliamentary privilege and the document and evidence were withdrawn by consent of the parties.

In *Niyonsaba v Commonwealth* the plaintiff is suing the Commonwealth in the Federal Court in relation to the death of a child migrant. An application by the plaintiff for discovery of documents covered, amongst other things, briefing notes prepared for Senate question time and estimates hearings. The Commonwealth has claimed exemption of these documents on the ground of parliamentary privilege. The matter has not yet been determined.

Western Australian case

The Western Australian Crime and Corruption Commission is conducting an inquiry into misconduct by public office-holders. In February this year it held hearings, taking evidence from current and former members of the state Parliament, and a former member of the Senate, into alleged improper influence on two parliamentary committees, the Estimates and Financial Operations Committee of the Legislative Council and the Standing Committee on Economics and Industry of the Legislative Assembly. The Commission appeared not to realise, at that stage, that it should not be taking evidence about proceedings of parliamentary committees, which are protected from examination in any court or tribunal by the law of parliamentary privilege.

The Commission wrote to the committee asking for access to relevant documents, including minutes and other documents of the committee. The committee drew attention to the parliamentary privilege point and reported the request to the Council. The Commission then made its request to the President. The Commission's letter to the President indicated an awareness that there might be some point of parliamentary privilege involved, but there was still apparently no realisation that the inquiry by the Commission into proceedings of the committee was itself unlawful. The President drew to the Council's attention the matter of parliamentary privilege involved. The committee also reported to the Council on the apparent unauthorised disclosure of committee proceedings which had been revealed by the evidence before the Commission.

After a report by the Procedure and Privileges Committee, the Council agreed to make the documents available to the Commission on condition that the law of parliamentary privilege is observed. This decision is somewhat puzzling, as it is difficult to see what use the Commission could make of the documents which would not involve a violation of parliamentary privilege. The Council also appointed a select committee to inquire into the apparent unauthorised disclosure of committee proceedings. This committee has not yet reported.

Strangely, the Legislative Assembly seems not to have been concerned about the parliamentary privilege point, but only about the unauthorised disclosure of committee proceedings revealed in the testimony before the Commission. The Procedure and Privileges Committee of the Assembly found that a member of the Economics and Industry Committee had disclosed the chair's draft report of the committee to a former member of the Assembly, who had in turn disclosed it to another person. The purpose of these disclosures was found to be private gain. The committee found that the member and the former member were guilty of contempt, and recommended that the member be censured, suspended from the service of the House for seven weeks and disqualified from service on any parliamentary committee for the remainder of the Parliament. These recommendations were adopted by the Assembly.

Industrial Relations case

Smith and Department of Foreign Affairs and Trade is a case before the Industrial Relations Commission in which the applicant Smith is challenging under the Workplace Relations Act his dismissal from the Department of Foreign Affairs and Trade, which was partly on the basis of an exchange of emails with a member of the staff of an Opposition member of the House of Representatives. The staff member asked about a government report and in his response Mr Smith suggested that a question should be asked at the Senate estimates hearings, that perhaps such a question had been asked already and that the Hansard database should be consulted. Mr Smith had sought advice from the Clerk of the Senate and had been

advised that it was at least persuasively arguable that his email was protected by parliamentary privilege in that he was informing a member of the Parliament of the availability of a parliamentary process, namely Senate estimates hearings. He raised this argument in hearings before the Commission in an attempt to have the email excluded as a ground for his dismissal.

The Commissioner hearing the applicant decided on the evidence before him that the email exchange was for the purpose of the formulation of Opposition policy and not for the purpose of proceedings in Parliament, and that therefore the communication was not protected by parliamentary privilege. This decision does not have authority as a judgment in law, because the Commission is not a court. The Commission has not yet issued its final determination on Mr Smith's application. If that determination goes against him, he may have an appeal to the Federal Court, and he could argue the parliamentary privilege point again there.

OVERSEAS CASES

Jefferson case: search warrants

William J. Jefferson is a member of the US House of Representatives whose congressional office was searched and documents seized under warrant by federal law enforcement agencies investigating official corruption. This was believed to be the first occasion of a search of a congressional office, and Jefferson's challenge to the search provided the first occasion for the courts to consider legislative immunity in that context.

The agencies which conducted the search put in place a "filtering" process to ensure that material relating to the congressman's legislative duties was not seized. Jefferson, however, maintained that the search as such was unconstitutional, on separation of powers grounds. The House of Representatives did not support that broad claim, but maintained that Jefferson should have been allowed to remove immune material from the scope of the search.

A District Court rejected both of these arguments and found that the legislative immunity extended only to the use of material in court proceedings, and afforded no protection against lawful searches.

The Court of Appeals, however, ordered a stay of this judgment and put in place an arrangement similar to those used by the Australian Senate in similar cases, whereby the congressman would be allowed to claim immunity for particular documents and the claim would be determined by the court.

In its substantive judgment, delivered on 3 August 2007, the Court of Appeals held that the search and seizure violated the legislative immunity, because Jefferson should have been allowed to claim immunity for particular documents, that claim should have been determined by the court, and immune documents should not be obtained by the law enforcement agencies. The court thereby arrived at a position identical to that argued by the Australian Senate in the Australian cases.
Information in relevant Australian cases was supplied by the Department of the Senate to the US House of Representatives via researchers in the Library of Congress. So a process of cross-fertilisation has occurred: the Australian Senate has relied on US precedents, not relating to search warrants but to other processes for compulsory production of documents, to assert an immunity from seizure under search warrant, and the US legislative authorities have drawn upon the Australian Senate's precedents in arguing for such an immunity in their

courts. The US Court of Appeals judgment will now be persuasive should the issue come before Australian courts again, and will provide a basis for altering the only Australian judgment so far, that of French J. in *Crane v Gething*.

Employment cases

There have been cases in Canada and the United States which have caused great consternation and much discussion by raising the issue of whether parliamentary privilege or legislative immunity extends to employment decisions in respect of legislative staff or personal staff of legislators. These cases are irrelevant to Australia because such employment matters here are well regulated by statute, and it has never occurred to anyone that parliamentary privilege would have anything to do with such decisions. It is just possible that, in a court case about employment matters, there could be some difficulty caused by the inadmissibility of evidence relating to parliamentary proceedings; for example, there could be a dispute between a member of one of their personal staff about whether work done for the member was used in the chamber or in a committee, but the possibility is so remote as not to cause us any concern.

ADVICE NO. 41

RECENT PRIVILEGE CASES

This note is to acquaint the committee with developments in recent cases concerning parliamentary privilege.

Committee on the Judiciary v Miers (the "fired" prosecutors case)

The District Court declined an application by the administration for a stay of the court's order pending an appeal by the administration against the substantive judgment. The administration appealed against this decision to the Court of Appeals which, on 6 October 2008, granted a stay of the District Court's order and declined an application by the committee to expedite the hearing of the appeal against the substantive judgment.

The case will now carry over into the next Congress, if the next Committee on the Judiciary of the next House of Representatives renews the inquiry and the subpoenas which led to the case.

Habib v Commonwealth

In an application to the Federal Court for leave to file an amended statement of claim for the purpose of Mr Habib's action against the Commonwealth, counsel for Mr Habib sought to tender correspondence between the Senate Legal and Constitutional Affairs Committee and witnesses concerning their evidence before the committee, and answers to questions on notice asked during the proceedings of the committee. After seeking advice from the Department of the Senate, counsel for the Commonwealth submitted that the documents were proceedings in Parliament within the meaning of the *Parliamentary Privileges Act 1987*, and could not be used for any purpose prohibited by that Act. Having received submissions by counsel for Mr Habib as to the use to which the material was intended to be put, to draw conclusions and inferences about the actions of Commonwealth officials, the court on 7 October 2008 (Perram J) held that the documents could not be tendered for that purpose.

ADVICE NO. 42

RECENT PRIVILEGE CASES

This note is to provide the committee with information concerning two parliamentary privilege cases.

Search warrants: members' documents

Following the Court of Appeals judgment, which held that documents seized in the search of Congressman Jefferson's office that related to his legislative functions should not be available to prosecutors in the corruption prosecution against him, the congressman attempted to argue that the entire prosecution should be thrown out as being in violation of his legislative immunity. This claim (not supported by his House) was not successful, and his trial will now proceed based on evidence obtained by the prosecution and unrelated to his legislative functions.

In another case involving prosecution of a former member for alleged corruption, the House of Representatives has submitted to the court that evidence gained by means of telephone interceptions and interviews should not be allowed to be used in the prosecution because it included material about the member's legislative activities. If successful, this submission would make it clear that the principle applying to search warrants extends also to the interception of telephone conversations and the conduct of interviews. The case is as yet unresolved. (*US v Renzi*)

A great controversy broke out in Britain in November 2008 when police searched the offices, including the Westminster office, of an Opposition member, Mr Damian Green, and seized computer files and other documents. The police were investigating leaks of information from a government department which appeared to be finding their way to Mr Green. It subsequently transpired that the police had no search warrant for the raid on the Westminster office, and the Sergeant at Arms had given permission for the search after consulting the Speaker but not the Clerk of the House of Commons. Mr Green was also arrested and questioned by police, but has not been charged with any offence.

In the voluminous press reports and commentary on the incident, there have been references to "breach of parliamentary privilege", but seemingly no realisation that at least some of the material seized from the offices could be immune from seizure by virtue of parliamentary privilege, if the law from across the Atlantic, and the acceptance of the essence of that law by the executive government in Australia, is followed. I wrote to the Clerk of the House of Commons to draw attention to this issue, but at the time of writing it had still not been mentioned in the continuing publicity about the matter.

The Speaker has appointed a panel of members to inquire into issues arising from the police actions. The Home Secretary has said that she will review the case when the police inquiries have concluded.

Committee on the Judiciary v Miers (the "fired" prosecutors case)

There was an investigation by the Inspector General of the Justice Department into the matter of the termination of appointments of prosecutors, which concluded that there had been politicised hiring and other improper actions in the appointment and dismissal of prosecutors. Some material was referred for possible criminal prosecution. This report lends support to the inquiry by the House of Representatives Committee on the Judiciary into the matter, and is likely to facilitate the handing over of relevant documents to the committee by the new administration. The District Court judge dealing with the case on 13 January 2009 made a consent order that the documents in dispute are to be secured pending a decision by the incoming President.

ADVICE NO. 43

RECENT PRIVILEGE CASES

This note is to draw to the attention of the committee two developments overseas in relation to the use of members' participation in proceedings in Parliament as evidence against them in prosecutions for corruption offences. A case of unauthorised disclosure of committee documents is also referred to.

United Kingdom: misuse of members' entitlements

Following the great public controversy in the United Kingdom about misuse by members of the House of Commons of their entitlements to housing assistance, the government presented a bill to establish an Independent Parliamentary Standards Authority and a Commissioner for Parliamentary Investigations to police members' use of their entitlements and to proceed against any misuse of entitlements.

The bill contained a provision to the effect that article 9 of the Bill of Rights and the freedom of speech in Parliament would be set aside to allow members' participation in parliamentary proceedings to be used against them in any investigation of their use of their entitlements and in any prosecution for offences created by the bill. This provision was vigorously criticised by the Clerk of the House of Commons, Dr Malcolm Jack, in evidence before the Justice Committee of the House, as a serious abridgment of the freedom of speech in Parliament. In the course of his evidence, the Clerk again commended to members of the House the Australian *Parliamentary Privileges Act 1987* as a model that the United Kingdom should follow. The committee expressed concern about the provision, and in committee of the whole in the House the provision was struck from the bill by three votes. Subsequently, in anticipation of further defeats in the House of Lords, the government withdrew provisions in the bill which would have allowed the Authority and the Commissioner to take action against members. This will mean that they can only refer any alleged misuse of entitlements to the House and its Privileges Committee for remedial action.

The House of Lords further amended the bill to insert a provision declaring that it does not affect article 9, and put a two-year sunset clause on it, subject to extension by resolution of both Houses.

The end result is that a very significant change to the law of parliamentary privilege has been avoided.

United States: evidence to ethics committees

In a recent judgment the United States Court of Appeals held that statements made by a member of the House of Representatives to the House Ethics Committee, in an investigation of alleged improper acceptance of benefits from lobbyists, could not be used against the member in a subsequent criminal prosecution for the same matter.

It is obvious to us that statements made to a parliamentary committee are protected by parliamentary privilege and may not be used as evidence in proceedings before a court, but there were confusing judgments in the United States, one suggesting that statements to ethics committees were not always protected because they did not relate to legislative proceedings. These judgments were clearly inconsistent with judgments of the Supreme Court on legislative immunity. The court in the recent case could not overrule the previous judgments, but one of the judges suggested that the full court consider the question of law and explicitly

reverse the earlier contradictory judgments to make it clear that all statements to ethics committees are legislative proceedings and therefore protected by parliamentary privilege.

United Kingdom: unauthorised disclosure of committee documents

Following a leak to a newspaper of a draft report of a House of Commons committee, the committee concerned conducted a preliminary inquiry and the matter was then referred to the Committee on Standards and Privileges. That committee followed an email trail, and a recipient of the leak confessed to providing it to the newspaper. As a result, a member's staffer, a party researcher and a journalist were found guilty of contempt; the staffer was also found to have misled the committee. By way of penalty, the culprits had their security passes and their access to the parliamentary IT network suspended for various periods.

ADVICE NO. 44

REQUEST FOR ADVICE - POTENTIAL CONFLICTS OF INTEREST

The committee seeks my views on whether it is appropriate for members of the committee to participate in an inquiry which was referred to it in the 42nd Parliament and which it is considering re-adopting, given the previous involvement of two members in events which were the subject of the precursor inquiry by another committee. In particular, the committee seeks my advice on whether these matters give rise to an application of standing order 27(5).

Standing order 27(5) provides as follows:

> A senator shall not sit on a committee if the Senator has a conflict of interest in relation to the inquiry of the committee.

This standing order is intended to address potential conflict between senators' private interests and their public duty. It was the subject of a statement by President Beahan on 24 February 1994 in response to a suggestion that a senator had a conflict of interest because he had written newspaper articles critical of a committee of which he was a member, without identifying himself as such. President Beahan indicated that the standing order applies to a situation in which a senator has a private interest in the subject of a committee's inquiry which conflicts with the duty of the senator to participate conscientiously in the conduct of the inquiry, an example being a senator holding shares in a company, the activities of which are under inquiry.

Relating as it does to a conflict between ***private*** interests and public duty, standing order 27(5) has no application to the present circumstances wherein members of the committee have previous ***professional*** involvement in circumstances preceding the reference of the matter to the Committee of Privileges. These circumstances raise a broader issue of conflict of interest than is contemplated by standing order 27(5).

This broader issue was the subject of detailed advice to the committee from my predecessor in 1989 and subsequently published by the committee. Copies (printed from the committee's website) are attached. Mr Evans' advice discusses specific circumstances and precedents but he also makes several significant points of principle. The most important of these is that it is always a matter for the good judgement of senators whether they should refrain from participating in particular inquiries because they might be regarded as not bringing a completely impartial mind to them. However, Mr Evans also points to the absence of any rule in this or any comparable jurisdiction against members with views about matters participating in inquiries into those matters. He distinguishes the practice of the legislature from the practice of the courts where conflict of interest rules apply more strictly in the interests of the proper administration of justice.

The absence of any such rule in the parliamentary context is consistent with the function of legislatures in free states to monitor and participate in discussion of matters of public interest

or controversy. If legislators with prior knowledge of, or views about, such matters excused themselves on this basis, then there would be few legislators left to participate in most inquiries.

Mr Evans also quoted from the report of the Select Committee on Allegations Concerning a Judge and a foreshadowed challenge to three members of that committee who had been members of the earlier Select Committee on the Conduct of a Judge. The members did not disqualify themselves, the challenge did not eventuate and the committee reported in the following terms:

> Whilst not conceding the validity of the submission foreshadowed by Mr Hughes, the three members concerned considered whether they should disqualify themselves from sitting on the Committee, and concluded that they should not do so. They considered that their service on the previous Committee did not preclude them from making a proper and unbiased judgement on the matters before this Committee on the basis of the evidence to be heard by it, or that they had any sense of vested interest in maintaining their earlier decision.

Mr Evans urged the then members of the Privileges Committee to be careful about not placing future committees and senators in a difficult position by providing a precedent which would encourage future challenges to the participation of senators in inquiries by too ready an acceptance of the misleading analogy with the rules and practices of the courts. He advised that a solution to perceived bias or conflict of interest was for those members who may have prior knowledge of matters to include a statement in the report indicating that they had come to their conclusions and recommendations on the basis of the evidence put before the committee and, in the words of the select committee, did not have a vested interest in maintaining an earlier position.

In the present circumstances I do not consider that even this precaution is warranted.

To explain this view, it may be useful for me to characterise the work of the committee as falling into three distinct types of inquiry: contempt matters, right of reply applications and general matters. It has certainly been the case that members of the committee who have had an involvement in matters giving rise to a contempt or right of reply inquiry have excused themselves from participation on the grounds of that involvement. For example, Senator Hurley, as chair of the Economics Legislation Committee which conducted the inquiry into the Car Dealership Financing Guarantee Appropriation Bill 2009 at which Mr Godwin Grech appeared, did not participate in the subsequent inquiries by the Privileges Committee. In the past, when the committee investigated numerous allegations of unauthorised disclosure of committee proceedings, it was standard practice for any members of the committee who were also members of the affected committee to excuse themselves from participation in those inquiries. Many members in the past have also excused themselves from consideration of applications under Privilege Resolution 5 on the grounds that it was they who made the remarks in the Senate at which the application was directed. These types of matters, however, can be distinguished from general inquiries where there is no issue of contempt

involved, no question of individual conduct under consideration and therefore no issue of possible bias.

The proposed inquiry falls clearly into the category of general matters. Its genesis was a recommendation by the Senate Foreign Affairs, Defence and Trade References Committee in a report on a privilege matter arising from an equity and diversity health check in the Royal Australian Navy – HMAS Success. While both Senator Faulkner and Senator Johnston had an involvement in the earlier inquiry in separate roles, the committee's proposed terms of reference need not involve any revisiting of those matters.

The terms of reference deal with the adequacy of the Government Guidelines for Official Witnesses appearing before Parliamentary Committees. Should it proceed with its inquiry, the committee can expect to receive evidence of instances where the guidelines have been less than adequate. The report of the Foreign Affairs, Defence and Trade References Committee on the privilege matter arising from its inquiry into the HMAS Success is one such instance. That committee inquired into the circumstances of the inadequacy and reported its concerns to the Senate. Those concerns are now a matter of record and do not require the Privileges Committee to revisit the particular facts. Even if the committee did so, however, it would be a simple matter for the affected members to state their previous involvement and indicate the basis on which they were participating in the current inquiry (that is, on the basis of the evidence submitted, not on their previous positions which were necessarily associated with earlier or particular roles).

The proposed terms of reference of the Privileges Committee require it to extrapolate from the HMAS Success episode and other instances that may be brought to its attention, and to consider the overall adequacy of the guidelines in the light of such instances. The committee may also wish to go further and suggest how the guidelines could be improved. None of this requires it to dwell on the circumstances of particular cases. They are only illustrative of the broader issue. The important role of the committee is to bring to bear on the terms of reference the collective judgement and experience of its membership.

For two such experienced and well-informed members as Senators Faulkner and Johnston not to participate would be to deny the committee, and ultimately the Senate, of the benefit of that experience. In my view, such an outcome would not only be unfortunate in itself but it would set an unfortunate precedent by suggesting that prior professional knowledge and interest in a subject necessarily amounts to conflict of interest. The work of the Senate and its committees could not proceed on this basis.

Note: at its meeting on 3 March 2011 the committee noted the Clerk’s advice.

Senator Faulkner advised the committee that he had determined to participate in the proposed inquiry only if it was the unanimous decision of the committee that his participation was appropriate. Senator Faulkner then absented himself from the meeting.

In his absence, the committee considered the Clerk's advice and Senator Faulkner's proposal and unanimously agreed that Senator Faulkner's participation was appropriate.

The committee agreed to publish the Clerk's advice and this resolution concerning Senator Faulkner's participation in the proposed inquiry.

ADVICE NO. 45

UPDATE ON OVERSEAS AND DOMESTIC DEVELOPMENTS

Past practice of Clerks has been to provide the Committee with information about developments in other jurisdictions where it may be of interest to it. I am pleased to continue that practice.

The developments covered by this note are:

- a decision by the United Kingdom Supreme Court in *R v Chaytor and ors* [2010] EWCA Crim 1919; [2010] WLR (D) 218;
- a decision by the New Zealand Court of Appeal in *Erin A Leigh v The Attorney-General in respect of the Ministry of Environment* CA483/2099;
- the various opinions given on the power of committees of the New South Wales Legislative Council to meet after prorogation;
- the tabling by the Speaker of the New South Wales Legislative Assembly of an exposure draft Parliamentary Privileges Bill.

R v Chaytor and ors

Chaytor and three other members of the House of Commons were committed to stand trial for offences connected with their expenses claims. They challenged the charges on the ground that the criminal proceedings were an infringement of parliamentary privilege, arguing that the expenses scheme was for the purposes of enabling the Parliament to perform its core business and therefore attracted the Article 9 immunity. It was also argued that the doctrine of "exclusive cognisance" prevented the Crown Court from having any jurisdiction in the matter. (Under that doctrine, only the House of Commons could deal with conduct by its members.) The appeals were dismissed by the Court of Appeal (Criminal Division) but that decision was itself appealed to the Supreme Court which dismissed the appeal, with the reasons being published on 1 December 2010.

The Court reaffirmed the basic principle that members of parliament have no immunity from criminal justice and concluded that the submission of allegedly false expenses claims had nothing to do with the need to preserve a member's right to freedom of speech in Parliament or with the core business or functions of Parliament. Their Lordships were unable to envisage the circumstances in which the performance by a member of his or her core responsibilities would require or permit the member to commit a crime. No question of privilege arises in relation to ordinary crimes.

Leigh v Attorney-General

In this New Zealand case, reasons for which were published on 17 December 2010, briefing material provided to a minister to answer questions in Parliament was allowed to be used to found an action in defamation against him and the briefing-provider, a senior public servant.

Erin Leigh had been contracted to a departmental communications unit to develop a communications strategy on climate change issues but left suddenly when a person was appointed to oversee the strategy on which she had been working. Questions were asked in Parliament about the appointment of the supervisor and briefings, both written and oral, were sought and given. The minister answered questions in Parliament in the course of which he made criticisms of Ms Leigh.

Ms Leigh commenced proceedings for defamation on the basis of the written and oral briefings and claimed that the republication of the defamations in the House aggravated the damage suffered as a result of the original defamation. Action was taken by the respondents in the High Court to strike out Ms Leigh's claims (not all of which are covered here because not all raised issues of parliamentary privilege). The action based on the written briefing was struck out on the basis that it was incapable of bearing the defamatory meanings claimed, while the action based on the oral briefing was struck out in respect of one statement for the same reason. The judge found that Article 9 of the *Bill of Rights* precluded the claim that the minister's statements in the House amounted to a republication. Ms Leigh appealed.

The Court of Appeal confirmed the last finding but upheld the appeals in respect of the written and oral briefings.

The relevant parts of the reasons concern the issue of whether the briefings fell within the meaning of "proceedings in Parliament". In upholding the appeal, the Court of Appeal found that they do not. I understand that an appeal to the relatively new Supreme Court is under consideration.

The reason for concern is that the judgment applies a rather narrower view of "proceedings in Parliament" than has previously been accepted to apply in New Zealand. Because New Zealand has now abolished appeals to the Privy Council and established its own Supreme Court as the final court of appeal, there is also some concern that the Supreme Court might not necessarily follow Privy Council precedents in such cases as *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1 (PC) in which subsection 16(3) of the Australian *Parliamentary Privileges Act 1987* was found to be declaratory of the effect of Article 9 of the *Bill of Rights*. While the *Leigh* judgment referred to this finding, it nonetheless preferred a less inclusive interpretation of "proceedings in Parliament". In doing so, it took guidance from the judgment of Lord Phillips in *Chaytor*, and from the following statement of principle:

> In considering whether actions outside the House and committees fall within parliamentary proceedings because of their connection to them, it is necessary to consider the nature of that connection and whether, if such actions do not enjoy privilege, this is likely to impact adversely on the core or essential business of Parliament.

While noting Lord Phillips' conclusion that the examination of expenses claims forms by a court would have no adverse impact on the core or essential business of Parliament and therefore distinguishing the situation in Chaytor from the circumstances in the present case

where there was a link to the proceedings and a potential constraint on the minister's response to parliamentary questions, the Court of Appeal nonetheless considered the balance was best struck by not extending absolute privilege to the briefing material. It did not provide explicit reasons for arriving at that particular balancing point.

Although the decision has no implications for the Commonwealth because of the definitions in section 16 of the Parliamentary Privileges Act, the judgment is of concern because it weakens the position of parliament and the protection of parliamentary privilege as it has been previously understood to apply. Like the effective repetition decision (*Buchanan v Jennings*, another New Zealand case), it represents another chink in the parliamentary armour.

Committees of the NSW Legislative Council and prorogation

There was much attention in the press given to events in NSW. A committee of the Legislative Council had decided to undertake an inquiry into the sale of state electricity companies but the Parliament was prorogued and questions arose about the ability of the committee to meet after prorogation. The NSW Premier, armed with advice from the NSW Crown solicitor, suggested that any hearing of evidence by the committee would not be covered by parliamentary privilege. Although the Premier and one of her ministers gave evidence to the inquiry, former directors of the electricity company have declined. The President of the Legislative Council also declined to issue subpoenas for them to appear because there was reasonable doubt about the legal position.

Several advices have been published:

- advice from the NSW Crown Solicitor, dated 2 January 2011, confirming earlier Crown Solicitor's advice from 1994;
- advice from the Clerk of the Parliaments, Ms Lynn Lovelock, to the President of the Legislative Council, dated 11 January 2011;
- an opinion on the matter by Bret Walker SC, dated 21 January 2011.

Crown Solicitor's advice

The Crown Solicitor's advice is that committees cannot function during a prorogation without legislative authority and that standing orders permitting committees to operate for the "life of the Parliament" are beyond the authority of the relevant provision in the *Constitution Act 1902* (NSW). If committees are not able to function, they cannot therefore compel the attendance of witnesses. The Crown-Solicitor also advices that there is a risk that any evidence given would not be covered by parliamentary privilege, leaving witnesses potentially exposed to actions for defamation and breach of confidence. The advice also considers at what point legal action might be initiated to challenge the committee's actions and proposes that the service of a summons on a witness could support an action for declaration or injunction.

Clerk's advice

While noting that the legal position has not been tested, the Clerk advises that the Council is authorised by the Constitution Act to regulate its own business. In doing so, the Council has provided for the establishment of committees with the power to sit during the life of the Parliament, with no limitations on their power to sit during recesses. The only limitation is provided by a section of the Constitution Act which relates to the suspension of business before an election. The Clerk argues that the Legislative Council has a unique position in the system of responsible government operating in NSW, and that the power of modern standing committees to meet after prorogation is based on the principle of "reasonable necessity" as articulated by the High Court in *Egan v Willis*. The Clerk notes that the Crown Solicitor's advice is based on case law preceding *Egan v Willis* and goes on to present an extensive argument as to why the position, post-*Egan v Willis*, is different. The arguments are based on the changing nature of responsible government and the principle of reasonable necessity. The Clerk concludes that the proceedings of the committee will attract privilege, and that the standing orders and any orders issued by the committee are valid.

Advice of Bret Walker SC

In a relatively succinct opinion, Mr Walker agrees with the Clerk. He supports the importance of the judgments in *Egan v Willis* in changing the political landscape in NSW:

> It is clear from the reasoning of all justices in the High Court in Egan v Willis, various as their approaches were, that questions of parliamentary power depend not only on statutory wording but also on a broad, beneficial and purposive reading of provisions for such a central institution. And, at the heart of that approach, in my opinion, lies a paramount regard for responsible government in the sense of an Executive being answerable to the people's elected representatives.

He concludes by asking what justification there could be in modern times for permitting the Executive to evade parliamentary scrutiny by timing controversial actions just prior to advising the Governor to prorogue the Parliament.

Draft Parliamentary Privileges Bill

The NSW Parliament is in a different position to most Australian Parliaments in having no Constitutional or other statutory provision for its powers and privileges. In *Egan v Willis*, the High Court found that the Council had the powers and privileges that were reasonably necessary for it to carry out its functions as a central part of the system of responsible government in NSW. It therefore had the power to order the production of documents from the Executive (other than Cabinet papers). It did not, however, have the power to punish for contempt.

The exposure draft of the Parliamentary Privileges Bill 2010 confirms the scope of parliamentary privilege in NSW, provides measures to deal with offences against the Houses (contempts), including the imposition of penalties, and protects confidential communications of members from being discoverable in court proceedings except in certain circumstances. It borrows a number of things from the Commonwealth Parliamentary Privileges Act, including the threshold test for contempt in section 4 of the Commonwealth Act (that conduct must

amount to or be likely to amount to an ***improper interference*** etc). It goes a little further than section 16 of the Commonwealth Act in two respects:

- in defining "proceedings in Parliament", the bill makes it clear that the term covers persons who provide information to members for the purpose of asking questions or making statements (under the Commonwealth law, whether such actions are protected is subject to assessment by a court of the particular circumstances);
- it specifically provides for the problem of effective repetition, noting the Committee's 134th report on this subject and using the words suggested by the Committee in that report.

ADVICE NO. 46

REQUEST FOR ADVICE - APPLICATION OF PARLIAMENTARY PRIVILEGE TO AUSTRALIAN NATIONAL AUDIT OFFICE

The committee seeks my views on the application of parliamentary privilege to Australian National Audit Office (ANAO) draft reports and working papers created during the preparation of audit reports produced for tabling in the Parliament.

I have also considered the correspondence to the committee from the Auditor-General, dated 31 March 2011 proposing an amendment to the *Auditor-General Act 1997*, and the legal opinions attached to that correspondence: the 2001 opinion from the then Commonwealth Solicitor-General, Mr David Bennett, AO, QC and the 2008 opinion from a Mr A. Robertson, SC.

The statement submitted by the Auditor-General as part of his briefing to the committee on this matter characterises the 2001 advice as concluding:

> that the working papers created by the Auditor-General for the purposes of preparing audit reports or financial statement audit reports fall within the expression 'proceedings in Parliament' (as used in s16(2) of the Parliamentary Privileges Act)...

This conclusion is consistent with the long-standing view of the Senate of the scope of parliamentary privilege, and with the legislative scheme set out by the *Parliamentary Privileges Act 1987*.

The absolute immunity afforded by parliamentary privilege applies to proceedings in Parliament. The famous formulation of this protection is in article 9 of the Bill of Rights, 1688, which states:

> 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…

Article 9 applies to the Houses of the Commonwealth Parliament, by way of section 49 of the Constitution, and is now embodied in section 16 of the Parliamentary Privileges Act.
Subsection 16(2), which defines the phrase 'proceedings in Parliament', relevantly provides:

> ***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...
>
> (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;

There is no doubt the definition captures the presentation of a document to a House. Whether draft reports and working papers are also covered by privilege turns on the question whether their preparation is 'for the purposes of or incidental to' the presentation of such a document.

I note that the 2001 opinion was the subject of discussions between the then Acting Auditor-General, Mr McPhee, and my predecessor Mr Evans in 2002, and correspondence from Mr McPhee to the President of the Senate, tabled on 12 November 2002. The context was a decision of the ANAO to claim parliamentary privilege in relation to working documents it had created during the course of a performance audit conducted in 1997. The basis for the claim was that the documents fell within the term 'proceedings in parliament' for the purposes of section 16(2) of the Act. In a letter to the President tabled in the Senate on 14 June 2005 Mr Evans stated:

> I advised that this claim was well founded, because the only purpose of an ANAO audit is to make a report to the Parliament, and the whole process of reporting to the Parliament is part of proceedings in Parliament. This distinguishes ANAO from other bodies whose reports may be presented to Parliament only incidentally.

The statement from the Auditor-General to the committee submits that the status of audit working papers was thrown into doubt by the 2008 advice, 'suggesting that audit working papers "as a class" would not be "proceedings in Parliament" but that a particular working document may be'.

In my view the doubt as to the application of privilege to the draft reports and working papers in question is overstated. The 2008 opinion canvasses subsection 16(3) of the Parliamentary Privileges Act (which prevents the use of parliamentary proceedings in court proceedings for a wide spectrum of purposes) and subsection 16(4) (about *in camera* evidence, a provision which seems to me to have no relevance to the matter on which advice was sought). The opinion simply dismisses the application of the Act without explanation. It also fails entirely to consider subsection 16(2) of the Act, which is the basis for any claim of privilege in relation to such documents. As such, I cannot see that the opinion dislodges the reasoned conclusion drawn in the 2001 opinion of the Solicitor-General.

Nevertheless, the desire for certainty in this matter is understandable. The amendment suggested in the Auditor-General's correspondence would appear to provide this. It does not seek to extend the coverage of privilege, and the question of whether a particular document is covered by privilege will appropriately turn on whether the creation of the document is properly connected to the preparation of a report to be tabled in the parliament.

My one reservation about the proposed amendment is that it may raise an implication that documents produced by other agencies in similar circumstances might not be covered by privilege. As the intent of the amendment is to clarify the position of such documents created by the ANAO, my preference would be to see it reframed as an amendment 'for the avoidance of doubt' (or, to use the modern drafting style, 'to avoid doubt'). This approach is consistent with the language of section 16 of the Parliamentary Privileges Act, language carefully chosen to prevent a restricted meaning being given to the definition of 'proceedings in Parliament' and other article 9 terms as they are used in the different Australian jurisdictions and elsewhere.

I note, in passing, that the report of the Joint Committee of Public Accounts and Audit which raised this matter muddies the water by drawing a link between the status of the Auditor-General, under the *Auditor-General Act 1997*, as an independent officer of the Parliament and the application of parliamentary privilege to the Auditor's work. It is accepted that this status is symbolic. This is made clear by in subsection 8(2) of the Act, which provides that 'There

are no implied functions, powers, rights, immunities or obligations arising from the Auditor-General being an independent officer of the Parliament.' There are no implications in the law of parliamentary privilege arising from this status.

ADVICE NO. 47

REQUEST FOR ADVICE - CONSIDERATION OF SUBMISSIONS BY COMMITTEES

The committee has asked for my advice on whether it should accept two documents sent as submissions to its current inquiry on guidance for officers giving evidence to Senate committees and providing information to the Senate and senators. As the committee appreciates, the decision is one for it to make but, in this advice, I shall set out what I believe are the relevant considerations for the committee to take into account.

Terms of reference

The first consideration is the terms of reference which provide the basis for the committee to examine the extent to which the documents address those terms of reference.

As subsidiary bodies, committees undertake inquiries as instructed by the Senate either in standing orders or individual resolutions, using powers delegated to them by the parent body for the purpose. Some terms of reference are designed with deliberate flexibility by including the phrase "and any related matters" or similar terms. Such terms allow committees to inquire more broadly than the specific terms of reference might otherwise indicate, including to pursue related issues that may be raised in submissions. Committees may also seek variations to their terms of reference from the Senate.

In the case of the committee's current inquiry, the terms of reference are as follows:

> The adequacy and appropriateness of current guidance and advice available to officers giving evidence to Senate committees and when providing information to the Senate and to senators, including:
>
> (a) the adequacy and applicability of government guidelines and instructions;
>
> (b) the procedural and legal protections afforded to those officers;
>
> (c) the awareness among agencies and officers of the extent of the Senate's power to require the production of information and documents; and
>
> (d) the awareness among agencies and officers of the nature of relevant advice and protections.

They are fully defined, without the catch-all "and any related matters".

As the committee knows, the genesis of the inquiry was a report in the previous Parliament by the Senate Foreign Affairs, Defence and Trade References Committee entitled, *Report on parliamentary privilege – Possible interference with the work of the committee* (Parliamentary Paper No. 69/2010). The possible interference was in relation to that committee's inquiry concerning events on HMAS Success, and involved departmental instructions to staff about their participation in the inquiry which the committee saw as obstructive to its work. The departmental instructions, which drew problematic distinctions

between the participation of officers in a professional as opposed to personal or private capacities, had the potential to deter officers from assisting the committee with its inquiry. The committee was highly critical of the department in failing to exercise its responsibilities and obligations to the committee. It also noted potential deficiencies in the *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters* and, in particular, their failure to make clear what was meant by the term "private capacity". It recommended that the adequacy of these guidelines be referred to the Privileges Committee for inquiry and report.

On 23 June 2010, the Senate referred to the Privileges Committee the following matter:

> The adequacy of advice contained in the *Government Guidelines for Official Witnesses before Parliamentary Committees and Related Matters* for officials considering participating in a parliamentary committee whether in a personal capacity or otherwise.

Before the committee could consider the matter thoroughly, the Parliament was prorogued for the 2010 general election and the committee presented a brief report on 2 September 2010 indicating that the matter may be referred again in the new Parliament. At that stage, only one submission had been received (from me, as it happens).

The current inquiry is the result of the committee's reconsideration of the original terms of reference and its decision to expand and clarify them. Although I had no involvement in advising the committee on the expansion of its terms of reference, it is clear to me that the revised terms of reference incorporate long-running concerns of the committee with the preparedness of officers to interact with the Parliament (see 125th report, pp 46-56) and more recent developments involving the querying by statutory officers of the Senate's powers to order the production of documents (not forgetting the matters covered in the committee's 144th report on statutory secrecy provisions).

The kernel of the terms of reference is therefore the extent to which current information about the rights and obligations of officers as witnesses serves the needs of the Senate, as a House of the Commonwealth Parliament, and its committees, and what might be done to improve it. The inquiry is somewhat inward-looking in its focus, being designed to lift the performance of Commonwealth officers in particular, for the benefit of parliamentary committees. The evidence that such improvements are necessary has confronted the Senate and its committees over a considerable period of time and particular problems have been experienced with Commonwealth officers who might have been expected to know better (see, for example, the committee's 36th and 42nd reports). Notwithstanding numerous examples of poor performance in the past, the inquiry is not specifically addressing cases of individual conduct, except, I imagine, insofar as individual examples might illuminate ways of addressing any inadequacies in the guidance currently provided to officers.

Finally, in the context of the committee's overall work, the inquiry is not an exercise of its contempt jurisdiction, but a general inquiry into a matter of parliamentary law and policy.

Whether submissions are relevant to the terms of reference

The second major consideration is whether a submission is relevant to the terms of reference.

In considering whether submissions lodged are relevant to their terms of reference, committees are guided by the judgement of their members. If a submission casts light on the terms of reference, provides information or illustrations in relation to the terms of reference or draws the committee's attention to documents already in existence that might inform the committee about its terms of reference, then the submission is a relevant one. It is also relevant if it provides ideas about directions a committee might pursue in its recommendations or if it provides comparative information from other jurisdictions that illustrates a way forward (or not, as the case may be). Submissions that the committee will refer to in the course of the analysis, conclusions and recommendations in its report are clearly relevant submissions, as are those which prompt the committee to "think outside the square" about solutions which may be unorthodox. Evidence concerning another jurisdiction may be relevant to an inquiry in some circumstances. The fact that a committee may possibly not be able to compel such evidence from some State or Territory sources does not prevent a committee receiving it.

These characterisations are not intended to limit the ways in which submissions might be relevant to terms of reference. In proceedings in the Senate, a wide view of relevance has been taken but committees are entitled to form their own judgements on these matters.

Legal consequences of receiving and publishing submissions

A third consideration is that by receiving a submission and authorising it for publication, a committee confers parliamentary privilege on a document and its publication.

The actions of a person in preparing a document for submission to a committee and presenting it to the committee come within the definition of "proceedings in Parliament" in subsection 16(3) of the *Parliamentary Privileges Act 1987* and are therefore protected by parliamentary privilege. The document itself is not so protected unless it is ordered to be published and/or it is accepted as evidence by the committee. If neither of these two conditions applies, then publication of the document, for example, by its author, is not protected by parliamentary privilege.

Adverse reflections

Finally, a submission containing adverse reflections on a person may attract the provisions of paragraphs (11) to (13) of Privilege Resolution 1 and require the committee to take one or more actions in relation to the adverse reflections. A committee can decide not to receive such evidence, particularly if it is of limited or no relevance to the terms of reference. If the committee does receive the evidence, it can decide not to publish it. If the committee receives the evidence and wishes to publish it (because, for example, it is highly pertinent to the terms of reference), then it must give the person concerned reasonable opportunity to respond.

The documents

Given the foregoing, the two documents on which the committee has sought my advice relate to matters in Queensland which have previously been brought before various committees going back to the Senate Select Committee on Public Interest Whistleblowing in 1994.

The first document, from Mr Gordon Harris, President of the Whistleblowers Action Group Qld, is largely a rebuttal of a study undertaken by Griffith University on public interest disclosures and the treatment of those who make them, provided to the committee under cover of an email urging the Senate to appreciate certain claims by the author. The submission makes no attempt to address the committee's terms of reference. If the committee is satisfied that there is nothing in the document or covering letter that could inform its consideration of the terms of reference then there would be no reason to accept the document as a submission.

It is not apparent that the document attached to Mr Harris's email has previously been published and the committee should not overlook the possibility that the Whistleblowers Action Group Qld is seeking to have it published under parliamentary privilege.

The second document, submitted by Mr Kevin Lindeberg, is more problematic because it purports to address the terms of reference. It is entitled "Protection of Whistleblowers Appearing before Senate Committees". On first impressions, this is not the subject of the committee's inquiry which is about the adequacy and appropriateness of guidance and advice available to officers giving evidence to Senate committees and providing information to the Senate and senators. It may be, however, that the committee considers that the treatment of whistleblowers should be dealt with as part of any relevant guidance and advice. (As an aside, the Public Interest Disclosure Bill 2011, a response to the Dreyfus committee's report on whistleblower protection, to establish a framework for reporting and investigation of alleged wrongdoing in the Commonwealth public sector, is scheduled for introduction during the current winter sitting period.)

Mr Lindeberg's submission is accompanied by a 9 volume audit of the Heiner affair by David Rofe QC. At the risk of oversimplifying it, Mr Lindeberg's submission is that, since Federation, the Commonwealth has acquired sufficient extra powers (through numerous High Court judgments and accession to international treaties protecting civil and political rights) to enable it to exercise them in the oversight of any action by state officials that is contrary to the particular features of the rule of law that Mr Lindeberg argues the Commonwealth Constitution guarantees. It is an argument for extended jurisdiction of the Commonwealth Parliament over state matters to support Mr Lindeberg's contention that the committee should revisit the Heiner affair. Mr Lindeberg does not claim to have new evidence but he proposes that further facts that he has become aware of since the various committee inquiries concerning the matter, including the Senate Select Committee on the Lindeberg Grievance (2004), have led him to fresh insights into new ramifications about the illegality of the original acts and the validity of the testimony given by various parties to various committee inquiries (paragraph 2.4 and following). It is a complex and difficult submission, citing many High Court judgments and other sources (not always accurately) but also involving expressions of opinion, assertions and circular arguments. There is no doubt that the subject matter is very serious. The question is whether any of the documentation is likely to assist the committee to consider and come to conclusions on its current terms of reference.

Apart from the possibility noted above, it is difficult to see how the document does bear on the terms of reference. It does, however, present the committee with another issue to

consider; namely, whether the document discloses any evidence of contempt that has not previously been dealt with by the committee (in its 57th, 63rd and 71st reports) and that may warrant inquiry now. To satisfy itself on this front, the committee may wish to commission a research paper from its secretariat that identifies any such matters. Should there be matters which the committee considers warrant investigation as possible contempts, then it should raise them in accordance with standing order 81.

ADVICE NO. 48

A RECENT CASE – APPLICATION OF THE PARLIAMENTARY PRIVILEGES ACT

The committee may be interested in a recent case decided in the Federal Court which involved an application of provisions of the Parliamentary Privileges Act, particularly subsection 16(3) which deals with the meaning of "questioned or impeached" in Article 9 of the Bill of Rights 1688 (*British American Tobacco Australia Limited v Secretary, Department of Health and Ageing* [2011] FCAFC 107 (23 August 2011)).

Subsection 16 (3) 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.

The case was an appeal by British American Tobacco Australia Ltd under the *Freedom of Information Act 1982* against a decision of the Department of Health and Ageing to deny access to a copy of legal advice provided by the Attorney-General's Department in 1995 to the then Department of Human Services and Health concerning constitutional or other legal impediments to the introduction of generic packaging for tobacco products. The document was claimed to be exempt on the basis of legal professional privilege, a decision affirmed by the Administrative Appeals Tribunal.

The appellant argued that various disclosures of a summary of the advice constituted a waiver of that privilege. The Federal Court rejected the appeal.

The issue of parliamentary privilege arose because two of the acts of disclosure involved the tabling of a government response to a report of the Senate Community Affairs References Committee on the tobacco industry and the cost of tobacco-related illness, and the publication of the government response on a government website. The question was whether these disclosures were proceedings in parliament and therefore precluded from being considered for the purpose of determining waiver of legal professional privilege.

The Court reached its decision by applying the standard tests for whether the disclosures it was able to examine had amounted to a waiver of the privilege. First,

however, it considered whether section 16 of the Parliamentary Privileges Act precluded it and the AAT from examining the disclosures in the two publications of the government response. The appellant argued that it was permissible to refer to the tabled government response because it sought only to prove the fact that the words were used in the tabled document, not to invite any inference from the use of those words or to raise any question of the truth of, or motives behind, the response. The respondent argued that the tabled response could not be used to found a contention that legal professional privilege had been waived, because it was necessary to form a judgment on the basis of inferences or conclusions regarding the content of the original advice referred to in the response, in order to decide whether publication of the response was inconsistent with the maintenance of the privilege. The Court agreed with the respondent:

> 48. ... To avoid the threat presented by s 16(3) of the PP Act, the appellant is driven to say that it seeks to refer to the tabling of the Government Response in the Senate only to show that the words were published. However, if one does not go further and invite the inference that the reference reveals an inconsistency in the position of the respondent in now seeking to maintain legal professional privilege, then there can be no basis to the conclusion that the privilege has been waived. If the appellant seeks to show the inconsistency necessary to make good its waiver argument, it must be gored by s 16(3) of the PP Act.
>
> 49. In our opinion, it is not possible to avoid the conclusion that the appellant does indeed seek to make use of the tabling of the Government Response to permit the drawing of an inference adverse to the government. Since inconsistency in maintaining the privilege is the point on which waiver turns, for the appellant to succeed it must persuade the court that the conduct of the respondent in insisting upon the privilege is inconsistent with the publication of the Government Response by tabling it in the Senate. That is precisely the kind of reflection which may not be made upon the conduct of those whose published statements are within the protection of s 16(3) of the PP Act.

The Court concluded that the AAT did not err in law in concluding that subsection 16(3) of the Parliamentary Privileges Act precluded it from deciding whether the tabling of the government response in the Senate was inconsistent with the maintenance of legal professional privilege in the original advice.

In relation to the disclosure of the response on a government website, the Court concluded that this publication was not covered by parliamentary privilege. The respondent argued that the publication was covered by that aspect of "proceedings in parliament" represented by paragraph 16(2)(c):

the preparation of a document for purposes of or incidental to the transacting of any such business.

The Court rejected this claim, as well as the respondent's contention that Senate standing order 167 (which authorises the publication of any tabled document) in combination with paragraph 16(2)(d) of the Parliamentary Privileges Act[1] somehow transformed the publication of the document by a government agency on a government website into a "proceeding in Parliament". The Court had no difficulty in dismissing such an extravagant claim, based on a complete misunderstanding of standing order 167:

> 51. ... The respondent's argument fails to acknowledge that s 16(2) of the PP Act is concerned with what is incidental to the activities of the legislative arm of government and that the publication by the executive government was, on the face of things, unrelated to the business of either house of the legislative branch.
>
> ...
>
> 55. The courts should not be astute to confine the scope of parliamentary privilege, but neither should they give effect to exorbitant claims which are apt to interfere with the rights of subjects without any corresponding benefits in terms of freedom of debate in Parliament and the protection of Parliamentarians. See *Buchanan v Jennings* at [6] - [10]. It would, we think, give an unduly expansive operation to the provisions of Senate standing order 167 to regard it as clothing with parliamentary privilege any re-publication by any stranger of any document tabled in the Senate. And for present purposes, the offices of the executive government who published the Government Response on its website were strangers to the Senate.

On this website publication, the Court found that the AAT had erred in law in failing to consider and deal with the appellant's contention that disclosure of the government response on the website effected a waiver of legal professional privilege. In the end, however, this did not affect the final outcome (that the privilege had not been waived by the publication of references to the original advice).

On both counts, the judgment represents a sound application of the principles of parliamentary privilege as expressed in the Parliamentary Privileges Act.

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[1] 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:
… (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 do formulated, made or published.

UPDATE: ATTORNEY-GENERAL V LEIGH [2011] NZSC 106

In advice provided on 7 February this year, I informed the committee about a decision of the New Zealand Court of Appeal in *Erin A Leigh v The Attorney-General in respect of the Ministry of Environment* CA483/2099. The judgment confirmed that briefing material provided to a minister (in both written and oral form) to answer questions in Parliament was allowed to be used to found an action in defamation against him and the briefing-provider, a senior public servant. It did not fall within the meaning of "proceedings in Parliament" and was therefore not covered by absolute privilege. Ms Leigh's work performance was the subject of the briefing and the decision was given in relation to defamation proceedings which she instituted against the minister and senior public servant.

An appeal against the decision was recently determined by the New Zealand Supreme Court which has replaced the Privy Council as New Zealand's final court of appeal. The appeal was not successful and the judgment follows a recent trend to constrain the scope of parliamentary privilege across the Tasman, following on from *Buchanan v Jennings* (the effective repetition case). Repetition outside parliamentary proceedings of statements made in the course of those proceedings is not protected by parliamentary privilege. In the effective repetition case, the court allowed reference to protected statements made in the course of parliamentary proceedings to establish the meaning of unprotected statements made outside those proceedings (along the lines of "I do not resile from what I said in the House") to support a defamation action. In its 134th Report, the Committee examined the potential problem of effective repetition and advised the Senate that if the codification of the meaning and application of Article 9 of the Bill of Rights 1688[1] in section 16 of the *Parliamentary Privileges Act 1987* proved susceptible to similar erosion by Australian courts, then a clarifying amendment should be considered. There has been no occasion to revisit this issue.

Attorney-General v Leigh involved consideration of events that culminated in parliamentary proceedings (a minister answering questions in the House) and the extent to which those events (the provision of written and oral briefing to the minister) were protected by absolute privilege. Lower court decisions had found that the communications in question were not covered by absolute privilege. The communications could therefore be used to support Ms Leigh's defamation action.

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

The relationship between parliamentary privilege and defamation law has long been problematic. The use of parliamentary proceedings to support legal proceedings is prohibited by the law of parliamentary privilege but, as my predecessor, Mr Evans, advised the Committee in July 2004 (Advice No. 37):

> While this may be crystal clear to us, certain judges do not find it so. The problem appears to arise from a deeply-ingrained view in the legal system that the law of defamation is a fundamental law, and that the right to sue for defamation is the most fundamental human right, and every other law must give way to it.

This tendency is apparent in the decision in *Attorney-General v Leigh*. The key question was whether the communications between the senior public servant and the minister were within the scope of "proceedings in Parliament" and therefore covered by absolute privilege. In deciding this question, the Court followed the lower court in adopting the concept of connectedness, as expressed by Lord Phillips PSC in *R v Chaytor*[2]:

> [47] … In considering whether actions outside the Houses and committees fall within parliamentary proceedings because of their connection to them, it is necessary to consider the nature of that connection and whether, if such actions do not enjoy privilege, this is likely to impact adversely on the core or essential business of Parliament.

On this view, the test is one of necessity: "whether it is necessary for the proper and efficient conduct of the business of the House for the occasion in question to be classified as one of absolute privilege". Furthermore, where "the claim for absolute privilege would result, if successful, in depriving citizens of their common law rights, the courts will be astute to ensure that the claimed absolute privilege is truly necessary for the proper and effective functioning of Parliament. In such circumstances the privilege must be necessary in the sense of essential".[3]

Counsel for the Speaker of the New Zealand House of Representatives submitted that the proper test was whether the occasion was "reasonably incidental" to the discharge of the business of the House, a test based on the codification of "proceedings in

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2 *R v Chaytor* [2010] UKSC 52, [2011] 1 AC 684. This case concerned the prosecution of members of the UK Parliament for offences involving misuse of their expenses. The plaintiffs' argument that their actions were covered by parliamentary privilege because they came within the exclusive cognisance of the House was rejected, allowing the prosecutions to proceed (covered in advice to the Committee, dated 7 February 2011).

3 At [7].

Parliament" in section 16(2) of the *Parliamentary Privileges Act 1987*.[4] While section 16 has generally been seen as a correct codification of Article 9 of the Bill of Rights,[5] the Court rejected this test. Its reasoning was based on consideration of *Prebble v Television New Zealand Ltd*[6] in which Lord Browne-Wilkinson for the Privy Council said that section 16(3) contained the true principles to be applied. (Section 16(3) concerns the meaning of "impeach or question" in Article 9.[7]) However, in *Prebble*, there was no need to consider the scope of parliamentary proceedings or its codification in section 16(2), because the conduct in question comprised statements made in the House, incontrovertibly a proceeding in Parliament. The scope of parliamentary proceedings was therefore not an issue in the case. Nevertheless, the Court in *Leigh* came to this conclusion:

> His Lordship's reference to "that Act" [ie, *the Parliamentary Privileges Act 1987*] can hardly have been meant, in context, to express the view that all of s 16 was a reflection of the common law. The focus was on subs (3). In the unlikely event that their Lordships did mean to say that s 16 as a whole reflected art 9 and the associated common law, we respectfully consider they

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4 **16 (2)** For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, "proceedings in Parliament" means all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:

(a) the giving of evidence before a House or a committee, and evidence so given;

(b) the presentation or submission of a document to a House or a committee;

(c) the preparation of a document for purposes of or incidental to the transacting of any such business; and

(d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

5 Relevant Australian and Commonwealth cases are cited in *Odgers' Australian Senate Practice*, 12th edition, 2008, p. 43. Also see the discussion of section 16(2), in particular, and the endorsement of it as a model for a statutory definition in the Report of the (UK) Joint Committee on Parliamentary Privilege 1998-99, HL Paper 43—I, HC 214—I, pp. 37-8.

6 *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1 (PC).

7 **16 (3)** In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:

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

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

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

> went too far, notwithstanding the Australian Parliament's use of the words "[f]or the avoidance of doubt" in s 16(1).[8]

The Court did not explain the basis on which they reached the conclusion that this could "hardly have been meant" or that any such view was "unlikely". Arriving at this destination also required the Court to reject the description of the scope of parliamentary proceedings and the basis for determining it, expounded by David McGee QC in *Parliamentary Practice in New Zealand*, 3rd edition, 2005 (the New Zealand *Odgers'*).

The Court proceeded to determine the case by asking whether in the circumstances it was necessary to afford the communication more than qualified privilege. Noting that nothing had been put before it to suggest that limiting the senior public servant's communications to qualified privilege would "cause problems for the proper functioning of Parliament," the Court was not persuaded that absolute privilege was necessary, and dismissed the appeal.

The Speaker referred the decision to the Privileges Committee for consideration but, as the New Zealand House of Representatives has now been prorogued for a general election, it will be some time before the next steps in the debate become clear. In the wake of the effective repetition case, the New Zealand Parliament considered, but did not proceed with, legislative action. After this further unsympathetic decision, the Parliament may be more disposed to consider a statutory definition of the scope and application of parliamentary privilege, a position also currently attracting greater support in the UK (having already been recommended by the 1998-99 joint select committee).

Incidentally, Australian courts have routinely accepted that briefing material of the kind at issue in *Leigh* was within the scope of "proceedings in Parliament" as defined by section 16(2) of the Act.[9]

I shall keep the Committee informed of any significant developments.

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8 At [10].

9 For relevant cases, see *Odgers*, pp. 46-7.