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Anti-corruption agencies: Impact on the privileges and immunities of parliament¹

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Introduction

Until recently, only three Australian parliaments — NSW, Queensland and Western Australia — had legislated for the creation of specialist anti-corruption agencies. However, Tasmania has now established an Integrity Commission and Parliamentary Standards Commissioner, the Victorian government has indicated its support for the establishment of a Victorian Anti-Corruption Commission, the South Australian government has initiated a review of its anti-corruption institutions², and the federal government has signed a ‘confidence and supply’ agreement with independent MPs and the Greens committing to the establishment of a Parliamentary Integrity Commissioner.³ The term ‘parliamentary privilege’ refers to ‘the powers and immunities possessed by individual Houses of Parliament, their members and other participants in parliamentary proceedings, without which they could not perform their functions’.⁴ One of the most important of the privileges of Parliament is ‘freedom of speech’, which is enshrined in Article 9 of the *Bill of Rights 1689*. It states:

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

In those jurisdictions with specialist anti-corruption agencies, the legislation governing such agencies in some instances includes specific provisions which seek to protect parliamentary privilege. However, in practice issues have arisen regarding the extent to which such agencies can investigate conduct by MPs that is connected to the proceedings of parliament and would otherwise fall within the sole jurisdiction of parliament. This uncertainty in jurisdiction periodically manifests in high profile corruption investigations in which the relationship between parliament and the anti-corruption agency is re-examined. This article explores some of these investigations, including, for example: the seizure of potentially privileged material by the Independent Commission Against Corruption in NSW; the investigation by the Queensland Crime and Misconduct Commission of statements made by a minister to a parliamentary Committee; and investigations and reports by the Western Australian Corruption and Crime Commission on behalf of the

Parliamentary Procedures and Privileges Committee. Anti-corruption agencies in NSW, Queensland and Western Australia have extensive covert and coercive investigative powers and a broad mandate to investigate and expose public sector corruption. For instance, the ICAC can utilise telephone intercepts, assumed identities, and abrogate the privilege against self incrimination. There is a risk that the establishment of a powerful investigative agency with jurisdiction over MPs can weaken the traditional role of parliament of being the sole arbiter of conduct which occurs in the context of the proceedings of parliament. However, an examination of the incidents involving conflict or questioning of jurisdiction reveals that much depends on the legislative provisions protecting parliamentary privilege and the force of the parliament in confidently and consistently asserting its jurisdiction.

What follows focuses solely on the impact of anti-corruption agencies with jurisdiction over MPs on parliamentary privilege, primarily in the context of Article 9 of the *Bill of Rights*.

The NSW Independent Commission Against Corruption (ICAC)

The ICAC is charged with investigating corrupt conduct by public officials, including MPs. ‘Corrupt conduct’ occurs when a public official improperly uses, or tries to improperly use, the knowledge, power or resources of their position for personal gain or the advantage of others, a public official acts dishonestly or unfairly, or breaches public trust, a member of the public influences, or tries to influence, a public official to use his or her position in a way that is dishonest, biased or breaches public trust. However, conduct does not amount to corrupt conduct unless it could constitute or involve a criminal offence, or a disciplinary offence, or reasonable grounds for dismissing, dispensing with the services of or otherwise terminating the services of a public official, or, in the case of a Minister of the Crown or a member of a House of Parliament—a substantial breach of an applicable code of conduct.⁵ Section 122 of the Independent Commission Against Corruption Act 1988 (ICAC Act) states:

Nothing in this Act shall be taken to affect the rights and privileges of Parliament in relation to the freedom of speech, and debates and proceedings, in Parliament.⁶

Uncertainty surrounding the powers of the ICAC and parliamentary privilege has centred on a conflict between ICAC’s role to ensure the investigation of corrupt conduct, and the desire by Parliament to protect Article 9 immunity. The main issues to emerge regarding parliamentary privilege are as follows.

Regulation of Secondary Employment for Members of the NSW Legislative Assembly (2003): in 2002, the Legislative Assembly requested that ICAC investigate the regulation of secondary employment by its members, specifically the conduct of the Leader of the Opposition in his role as a ‘public affairs’ consultant ‘and allegations that he had asked questions in parliament that furthered the interests of his employer’.⁷ This investigation raised the issue of whether the ICAC was able to investigate the conduct referred to in this particular instance. It also

raised the broader question of who should investigate the conduct of members involving privilege. ICAC made a number of recommendations relating to secondary employment in general, but felt that it was unable to comment on the conduct of the Leader of the Opposition as it could not ‘use its statutory investigative powers as [it]... did not have the statutory authority to investigate matters where parliamentary privilege applies.’⁸ The Commissioner explained that ‘the jurisdiction of the ICAC did not extend to questioning the motive, intention or good faith of anything forming part of the proceedings in Parliament, or questioning or... drawing inferences from anything forming part of Parliamentary proceedings’.⁹ In its report, ICAC put forward two options to allow for the investigation of corrupt conduct which would involve questioning or relying upon proceedings in parliament:

Option 1: Amendment to the Independent Commission Against Corruption Act 1988 to allow the Parliament to waive parliamentary privilege for specific matters which are referred to the ICAC by resolution of the House (although such an amendment would most likely only extend to those Members who choose to give evidence to the ICAC on a voluntary basis).

Option 2: The appointment of an officer of the Parliament on a case-by-case basis to investigate particular matters (7 provisions are outlined which would safeguard the independence of the investigating official).

In the cases where the conduct of the investigation by the official, or the findings of the official are contested, that the House consider the appointment of an investigatory panel, similar to that of the British House of Commons.

The Assembly Committee on Parliamentary Privilege and Ethics considered the report, and made the following response:

..., the Committee recommends that s122 of the Act not be amended, and that the House consider options for investigating matters coming before the ICAC which involve parliamentary privilege on a case by case basis.

The Committee did not support option 1, acknowledging that the issue of waiver of privilege was contentious and would impact on the original intent of the parliament in legislating to protect Article 9 of the *Bill of Rights*.¹⁰ The issue of who should investigate allegations of misconduct and corruption related to the proceedings of parliament was revisited in a government initiated independent review of the ICAC Act in 2005, which recommended:

That consideration be given to the establishment of a Parliamentary investigator or Parliamentary Committee to investigate minor matters involving Members of Parliament so as to permit ICAC to focus on serious and systemic allegations of corruption or to investigate allegations of corruption that ICAC is unable to investigate because of Parliamentary privilege as preserved by section 122 of the Act.¹¹

This proposal was supported by ICAC, but was not supported by the Legislative Assembly Privileges and Ethics Committee.¹² The issue of a parliamentary mechanism to investigate allegations of corrupt conduct which involve questioning conduct relating to the proceedings of parliament has not yet been resolved. The ICAC’s investigations of MPs over the past ten years have focused mainly on the

misuse of parliamentary entitlements and resources,¹³ rather than investigations which are likely to raise substantive privilege issues, such as bribery or the use of confidential information.¹⁴ The terms of reference for both the Legislative Assembly and Legislative Council privileges committees allow them to consider and report upon any matters relating to privilege which referred to them by the House. Theoretically, the parliament and its committees have many of the investigative powers of a standing royal commission, such as the power to call for documents and compel witnesses. However, the Assembly committee has never conducted an inquiry into conduct of a member, and the Council committee has not conducted such an investigation in the past decade.¹⁵ It would be unsurprising if there was resistance from the ICAC, the public and media, to a committee comprising MPs investigating 'one of their own'. There is also potential for political motivations and real or perceived bias to hinder such investigations.

The ICAC is a well-established part of the 'justice' landscape in NSW and a culture and expectation has built up that public officials' conduct will be investigated by an external, independent agency. The absence of a Parliamentary Commissioner or some other parliamentary mechanism (aside from the Privileges Committees of both Houses) to deal with conduct relating to the proceedings of Parliament is somewhat of a 'sleeping issue'. It is foreseeable that unless such a mechanism is introduced, a high profile investigation may lead to significant public and political pressure for privilege to be 'waived' and ICAC's jurisdiction to be expanded.

Alleged misuse of allowances and resources by the Hon Peter Breen MLC (2004): following the execution by the ICAC of a warrant on Legislative Council MP, Peter Breen's parliamentary office, concerns were raised that some privileged material may have been seized.¹⁶ The matter was referred to Council's Standing Committee on Parliamentary Privilege and Ethics, which found that 'proceedings in Parliament will inevitably be hindered, impeded or impaired if documents forming part of proceedings in Parliament are vulnerable to compulsory seizure.'¹⁷ This view was contrary to that of ICAC, which had submitted that 'it is only the subsequent use of seized material which may amount to an impeaching or questioning, and not the seizure itself.'¹⁸ The Committee held a subsequent inquiry to develop a general protocol for the execution of search warrants on members' offices. It recommended the following three step test for determining whether or not a member's documents fall within the scope of proceedings in parliament and are therefore protected by parliamentary privilege:

Were the documents brought into existence for the purposes of or incidental to the transacting of business in a House or a committee?

- YES → falls within 'proceedings in Parliament'.
- NO → move to question 2.

Have the documents been subsequently used for the purposes of or incidental to the transacting of business in a House or a committee?

- YES → falls within 'proceedings in Parliament'.
- NO → move to question 3.

Have the documents been retained for the purposes of or incidental to the transacting of business in a House or a committee?

- YES → falls within ‘proceedings in Parliament’.
- NO → does not fall within ‘proceedings in Parliament’.¹⁹

The ICAC subsequently adopted this protocol, but with some differences in relation to the determination of claims of parliamentary privilege. In its examination of the ICAC protocol, as part of its later inquiry into entering into a Memorandum of Understanding with the ICAC, the Committee noted some discrepancies. For instance, the ICAC protocol ‘did not refer to the criteria for determining claims of privilege, whereas the Committee’s had included a definition of ‘proceedings in Parliament’ consistent with s.16(2) of the *Parliamentary Privileges Act 1987* (Cth), along with a test for determining whether documents are protected by privilege’. In evidence to the Committee, the ICAC advised that, it ‘did not agree that retention of a document for the purposes cited by the Committee is within the scope of ‘proceedings in Parliament’ and, therefore, may render a document immune from seizure.’ The ICAC felt that the test could ‘operate so as to prevent the seizure of any document, as a member could claim they intended to use a document at some future time, for or incidental to, the transacting of relevant business in the House.’²⁰ The ICAC protocol also did not make reference to procedures for disputed claims of privilege. In evidence to the Committee, the ICAC indicated that:

In the event the issue of parliamentary privilege arises in any future operation the Commission would need to determine, on a case by case basis, whether it accepted such a determination and if not whether it should seek judicial review of any such decision.²¹

The Committee disagreed and referred to the ‘broader, well-established principle that it is for the courts to determine the existence of a privilege but it is solely for the House to determine the manner of the exercise of a privilege.’ The Committee stated that in the event of judicial review it would expect that the ‘House would vigorously assert this principle’.²² However, the Committee did not consider that this disagreement over jurisdiction should prevent the Parliament from agreeing on the ‘issue of the procedures which should be followed by investigating officers to ensure that material subject to parliamentary privilege is not seized under a warrant.’ Hence, while the ICAC and the Houses of the NSW Parliament have entered into a Memorandum of Understanding on the execution of search warrants, differences of interpretation still remain. Also, the Memorandum of Understanding does not cover the ICAC’s use of telecommunications intercepts as part of its investigations. In this instance, it could not be argued that parliamentary privilege has been diluted by the ICAC investigation. Rather, the Parliament made a strong defence of parliamentary privilege and Article 9 and ‘vigorously asserted its right to ‘determine the manner of exercise of privilege’.

The Queensland Crime and Misconduct Commission (CMC)

The CMC investigates crime and official misconduct. ‘Official misconduct’ is ‘any conduct by a public official, related to the official’s duties, that is dishonest or lacks

impartiality, involves a breach of trust, or is a misuse of officially obtained information.’ For the conduct of an MP to ‘constitute official misconduct, the conduct must be capable of amounting to a criminal offence’.²³ While there is a Code of Conduct for members of the Queensland Assembly, it has no separate legal status and breaches are not subject to investigation by the CMC unless they also constitute a criminal offence. Queensland differs from other jurisdictions in that there is no express provision in the *Crime and Misconduct Act 2001* protecting parliamentary privilege. Rather there are procedures for claims of privilege, which in misconduct investigations include claims of parliamentary privilege.²⁴ For instance, a person who fails to comply with a notice does not commit an offence if the information or document is subject to privilege²⁵ and a person at a hearing is entitled to refuse to answer a question on the grounds of parliamentary privilege.²⁶ If a claim of privilege is made, the commission officer is required to consider the claim. If the notice to produce or requirement to answer a question is not withdrawn by the CMC, the person may apply to, or be required to attend before, the Supreme Court to establish the claim.²⁷

The relationship between the CMC and parliament in relation to the investigation of conduct by MPs has, at times, been fraught. For instance, the Members’ Ethics and Parliamentary Privileges Committee (MEPPC) has investigated Criminal Justice Commission (predecessor to the CMC) for contempt. Criminal Code provisions (since repealed) criminalised behaviour relating to proceedings of parliament and which would have otherwise been dealt with as contempt of parliament or breach of privilege. This created uncertainty as to the respective jurisdictions of the CMC and the parliament. While an examination of CMC investigations under the Criminal Code provision is largely academic, given that they have since been repealed, these investigations are still relevant in terms of analysing possible areas of contention between parliaments and anti-corruption agencies.

Report on a matter of privilege: Alleged contempt by the Criminal Justice Commission (1996): this inquiry related to ‘an alleged investigation of Mr Grice [MP] by the Criminal Justice Commission following a speech in the Legislative Assembly’ in which he had ‘made allegations concerning the unauthorised release by an officer of the CJC of highly confidential CJC information’.²⁸ Mr Grice made a number of allegations about the propriety of the CJC’s investigation, and requested that the MEPPC consider:

... that it is the very subject of my allegations in Parliament, the Criminal Justice Commission, which secretly launches an investigation into my behaviour, and further, that the member of the Commission’s staff whom I name in Parliament, according to the *Courier Mail*, is authorised by the Chairman of the Criminal Justice Commission to have the benefit of the evidence obtained “to help defend himself”. ... Any reasonable observer could only conclude that the action of the Criminal Justice Commission in secretly launching this investigation was using its not insubstantial powers in a manner that was likely to attempt to intimidate a Member of this House and obstruct a Member of this House in the discharge of his duty.

He also claimed that the actions of the Criminal Justice Commission were a 'fundamental attack on the right of a Member... to speak freely and without fear of prosecution'.²⁹ The MEPPC considered whether the CJC's conduct could constitute contempt either in terms of 'the deliberate molestation of a member or a member's source of information' or the 'questioning or impeaching of statements made by a member in the Legislative Assembly'. While the MEPPC found that in this instance there was insufficient evidence on either count, it did state that such conduct could constitute a contempt of parliament. In identifying that an investigation of a member of parliament following statements made in parliament may 'in certain circumstances constitute a breach of privilege enshrined by Article 9 and a contempt of parliament' the MEPPC stated:

...if the investigating body is carrying out a legitimate and lawful investigation into the substance of matters raised in Parliament, it is doubtful that that alone could ever constitute a contempt of Parliament. On the other hand, it may be a contempt if the evidence suggests that at least one purpose of the investigation was really directed towards trying to punish the member (or perhaps an informant) for the statement made in Parliament... Put simply, if it can be shown that the investigating body was trying to interfere with a proceeding in parliament or attempting to punish someone by whatever means for statements made in parliament, there may be an issue of privilege.³⁰

This inquiry by the MEPPC would seem to indicate that parliament possesses adequate mechanisms to deal with actions by an anti-corruption agency which infringe on parliamentary privilege. While it is possible that an anti-corruption agency might seek to hinder the proceedings of parliament or intimidate an MP, there are potential sanctions for such action in the form of investigation by parliament or a parliamentary committee for possible contempt of parliament or breach of privilege. It is also open for parliament, as legislator and through its oversight of anti-corruption agencies, to amend powers and jurisdiction of anti-corruption agencies where it considers necessary.

Investigation of matters relating to the conduct of the Hon Ken Hayward MP (2003): in 2003 the CMC conducted an investigation into allegations that the Hon Ken Hayward MP 'may have acted improperly in relation to various transactions between government agencies and business entities with which he may have been directly or indirectly linked.' Among other things, concern were raised about Mr Hayward making speeches in parliament 'on issues said to be of relevance to the interests of businesses and companies with which he was connected, without declaring those interests to the parliament.'³¹ Section 59(1) of the Criminal Code (since repealed) provided:

Any person who, being a member of the Legislative Assembly, asks for, receives, or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself, herself or any other person upon any understanding that the person's vote, opinion, judgment, or action, in the Legislative Assembly, or in any committee thereof, shall be influenced thereby, or shall be given in any particular manner or in favour of any particular side of any question or matter, is guilty of a

crime, and is liable to imprisonment for 7 years, and is disqualified from sitting or voting as a member of the Legislative Assembly for 7 years.

The CMC considered that the allegations about Mr Hayward's conduct in relation to parliament, such as 'failures to declare relevant interests in the Register of Members' interests or when making speeches to the parliament, did not involve matters which could amount to official misconduct; the conduct in question could not, even if proved, amount to a criminal offence (which is necessary before the conduct of an elected official, such as a member of parliament, can amount to official misconduct).³² While finding no evidence that Mr Hayward had engaged in such conduct, the CMC report made the following observations about the operation of the Code and parliamentary privilege:

Matters such as alleged breaches of SOs[Standing Orders] or the requirements to disclose relevant interests in the Register would ordinarily not amount to conduct capable of constituting official misconduct, such as would fall within the CMC's investigative jurisdiction, because such conduct could not by itself amount to a criminal offence. The CMC recognises that such issues relate to proceedings of parliament which are matters for the parliament alone to adjudicate upon, through the processes it has established, if issues or complaints arise.³³

The CMC stated that it had examined issues concerning parliamentary 'standards' and obligations in the context of 'their relevance to the concerns which were assessed as being capable of amounting to official misconduct.' The CMC also stated that it was 'mindful that evidence of any conscious failure to declare certain interests, as required by the parliament, may be a relevant factual circumstance if other evidence existed to support a view that Mr Hayward had at the material time engaged in official misconduct.' In regard to the jurisdiction of the MEPCC, the CMC report referred to section 92 of the *Parliament of Queensland Act 2001*, which provides, amongst other things, 'that a complaint about a member not complying with the Code may be considered only by the Legislative Assembly or the MEPCC.' However, the CMC contended that this exclusionary provision would not apply to an entity such as the CMC, if that entity may under a law (such as the Act) consider an issue and the issue that is considered involves the commission or claimed or suspected commission of a criminal offence.³⁴

Allegations concerning the Honourable Gordon Nuttall MP (2005): in 2005 the issue of whether the CMC could conduct investigations which involve 'impeaching or questioning' parliamentary proceedings, and which also involve specific offences under the Criminal Code, was revisited. Following evidence given by the then Minister for Health, the Hon Gordon Nuttall MP, before a parliamentary estimates committee, the Leader of the Opposition made allegations to the police that the Minister had contravened section 57 of the Criminal Code. The police then referred the matter to the CMC. The matter was also referred to the MEPPC, which indicated that, in keeping with its established procedures formatters that may be a contempt and, and a criminal offence, it would 'take no action with the reference until it was established that other authorities were not taking action in respect of the matter.'³⁵ Under s47(1) of the *Parliament of Queensland Act* a person may be

proceeded against for the contempt or for the offence against the other Act, but the person is not liable to be punished twice for the same conduct. Section 57 (since repealed) stated:

False evidence before Parliament

Any person who in the course of an examination before the Legislative Assembly, or before a committee of the Legislative Assembly, knowingly gives a false answer to any lawful and relevant question put to the person in the course of the examination is guilty of a crime, and is liable for imprisonment for 7 years...

The CMC investigation raised important issues about the role and jurisdiction of the CMC and the Queensland parliament, including whether an investigation regarding an offence under section 57 breaches the law with respect to parliamentary privilege and how such an investigation would be reported — directly to the Director of Public Prosecutions (as provided under the CMC Act) or to the Attorney-General for consideration by Parliament (as provided under the *Parliament of Queensland Act*)?³⁶ Both the CMC and the Clerk of the Parliament, on behalf of the Speaker, sought legal advice on the interaction of section 57 of the Criminal Code and freedom of speech under Article 9. Counsel for the CMC found that parliamentary privilege wouldn't prevent an investigation, but it would prevent the CMC from using coercive powers to question the member. Counsel for the Clerk advised that while it would be open for the CMC to report to either the Director of Public Prosecutions or the Attorney-General, in this instance the Attorney-General would not be an 'appropriate' prosecution authority, given the 'highly contentious party political' issues at stake.³⁷ However, the CMC relied on its own legal advice that it should report on its investigation direct to the Attorney-General for the consideration of parliament.³⁸ In its report, the CMC advised that two options were open to parliament:

Parliament may direct the Attorney General to prosecute the minister for the offence created by section 57 of the Criminal Code. Alternatively, if Parliament concludes that the more appropriate course is to deal with the matter as a contempt of parliament, it may direct that the matter be dealt with in accordance with Part 2 of Chapter 3 of the Parliament of Queensland Act.³⁹

The Attorney-General tabled the report, and two days later, in a special sitting of the House, the Premier moved a motion that the MP's conduct be dealt with as contempt of parliament, and that the MP's resignation as a minister and apology to the parliament be accepted as the appropriate penalty.⁴⁰ After nearly six hours of heated debate, the government used its majority to pass the Premier's motion.⁴¹

The provisions in the Criminal Code concerning parliament — Section 56 (Disturbing the Legislature), 57 (False evidence before Parliament) or 58 (Witnesses refusing to attend or give evidence before Parliament or parliamentary committee) - were later repealed in 2006.⁴² The sole jurisdiction to investigate and punish such conduct was returned to the parliament. At first glance, such a result might seem to be a 'win' for parliament in asserting its authority as the sole arbiter

of conduct connected to its proceedings. However, as the parliamentary debates⁴³ and media reports⁴⁴ surrounding these developments reveal, this assertion of parliamentary authority was at the expense of damaging the reputation of the parliament, its members and parliamentary privilege itself. Such actions by parliament gave rise to perceptions of the parliament applying ‘one set of standards for the Public Service and a different, lower set of standards for itself’⁴⁵ of ‘Caesar judging Caesar’⁴⁶, and of bias and undue political influence in the investigation of misconduct by members. In this instance, the highly political response of the government to the CMC inquiry exposed the parliament to the perception that privilege is something to be used to protect parliamentarians at the expense of justice and standards. It also resulted in the repeal of powerful criminal sanctions which could be used by parliament to punish for contempt and breach of privilege, thus weakening the position of parliament in its protection of the integrity of its proceedings.

The Western Australian Corruption and Crime Commission (CCC)

The CCC investigates, amongst other things, misconduct and corruption. Its website summarised misconduct as occurring ‘when a public officer abuses their authority for personal gain, causes detriment to another person, or acts contrary to the public interest’, with corruption as ‘the most serious form of misconduct’.⁴⁷ A public officer includes a member of the Western Australian parliament.⁴⁸ Section 4(2) of the Corruption and Crime Commission Act 2003 (WA) states that:

Nothing in this Act affects, or is intended to affect, the operation of the Parliamentary Privileges Act 1891 or the Parliamentary Papers Act 1891 and a power, right or function conferred under this Act is not to be exercised if, or to the extent, that the exercise would relate to a matter determinable exclusively by a House of Parliament, unless that House so resolves.⁴⁹

The section is curiously worded, in that it protects the operation of privilege, except in those circumstances in which a House of Parliament so resolves. The rationale for this exception is explained in the debates on the introduction of the legislation, which indicated that it was felt that such a provision was needed to ‘accommodate the fact that some matters would not be exclusively determined by the House as a result of the proposed section 27B(3)’.⁵⁰

Section 27A and 27B of the *Corruption and Crime Commission Act 2003* (WA) require that if an allegation of misconduct, not being serious misconduct, is made against an MP, the matter must be referred by the CCC to the Presiding Officer, who must then refer it to the Procedure and Privileges Committee of the House concerned. If the Procedure and Privileges Committee decides that the matter warrants investigation, it must direct the CCC to investigate on the Committee’s behalf. The definition of ‘misconduct’ includes certain types of conduct which constitute, or could constitute, an offence against ‘any written law’, including the

Parliamentary Privileges Act 1981 (WA).⁵¹ Section 27B(3) provides that for the purposes of conducting such an inquiry, the Commission:

- a) has the powers, privileges, rights and immunities of a committee under the *Parliamentary Privileges Act 1891*;
- b) is to refer a matter, including an objection made under section 7 of the *Parliamentary Privileges Act 1891*, to the presiding officer for decision in a case where a committee is required to obtain a decision of the House;
- c) may order without summons a member or officer of either House to appear and give evidence or produce documents;
- d) may be assisted by parliamentary and Commission officers;
- e) cannot delegate the performance of a function that cannot be delegated by a committee of a House;
- f) is to report to the presiding officer and the Privileges Committee when so requested or at predetermined intervals or both.⁵²

The CCC has significant autonomy in the conduct of such an inquiry. In addition to its normal powers to make recommendations for prosecution or disciplinary or other action, the CCC can ‘recommend that a member be expelled or an officer be removed under section 35 of the *Constitution Act 1889*’. The CCC also has control over the content of the final report, as the presiding officer must present such a report from the CCC to the House, ‘in the form in which it is received’, on the sitting day next following its receipt.’ This has created a system where, ‘technically, the reports [are] undertaken for the PPC [Procedure and Privileges Committee] but for all practical purposes, they are reports of the CCC with no input from the PPC.’⁵³ Such an investigation may call into question privileged material, which has prompted calls for amendment to bring such conduct within the sole jurisdiction of the parliament. As part of a Review of the CCC Act published in 2008, the Acting Clerk of the Western Australian Legislative Council submitted that ‘offences under the *Parliamentary Privileges Act* should not constitute misconduct under the Act’, but rather that ‘all of the subject matter of section 8 of the *Parliamentary Privileges Act* falls properly within the sole jurisdiction of the Parliament.’ The review concluded that ‘if Parliament now wishes to amend the Act to exclude offences under the *Parliamentary Privileges Act*, it would be necessary to do so expressly.’ To date, there have been no such legislative amendments. For investigations other than those conducted under s27A and B, the CCC is not permitted to ‘go behind parliamentary privilege’.⁵⁴

Report: Select Committee of Privilege on a matter arising in the Standing Committee on Estimates and Financial Operations (2007): as part of its investigations into lobbying and public sector misconduct, the CCC identified a ‘possible breach of parliamentary privilege in relation to alleged disclosures of deliberations of the [Standing Committee on Estimates and Financial Operations].’ The CCC requested access to committee records, committee members and committee staff for the purposes of its investigations.⁵⁵ As a result, the Legislative Council established a Select Committee on Privilege to consider the matter.⁵⁶ Although this committee conducted the inquiry, it was greatly assisted by the

evidence of the CCC, including ‘transcripts of telephone intercepts, chronologies, email, diaries and other evidence in its possession that it had acquired over a number of private hearings.’⁵⁷ During the course of the inquiry, the CCC demonstrated its willingness to become involved in investigations of ‘what were effectively internal disciplinary breaches committed by Members of Parliament’.⁵⁸ Although in this instance the CCC and the Parliament worked together to investigate misconduct by MPs, the significant powers of the CCC regarding MPs also prompted the Select Committee to comment that there is a ‘very real risk that if the Parliament itself does not deal satisfactorily with breaches of its privileges, then the CCC, with its extensive powers, will take up the shortfall.’ The Select Committee found that this is especially so, as sections 27A and 27B mean that ‘the Western Australian Parliament no longer has the option of following the lead of so many other parliaments that have set very high thresholds of breaches of privilege and contempts before they will establish committees of privilege to consider them’.⁵⁹

Response to matters raised in Corruption and Crime Commission Reports referred under 27A of the CCC Act (2008): in 2008, the newly constituted Procedure and Privileges Committee (PPC) tabled a report responding to the recommendations made by the CCC as a result of two referrals from the previous PPC. As a result of an investigation under section 27B on behalf of the PPC, the CCC had recommended that:

... consideration be given to formulating a procedure for the disclosure of approaches made to committee members by those wishing the member to take a particular position in respect of a matter which is before the committee or may come before it for consideration or a decision. Such disclosure would assist in ensuring that the significant powers of committees are not improperly used for the purpose of advancing private interests. Disclosure requirements should include the name of the person who made the approach, the interest that they represented and the position that they advocated. It would be desirable if such disclosures were made at the commencement of each meeting and recorded in the minutes.

The PPC responded that the ‘CCC had not fully considered the effect that disclosing and minuting such lobbying might have on the ability of a member to perform his or her functions as a member of Parliament or a member of a committee.’ The PPC stated that it is the nature of politics and parliament that members are regularly subject to lobbying, and it is for members to decide ‘whether they wish to take a particular position on behalf of their constituents, whether presented to them by a lobbyist or any other person’. It was felt that disclosure of approaches by lobbyists would act as a deterrent ‘for members seeking a wide range of opinion on an issue.’⁶⁰ The CCC had also recommended that:

... consideration be given to formulating guidelines for the drafting of motions by Members, specifically that Members should be cautious about accepting the assistance of lobbyists in this regard, given that the interest of the lobbyist or their client may not be revealed or be readily apparent. Members should exercise care in ensuring that they do not become either the willing or unwilling instrument for advancing private interests. Members should also consider whether if assistance in drafting a motion is received it may be appropriate to disclose that fact.

The Committee responded that it was for the members themselves to judge whether obtaining assistance in drafting motions was appropriate.

Although the Western Australian Parliament has devolved a significant portion of its jurisdiction to investigate the conduct of its members for contempt of parliament and breach of privilege, it still retains a discretion regarding the adoption of the CCC's recommendations. To date, none of the recommendations in the initial CCC report have been implemented. However, the PPC's criticisms of the CCC's report in this instance show that the situation under section 27B where the PCC is required to refer a matter to the CCC is unsatisfactory. The CCC's original report contained overly prescriptive recommendations that demonstrated little understanding of the parliamentary environment and processes, and there may be some instances where such issues are best left to the parliament and its committees.

Conclusion

In those states with established specialist anti-corruption agencies, some of the most dramatic recent conflicts around parliament privilege have occurred in the context of an investigation by an anti-corruption agency. There seems to be an uneasy relationship between parliaments and anti-corruption agencies relating to jurisdiction over the investigation of the conduct of MPs. Anti-corruption agencies with extensive covert and coercive powers and a broad mandate to investigate and expose corruption are formidable rivals to parliament's traditional sole jurisdiction over the proceedings of parliament. Different jurisdictions face different issues, which in a large part are dependent on the provisions relating to parliamentary privilege in the legislation governing the various anti-corruption agencies. Much also depends on the extent to which parliament is willing and able to assert its authority. ▲

Endnotes

- ¹ This paper was written for the ANZACATT Parliamentary Law, Practice and Procedure Program 2010
- ² See South Australian Attorney-General's Department, [A review of Public Integrity Institutions in South Australia and an integrated model for the future](#), 2010.
- ³ See Clause 4.3(b) of the 'The Australian Greens and Australian Labor Party - Agreement' and Clause 18 of Annex A, 'The Australian Labor Party & the Independent Members (Mr Tony Windsor and Mr Rob Oakeshott).
- ⁴ NSW Parliament, Standing Committee on Parliamentary Privilege, 'Parliamentary privilege and the seizure of documents by ICAC', Report 25 — December 2003, p. 4.
- ⁵ Section 8, *Independent Commission Against Corruption Act 1988*.
- ⁶ *ibid*, Section 122.

- ⁷ NSW Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics, Regulation of Secondary Employment for Members of the NSW Legislative Assembly, September 2004, p. 1.
- ⁸ Paper presented by the Hon John Price MP, Deputy Speaker of the NSW Legislative Assembly, *Codes, Regulations and Guidelines: The elusive balance between external accountability and Parliament's powers, privileges and immunities*, 35th Conference of Presiding Officers and Clerks, Melbourne, July 2004, p. 4.
- ⁹ *ibid*, p. 4.
- ¹⁰ NSW Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics, Regulation of Secondary Employment for Members of the NSW Legislative Assembly, *ibid*, pp. 29–31.
- ¹¹ B. McClintock SC, Independent Review of the *Independent Commission Against Corruption Act 1988*, Final Report, January 2005, p. xiii.
- ¹² *ibid*, p. 76.
- ¹³ ANZACATT Professional Development Seminar, ACT, 2010, Workshop C, Do extra parliamentary watchdogs help or hinder parliament?, pp.12–17. Also see the two most recent ICAC reports relating to the conduct of Members of Parliament — Operation Corinth (July 2010) and Operation Syracuse (December 2010) at www.icac.nsw.gov.au.
- ¹⁴ For instance 'Parliamentary privilege may restrict investigations into substantial breaches of the code of conduct, particularly in relation to clause 2 of the code concerning bribery and clause 5 of the code concerning use of confidential information.' See B. McClintock SC, Independent Review of the Independent Commission Against Corruption Act 1988, Final Report, January 2005, p. 82.
- ¹⁵ However, the Legislative Council Committee on Parliamentary Privilege and Ethics conducted the following investigations in the late 1990s: Report on Inquiry into the conduct of the Honourable Franca Arena MLC, Report No.6, June 1998; Report on Special Report from General Purposes Standing Committee No.2 Concerning a Possible Contempt, Report No.9. November 1998; Report on Inquiry into Statements made by Mr Gallacher and Mr Hannaford, Report No.11, November 1999.
- ¹⁶ NSW Legislative Council Privileges Committee, *Protocol for execution of search warrants on members' offices*, Report 33, February 2006, p. 1.
- ¹⁷ NSW Legislative Council Privileges Committee, *Parliamentary privilege and seizure of documents by ICAC*, Report 25, December 2003, p. ix.
- ¹⁸ NSW Legislative Council Privileges Committee, Report 33, *op. cit.*, p. 1.
- ¹⁹ *ibid*, p. 16.
- ²⁰ NSW Joint Standing Committee on the Independent Commission Against Corruption, Review of the 2007–2008 Annual Report of the Independent Commission Against Corruption, Report 9/54, p. 12.
- ²¹ NSW Legislative Council Privileges Committee, A memorandum of understanding with the ICAC relating to the execution of search warrants on members' offices, Report 47, November 2009, p. 20.
- ²² *ibid*, p. 21.
- ²³ See CMC website <http://www.cmc.qld.gov.au/asp/index.asp?pgid=10698&cid=5266&id=128>
- ²⁴ *Privilege*, in relation to an answer, information, communication or document, or thing means — (b) in the context of a misconduct investigation (iii) parliamentary privilege; (c) in relation to a confiscation related investigation- (iii) parliamentary privilege. However,

parliamentary privilege is not included in the definition of privileges in the context of a crime investigation or witness protection function. Schedule 2, Dictionary, *Crime and Misconduct Act 2001* (Qld).

²⁵ *ibid*, Section 75(5)(a).

²⁶ *ibid*, Section 192(2A)(c).

²⁷ *ibid*, Section 80 and 196.

²⁸ Queensland Parliament, Members' Ethics and Parliamentary Privileges Committee, Report No 10, Report on a Matter of Privilege: Alleged Contempt by the Criminal Justice Commission — Matter referred to the committee on 3 December 1996, Chairman's Foreword.

²⁹ Queensland Parliament, Members' Ethics and Parliamentary Privileges Committee, Report No 10, Report on a Matter of Privilege: Alleged Contempt by the Criminal Justice Commission — Matter referred to the committee on 3 December 1996, pp. 6–7.

³⁰ Queensland Parliament, Members' Ethics and Parliamentary Privileges Committee, Report No 10, *ibid*, p. 23.

³¹ Crime and Misconduct Commission, An investigation into matters relating to the conduct of the Hon Ken Hayward MP, November 2003, p. xiii.

³² *ibid*, p. xiv.

³³ *ibid*, p. 16.

³⁴ *ibid*, p. 17.

³⁵ Queensland Parliament Members' Ethics and Parliamentary Privileges Committee, Report No.72, Matter of Privilege Referred by the Speaker on 24 August 2005 Relating to the Alleged Misleading of Estimates Committee D, p. 2.

³⁶ Section 49(2)(a) of the CMC Act provides that the CMC can report on the investigation to 'the directed of public prosecutions, or other appropriate prosecuting authority, for the purposes of any prosecution proceedings the director or the authority considers warranted.' Section 47(2) of the *Parliament of Queensland Act* provides that 'The Assembly may, by resolution, direct the Attorney General to prosecute the person for an offence against the other Act'.

³⁷ Queensland Crime and Misconduct Commission, *Allegations concerning the Honourable Gordon Nuttall MP: Report of a CMC Investigation*, December 2005, Appendix 5, Mr Hugh Fraser QC, pp. 28–9.

³⁸ *ibid*, p. 3.

³⁹ *ibid*, p. 1.

⁴⁰ Hon PD Beattie, Hansard, 9 December 2005.

⁴¹ Queensland Parliament Hansard, 9 December 2005.

⁴² *Criminal Code Amendment Act 2006*

⁴³ See for instance the comments by, among others, the Leader of the Opposition, Queensland Parliament Hansard, 9 December 2005.

⁴⁴ See for instance: 'Nuttall legacy lingers in abuse of privilege', *Courier Mail*, 13 June 2010; and 'Amendment protects MPs' parliamentary privilege' ABC News, 9 May 2006.

⁴⁵ Queensland Parliament Hansard, Dr Flegg, Member for Moggill, 9 December 2005, p.4737.

⁴⁶ Queensland Parliament Hansard, Ms Pratt, Member for Nanango, 9 December 2005, p.4734.

- ⁴⁷ See CCC website - <http://www.ccc.wa.gov.au/AboutCCC/Pages/default.aspx>.
- ⁴⁸ Section 3 of the *Corruption and Crime Commission Act 2003* (WA), which refers to section 1 of the *Criminal Code 1913*.
- ⁴⁹ Section 4(2), *Corruption and Crime Commission Act 2003* (WA).
- ⁵⁰ WA Parliamentary Debates, Legislative Council, 11 December 2003, pp. 14765–66.
- ⁵¹ Section 4(d), *Corruption and Crime Commission Act 2003* (WA).
- ⁵² *Ibid*, Section 27B(3).
- ⁵³ WA Parliament, Procedure and Privileges Committee, Procedure and Privileges Committee's response to matters raised in Corruption and Crime Commission Reports referred under 27A of the CCC Act, Report No.1 2008, p.1.
- ⁵⁴ http://www.department.dotag.wa.gov.au/_files/CCC_Review.pdf para 717.
- ⁵⁵ WA Parliament, Report: Select Committee of Privilege on a matter arising in the Standing Committee on Estimates and Financial Operations, November 2007, p. 43.
- ⁵⁶ WA Legislative Council Hansard, 12 March 2007.
- ⁵⁷ G. Hitchcock, ANZACATT Conference paper, ACT, 2010, p. 20.
- ⁵⁸ P. Grant, ANZACATT Conference paper, Perth, January 2007.
- ⁵⁹ WA Parliament, Report: Select Committee of Privilege on a matter arising in the Standing Committee on Estimates and Financial Operations, November 2007, pp. 19–20.
- ⁶⁰ Western Australian Parliament, Procedure and Privileges Committee, Procedure and Privileges Committee's response to matters raised in Corruption and Crime Commission Reports referred under 27A of the CCC Act, Report No.1 2008, p. 1–2.