
exposure draft

The Hon G R Torbay, MP

New South Wales

Parliamentary Privileges Bill 2010

Explanatory note

Overview of Bill

The objects of this Bill are as follows:

- (a) to confirm the scope of the privilege of freedom of speech and debates and other proceedings in the Houses of Parliament,
- (b) to set out the procedures by which alleged breaches of parliamentary privilege (described in the Bill as offences against the House) may be dealt with and the penalties for such breaches,
- (c) to protect certain confidential communications contained in the records and correspondence of members from disclosure in response to pre-trial discovery, subpoena and other disclosure documents and to make them inadmissible in court proceedings (except in specified circumstances).

Outline of provisions

Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

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Clause 2 provides for the commencement of the proposed Act on a day or days to be proclaimed.

Clause 3 defines certain words and expressions used in the proposed Act. A definition of **document** is included to make it clear that “document” (which is defined in the *Interpretation Act 1987* to mean any record of information and to include, among other things, anything from which sounds, images or writings can be reproduced with or without the aid of anything else) extends to part of a document.

Clause 3 (2) makes it clear that a written submission received as evidence by a House or committee is to be regarded as evidence given before the House or committee so that the privilege under clause 7 will extend to written statements as well as oral evidence.

Clause 4 makes it clear that conduct is not a contempt (and so does not constitute an offence against a House) unless it amounts, or is intended or likely to amount to an improper interference with the House, its committees or members. The definition is based on that contained in section 4 of the *Parliamentary Privileges Act 1987* of the Commonwealth. The note to the clause includes some examples of what constitutes contempt drawn from those set out in other jurisdictions (for example, section 3 of the *Parliamentary Privilege Act 1858* (Tas) and section 37 of the *Parliament of Queensland Act 2001*).

Clause 5 provides for the phrase “offence against a House” to be used for acts commonly called breaches of privilege, or a contempt, of a House. It also makes it clear that whether particular conduct is an offence against the House is for the House to decide, acting on any advice it considers appropriate.

Clause 6 preserves the powers, privileges and immunities of each House, its members and committees except to the extent they are altered by the Bill.

Part 2 Powers, privileges and immunities

Article 9 of the *Bill of Rights 1688* (which provides that speeches, debates or other proceedings in Parliament cannot be questioned in any court or place outside Parliament) is currently incorporated by reference into the statute law of New South Wales by the *Imperial Acts Application Act 1969*. Article 9 ensures that words spoken in Parliament cannot be used as the basis for legal proceedings and ensures that Parliament, its committees, members and witnesses are protected from adverse actions in courts and tribunals for what is said or done in Parliament. However, different views have been expressed by courts and others as to the operation of Article 9.

Division 1 Privileges and immunities

Clause 7 removes any doubt about the operation of Article 9 by expressly enacting the terms of Article 9 as a law of New South Wales and including provisions largely based on section 16 of the *Parliamentary Privileges Act 1987* of the Commonwealth (which was enacted to overcome the consequences of a strict interpretation of Article 9 in *R v Murphy* (1986) 5 NSWLR 18).

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Clause 7 (3) provides a definition of the term *proceeding in Parliament* to include all words spoken and acts done in transacting the business of a House or its committees, including the preparation and submission of documents. Clause 7 (3) (c) expands on the equivalent Commonwealth provision to make it clear that the term covers persons such as constituents who provide information to members for the purposes of making statements or asking questions.

Clause 7 (4) is based on a provision suggested in paragraph 1.18 of the 134th Report of the Senate Privileges Committee (18 June 2008) to deal with the question of effective repetition (that is, where a member acknowledges or affirms but does not repeat or elaborate on words uttered under the protection of parliamentary privilege outside Parliament).

Clause 7 (5) prevents the use of parliamentary proceedings in any court or tribunal in a manner involving questioning or relying on the truth, motive, intention or good faith of words spoken or acts done in those parliamentary proceedings or to attack or support the evidence or credibility, motive, intention or good faith of any person or to draw inferences or conclusions for the purposes of the court or tribunal proceedings.

Clause 7 (6) prevents evidence which is taken in camera by a House or committee and not published from being used in court proceedings. It covers documents specifically prepared for submission to a House or committee and accepted as in camera evidence, and oral evidence taken in camera.

Clause 7 (7) permits courts to examine proceedings in Parliament for the purposes of interpretation of an Act.

Clause 8 restricts the immunities of members, officers of a House and witnesses from civil arrest and compulsory attendance before a court or tribunal to days on which the relevant House or committee sits and, in the case of members and officers, to the period extending from 5 days before and 5 days after such a sitting. It is based on section 14 of the *Parliamentary Privileges Act 1987* of the Commonwealth.

Division 2 Records and correspondence of members

Clause 9 provides that a member can not (except in specified circumstances) be required by a subpoena or other disclosure requirement to produce a document which would result in the disclosure of a confidential communication and that evidence of such a confidential communication is not admissible in any proceeding in a court or tribunal.

Part 3 Penalties for offences against the House

Clauses 10–12 empowers a House to impose a fine or imprisonment on a person who it determines has committed an offence against the House.

Clause 13 sets out the procedure for dealing with a charge of committing an offence against a House.

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Explanatory note

Clause 14 provides for the issue of warrants for the committal to custody of persons on whom a House has resolved to impose a penalty of imprisonment for an offence against the House.

Clause 15 enables a House (subject to clause 10) to give directions and issue warrants that are necessary or convenient for carrying the proposed Part into effect.

Clause 16 exculpates any person acting under the authority of the proposed Part from any civil or criminal liability.

Part 4 Miscellaneous

Clause 17 provides for the giving of certificate evidence relating to parliamentary proceedings.

Clause 18 enables the Governor to make regulations for the purposes of the proposed Act.

Clause 19 provides for the review of the proposed Act.

Schedule 1 Savings, transitional and other provisions

Schedule 1 contains savings, transitional and other provisions consequent on the enactment of the proposed Act.

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New South Wales

Parliamentary Privileges Bill 2010

No. , 2010

A Bill for

An Act to declare certain powers, privileges and immunities of each House of Parliament and the members and committees of each House; and for related purposes.

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Clause 1 Parliamentary Privileges Bill 2010

Part 1 Preliminary

The Legislature of New South Wales enacts:

Part 1 Preliminary

1 Name of Act

This Act is the *Parliamentary Privileges Act 2010*.

2 Commencement

This Act commences on a day or days to be appointed by proclamation.

3 Definitions

(1) In this Act:

Clerk means the Clerk of a House, and includes an officer of a House acting as the Clerk of the House.

committee means:

- (a) a committee of both Houses or either House, including a committee of a whole House and a committee established by an Act, or
- (b) a sub-committee of a committee referred to in paragraph (a) which has been authorised by a House or by law to require a person to attend before it or to produce any document or thing to it.

contempt—see section 4.

document includes a part of a document.

Note. **Document** is defined in the *Interpretation Act 1987* to mean any record of information and to include, among other things, anything from which sounds, images or writings can be produced.

exercise a function includes perform a duty.

function includes a power, authority or duty.

House means a House of Parliament.

member means a member of a House.

offence against a House—see section 5.

Presiding Officer means the President of the Legislative Council or the Speaker of the Legislative Assembly.

tribunal means any person or body (other than a House, a committee or a court) having power to examine witnesses on oath, including a Royal Commission or other commission of inquiry of this State, the Commonwealth or another State or Territory having that power.

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Parliamentary Privileges Bill 2010

Clause 4

Preliminary

Part 1

- (2) For the purposes of this Act, the submission of a written statement by a person to a House or committee is, if so ordered by the House or the committee, taken to be the giving of evidence in accordance with that statement by that person before that House or committee.
- (3) Notes included in this Act do not form part of this Act.

4 Meaning of contempt of s 4 Parliamentary Privileges Act 1987 (Cth)

Conduct, including words, is not a contempt unless it amounts, or is intended or likely to amount, to an improper interference with:

- (a) the free exercise by a House or a committee of its authority or functions, or
- (b) the free performance by a member of the member's duties as a member.

Note. Examples of contempt:

- (a) assaulting, menacing, obstructing or insulting a member:
 - (i) in the member's coming to or going from a House or a meeting of a committee, or in the House or a meeting of a committee, or
 - (ii) any where else because of the member's performance of his or her parliamentary duties,
- (b) sending a challenge to fight to a member,
- (c) attempting to compel a member by force, insult or menace to take a particular position in relation to a proposition or matter pending, or expected to be brought, before a House or committee,
- (d) the offering of a bribe to or attempting to bribe a member,
- (e) creating or joining in any disturbance in a House or before a committee,
- (f) improperly influencing, or attempting to improperly influence, a person in relation to be evidence to be given by the person to a House or a committee,
- (g) treating a person adversely and without lawful authority, or attempting to do so, because of evidence given by the person to a House or a committee or because of a belief or suspicion about that evidence.

5 Meaning of offence against a House of s 3 (3) Parliamentary Privileges Act 1987 (Cth)

- (1) In this Act, a reference to an *offence against a House* is a reference to a breach of the privileges or immunities, or a contempt, of a House or of the members or committees.
- (2) Whether particular conduct is an offence against the House is for the House to decide, acting on any advice it considers appropriate.
- (3) Subsection (2) does not apply to any conduct deemed to be a contempt of Parliament under section 11 of the *Parliamentary Evidence Act 1901*.

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Clause 6 Parliamentary Privileges Bill 2010

Part 1 Preliminary

6 Powers, privileges and immunities of s 5 Parliamentary Privileges Act 1987 (Cth)

Except to the extent that this Act expressly provides otherwise, the powers, privileges and immunities of each House, and of its members and committees as in force immediately before the commencement of this Act, continue in force.

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Parliamentary Privileges Bill 2010

Clause 7

Powers, privileges and immunities

Part 2

Part 2 Powers, privileges and immunities

Division 1 Privileges and immunities

7 Parliamentary privilege in court and tribunal proceedings cf s 16 Parliamentary Privileges Act 1987 (Cth)

- (1) The freedom of speech and debates or proceedings in Parliament can not be impeached or questioned in any court or place outside of a House.
- (2) It is declared that subsection (1) continues article 9 of the *Bill of Rights 1688* in force in New South Wales under the *Imperial Acts Application Act 1969* in its application to each House with, in addition to any other operation, the effect provided by this section.
- (3) For the purposes of this section, *proceedings in Parliament* means all words spoken and acts done in the course of, or for the purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limitation, includes the following:
 - (a) the giving of evidence before the House or a committee, and evidence so given,
 - (b) the presentation or submission of a document to the House or a committee,
 - (c) the preparation of a document for purposes of or incidental to the making of laws by the Legislature, any questions or statements before the House or committee or the transacting of any other business of a House or committee,
 - (d) the formulation, making or publication of a document, including a report, by, under the authority of or pursuant to an order of a House or a committee and the document so formulated, made or published.
- (4) For the avoidance of doubt, it is declared that subsection (3) extends to any reference, affirmation or adoption outside a House by a member of words spoken or written, or actions taken, in the course of proceedings in Parliament by that member, provided that the reference, affirmation or adoption is made without elaboration.
- (5) 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, or

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Clause 8 Parliamentary Privileges Bill 2010

Part 2 Powers, privileges and immunities

- (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person, or
 - (c) drawing, or inviting the drawing of, inferences, conclusions wholly or partly from anything forming part of those proceedings in Parliament.
- (6) A court or tribunal must not:
- (a) require to be produced, or admit into evidence, a document that has been prepared for the purpose of submission, and submitted, to a House or a committee and has been directed by a House or committee to be treated as evidence taken in camera, or admit evidence relating to such a document, or
 - (b) admit evidence concerning any oral evidence taken by a House or committee in camera or require to be produced or admit into evidence a document recording or reporting any such oral evidence,
- unless a House or committee has published, or authorised the publication of, that document or a report of that oral evidence.
- (7) In relation to proceedings in a court or tribunal in so far as they relate to the interpretation of an Act, neither this section nor the *Bill of Rights 1688* prevents or restricts the admission in evidence of a record of proceedings in Parliament published by or with the authority of the House or a committee or the making of statements, submissions or comments based on that record.

8 Immunities from arrest and attendance before courts cf s 14 Parliamentary Privileges Act 1987 (Cth)

- (1) A member:
- (a) must not be required to attend before a court or tribunal, and
 - (b) must not be arrested or detained in a civil cause,
- on any day on which a House or committee of which that member is a member meets or within a day which is 5 days before or after a day on which that House or Committee meets.
- (2) An officer of a House:
- (a) must not be required to attend before a court or tribunal, and
 - (b) must not be arrested or detained in a civil cause,
- on any day on which a House or committee upon which that officer is required to attend meets or within a day which is 5 days before or after a day on which that House or Committee meets.

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Parliamentary Privileges Bill 2010

Clause 9

Powers, privileges and immunities

Part 2

- (3) A person who is required to attend before a House or committee on a day:
 - (a) must not be required to attend before a court or tribunal, and
 - (b) must not be arrested or detained in a civil cause, on that day.
- (4) Except as provided by this section, a member, an officer of a House and a person required to attend before a House or a committee has no immunity from compulsory attendance before a court or tribunal or from arrest or detention in a civil cause by reason of being a member or such an officer or person.

Division 2 Records and correspondence of members

9 Disclosure of confidential communications

- (1) Except as provided by subsection (2), a member can not be required by a disclosure requirement to produce a document which would result in the disclosure of a confidential communication and evidence of such a confidential communication is not admissible in any civil proceedings in a court or tribunal.
- (2) Subsection (1) does not apply to a confidential communication disclosed:
 - (a) with the consent of the person who provided it to the member, or
 - (b) in accordance with a resolution of the House of which the member is a member, or
 - (c) in accordance with a requirement imposed by or under the *Independent Commission Against Corruption Act 1988*, the *Special Commissions of Inquiry Act 1983* or any other Act prescribed for the purposes of this section.
- (3) This section does not affect, and operates in addition to, any privilege that may be asserted by a member under the *Evidence Act 1995*.
- (4) In this section:

confidential communication means a communication or information provided to a member:

 - (a) in the exercise of his or her functions as a member, and
 - (b) on the understanding that it was confidential and would not be disclosed.

disclosure requirement means a process or order of a court that requires the disclosure of information or a document and includes the following:

 - (a) a summons or subpoena to produce documents or give evidence,

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Clause 9 Parliamentary Privileges Bill 2010

Part 2 Powers, privileges and immunities

- (b) pre-trial discovery,
- (c) non-party discovery,
- (d) interrogatories,
- (e) a notice to produce,
- (f) a request to produce a document under Division 1 of Part 4.6 of the *Evidence Act 1995*.

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Parliamentary Privileges Bill 2010

Clause 10

Penalties for offences against the House

Part 3

Part 3 Penalties for offences against the House see s 7 Parliamentary Privileges Act 1987 (Cth), s 39 and 40 Parliament of Queensland Act 2001

10 Power of House to deal with offence against the House

- (1) If a House determines that a person has committed an offence against the House, it may by resolution impose on the person in accordance with this Part:
 - (a) a penalty of imprisonment for a period not exceeding 6 months, or
 - (b) a fine not exceeding:
 - (i) \$5,000, in the case of a natural person, or
 - (ii) \$10,000, in the case of a corporation.
- Note.** For the meaning of offence against the House see section 5.
- (2) Nothing in this Part prevents a House from dealing with a person who it has determined has committed an offence against the House otherwise than by imposition of a penalty of imprisonment or a fine.
- (3) This Part does not affect, and operates (subject to section 5 (3)) in addition to, the provisions of the *Parliamentary Evidence Act 1901*.

11 Imprisonment

- (1) A House does not have the power to order the imprisonment of a person for an offence against the House otherwise than in accordance with this Part.
- (2) A penalty of imprisonment imposed in accordance with this Part is not affected by the prorogation of the Parliament or the dissolution or expiration of the House.
- (3) A resolution of a House ordering the imprisonment of a person in accordance with this section may give the Presiding Officer of the House power, either generally or in specified circumstances, to order the discharge of the person from imprisonment (the *discharge power*).
- (4) If the Presiding Officer is given the discharge power, the Presiding Officer has, by force of this Act, power to discharge the person accordingly.

12 Fines

- (1) A fine imposed under this Part is payable within the period specified in the resolution imposing the fine.
- (2) A fine must not be imposed on a person under this Part for an offence for which a penalty of imprisonment is imposed on that person.

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Clause 13 Parliamentary Privileges Bill 2010

Part 3 Penalties for offences against the House

- (3) A fine imposed under this Part is a debt due to the Crown and may be recovered in a court of competent jurisdiction by the Clerk of the House or any other person appointed by the House for that purpose.

13 Procedure for dealing with charge of committing an offence against the House

- (1) Proceedings for an offence against the House may be instituted by the House ordering the person alleged to have committed the offence (the *alleged offender*) to appear before the bar of the House to answer the charge on a date and time specified in the order.
- (2) An alleged offender other than a member may be summoned to appear before a House to answer a charge by notice of the order of the House signed by the Clerk of the House, and personally served on the person.
- (3) The appearance of an alleged offender who is a member to answer a charge is to be in accordance with the Standing Orders of the House of which he or she is a member.
- (4) The alleged offender must be given particulars in writing of the matters constituting the alleged offence.
- (5) The alleged offender may appear personally or be represented by an Australian legal practitioner or other person.
- (6) If the alleged offender fails, without reasonable excuse, to appear or be represented the House may proceed to deal with the matter in his or her absence.

14 Resolutions and warrants for committal of s 9 Parliamentary Privileges Act 1987 (Cth)

- (1) The resolution of a House imposing a penalty of imprisonment for an offence against the House on a person and the warrant committing the person to custody must set out the particulars of the matters determined by the House to constitute the offence.
- (2) The warrant is sufficient authority for the person to be detained and held in custody in accordance with the resolution of the House. In particular, it is authority:
- (a) for the usher of the black rod or serjeant at arms to hold the person in custody, and
 - (b) for a police officer or other person to convey the person to a correctional centre, and
 - (c) for the governor of a correctional centre to hold the person in custody for the term stated in the warrant.

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Parliamentary Privileges Bill 2010

Clause 15

Penalties for offences against the House

Part 3

15 Directions

Subject to section 10, a House may give such directions and authorise the issue of such warrants as are necessary or convenient for carrying this Part into effect.

16 Liability of s 11 (3) Parliamentary Evidence Act 1901

No person acting under the authority of this Part incurs any liability, civil or criminal, for such act.

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Clause 17 Parliamentary Privileges Bill 2010

Part 4 Miscellaneous

Part 4 Miscellaneous

17 **Certificates relating to proceedings** of s 17 Parliamentary Privileges Act 1987 (Cth)

For the purposes of this Act, a certificate signed by or on behalf of the Presiding Officer or a chairman of a committee stating that:

- (a) a particular document was prepared for the purposes of submission, and submitted to a House or a committee, or
- (b) a particular document was directed by a House or a committee to be treated as evidence taken in camera, or
- (c) certain oral evidence was taken by a committee in camera, or
- (d) a document was not published or authorised to be published by a House or committee, or
- (e) a person is or was an officer of the House, or
- (f) an officer is or was required to attend on a House or a committee, or
- (g) a person is or was required to attend before a House or a committee on a day, or
- (h) a day is a day on which a House or a committee met or will meet, or
- (i) a specified fine was imposed on a specified person by a House, or
- (j) that a communication or information was provided to a member in the exercise of his or her functions as a member,

is evidence of the matters contained in the certificate.

18 **Regulations**

The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.

19 **Review of Act**

- (1) A joint committee of members of Parliament is to review this Act.
- (2) The review is to be undertaken as soon as possible after the period of 4 years from the date of assent to this Act.
- (3) The joint committee is to report to both Houses of Parliament as soon as practicable after the completion of the review.

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Parliamentary Privileges Bill 2010

Savings, transitional and other provisions

Schedule 1

Schedule 1 Savings, transitional and other provisions

Part 1 General

1 Regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of the following Acts:
this Act
- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication on the NSW legislation website, the provision does not operate so as:
 - (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
 - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

Part 2 Provisions consequent on enactment of this Act

2 Saving of powers, privileges and immunities

- (1) Except to the extent that this Act expressly provides otherwise, the powers, privileges and immunities of each House, as in force, immediately before the commencement of this Act, continue in force.
- (2) Nothing in this Act derogates from the powers, privileges and immunities of either House, and of the members and committees of either House, under any other law.

3 Relationship of Act to Bill of Rights

- (1) Without prejudice to the effect that article 9 of the *Bill of Rights 1688* had, on its true construction, before the commencement of this Act, section 4 does not affect proceedings in a court or tribunal that commenced before the commencement of this Act.

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Schedule 1 Savings, transitional and other provisions

- (2) Except as provided by section 7 (2), nothing in this Act is to be construed as affecting the Imperial enactment 1 William and Mary sess 2 c 2 (The Bill of Rights) or section 6 of the *Imperial Acts Application Act 1969* so far as it relates to that enactment.