

Fiona Murphy  
Secretary  
Joint Standing Committee on Integrity  
Parliament of Tasmania

Dear Fiona

**Re: Responses to Question of Notice**

**1/ Is the independent legal arbiter used in New South Wales appointed to the position for a set-term or an ongoing basis?**

Under Standing Order 52(7) of the New South Wales Legislative Council, the Independent Legal Arbiter is appointed for each dispute referred. However, as a matter of practice, the Council regularly appoints the same individual. Recently, Keith Mason AC KC, former President of the NSW Court of Appeal and Solicitor-General, has been appointed regularly. Regular appointment allows for an individual to develop expertise in the area, and consistency of application of the law and principles.

**2/ What is your academic view of currently used assessment processes in privilege protocols or Memorandums of Understanding (MOUs) between Australian parliaments and integrity entities for the determination of what may be considered a proceeding of parliament, such as the three-step test that is used in New South Wales?**

The 'Breen test', developed by the New South Wales privileges committee to assist in determining whether a document falls within the scope of 'proceedings of parliament', and therefore the protection of parliamentary privilege, is as follows:<sup>1</sup>

- (1) 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.
- (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.
- (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'.

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<sup>1</sup> See Stephen Frappell and David Blunt, *New South Wales Legislative Council Practice* (Second edition, Federation Press, 2021) 125.

The test has also been adopted where there is a contest over privilege in at the Commonwealth level.<sup>2</sup>

Such a test is both of assistance and limited. It is of assistance because the broad steps – and questions – that need to be determined are agreed between parties.

However, the test is also limited because the steps/questions themselves are not necessarily straightforward, and involve a level of discretion and judgement. For instance, the question of whether a report has been brought into existence for the purposes of or incidental to the transacting of the business of parliament was recently considered in *Crime and Corruption Commission v Carne* [2023] HCA 28. Demonstrating the complexity of these questions, the High Court's decision on whether the report in question was prepared for the purpose of transacting the business of the committee has been subject to robust criticism from the long-standing Clerk of the Queensland Parliament, Neil Laurie.<sup>3</sup>

I trust these answers have been of assistance to the Committee.

Your sincerely

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**Research Director, Centre for Public Integrity**

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<sup>2</sup> See further Senate Committee of Privileges, *Status of Material seized under warrant: preliminary report* (No 163, December 2016) 8; Senate Committee of Privileges, *Disposition of material seized under warrant* (No 172, November 2018) 5 cited in Frappell, above, n 398.

<sup>3</sup> Neil Laurie, 'Removing the watchdog's bark: Crime and Corruption Commission v Carne' (24 October 2023) <<https://www.auspublaw.org/blog/2023/10/removing-the-watchdogs-bark-crime-and-corruption-commission-v-carne>>