
Patterns of change – parliamentary privilege

How do the privilege provisions applying to Australia's national parliament compare internationally? Has the curtailment of traditional provisions weakened the Parliament's position?

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1. Summary

- 1.1 The law of parliamentary privilege applying to Australia's national parliament has undergone significant change, as has the way matters of privilege and contempt are dealt with. This paper examines the law in Australia in comparison to the provisions in other parliaments. It does so by summarising three key provisions and commenting on the law of privilege in the wider legal context. It refers to two models for the privileges and immunities which apply in contemporary parliaments, and notes the way key provisions are dealt with in each model. The paper refers to adaptations in this area of law in other parliaments and to assessments that have been made of the needs of modern legislatures. It suggests that, paradoxically, the processes that involved significant reductions in traditional provisions applying to Australia's national parliament have strengthened the parliament. The paper ends by speculating about some of the issues that may arise in this area in the future¹.

¹ I am most grateful to Professor Geoff Lindell, who read through a draft of this paper and made very helpful suggestions for improvement - BW

2. Privilege in the national Parliament – three key features

Freedom of speech

- 2.1 Members of the national Parliament enjoy the privilege of freedom of speech². This privilege is an immunity or exemption from the laws that would otherwise apply. It has been described as ‘valuable and most essential’³ and the single most important parliamentary privilege⁴. It has the effect that members are not subject to suit (for example for defamation) or prosecution (for example for an action that would otherwise expose them to a criminal charge – one instance would be a member who revealed information subject to a secrecy provision). The immunity is limited: members enjoy it only in respect of their participation in proceedings in Parliament: it is not a ‘personal’ privilege or benefit that attaches to them just because they are members. The term ‘proceedings in Parliament’ is used in the historic Bill of Rights (1689). As that enactment was in force in respect of the British House of Commons in 1901 it was applicable to the Commonwealth Parliament because of section 49 of the Commonwealth Constitution. It has since been supplemented by section 16 of the *Parliamentary Privileges Act 1987* (and see below).
- 2.2 This immunity is not confined to members of Parliament: it also applies to others in respect of their participation in ‘proceedings in Parliament’. Importantly, this means that the immunity applies to witnesses in respect of the making of a submission or the giving of oral evidence to a committee⁵. It can also apply to parliamentary staff⁶. The words ‘proceedings in Parliament’ should not be read as implying that the immunity has a geographical base: words or actions are not protected because they are used or taken in a parliamentary building, the protection applies to activities taken in the course of or in connection with parliamentary proceedings – it has a functional rather than a geographic base.

2 *House of Representatives Practice*, 5th Edition, (2005), p 711; *Odgers’ Australian Senate Practice*, 11th Ed, (2004), p 33.

3 Hatsell *Precedents and Proceedings in the House of Commons with observations* (quoted in *House of Representatives Practice*, *op cit*, p 711).

4 Joint Committee on Parliamentary Privilege (UK), (1998-99), (HL 43-1), HC (214-1), report, para 36.

5 *House of Representatives Practice*, *op cit*, p 673; *Odgers*, *op cit*, p 33.

6 *And see Parliamentary Privileges Act 1987*, s. 11.

- 2.3 The immunity is important – to participants in proceedings, whether members or witnesses -- but also to others, such as those who may be subject to criticism by direct participants or otherwise affected. The articulation of the immunity in section 16 of the *Parliamentary Privileges Act* goes a long way to clarifying it⁷, but it is likely that issues will arise that will require courts to determine just where the boundaries lie⁸: the use of the phrase ‘for purposes of or incidental to the transacting of the business of a House or of a committee’ is significant⁹.
- 2.4 The immunity not only prevents participants in parliamentary proceedings from being sued or charged with a criminal offence in respect of statements or actions, it also prevents the ‘impeaching or questioning’ of parliamentary proceedings in any court or place out of Parliament¹⁰. The interpretation and application of this aspect has been of concern to parliaments and to courts in several jurisdictions for some years¹¹ (and see 4.3, 6.8 and 8.7- 8 below).

Other immunities of Members

- 2.5 Commonwealth parliamentarians enjoy another group of legal immunities which reflect the view that their duties and obligation to serve in their house and on committees should be given priority over certain other civic duties; the claim of Parliament is seen as paramount¹². Members are exempt from arrest or detention in a civil cause, and cannot be compelled to attend before a court or tribunal on a sitting day or within five days before or after a sitting day; the same immunities apply in respect of meetings of a committee of which the member is a member¹³. It should be noted that arrest or detention in a civil matter is now extremely rare in Australia. Members are also

⁷ *Odgers, op cit*, p.38-9; and see *Prebble v Television New Zealand Ltd* (1995) 1 AC 321 where the Privy Council on appeal from the New Zealand Court of Appeal indicated that ‘the Act declared what had previously been regarded as the effect of Article 9 of the Bill of Rights 1689’ at p 333.

⁸ And see *House of Representatives Practice, op cit*, pp 713-4.

⁹ *Parliamentary Privileges Act 1987*, s. 16.

¹⁰ Bill of Rights, Article 9; *Parliamentary Privileges Act 1987*, subsections 16(3), (5), (6).

¹¹ *House of Representatives Practice, op cit*, pp 715-7; *Odgers, op cit*, pp 34-38; McGee *Parliamentary Practice in New Zealand* (3rd ed), pp 625-9; and May 23rd Ed (2004) pp. 624-630, 632-5. The responsibilities of the courts and the Parliament in respect to the determination of charges of bribery has been an issue in India – see Kaul and Shakhder *Practice and Procedure of Parliament* (5th ed), pp 234-246.

¹² Campbell, E, *Parliamentary Privilege* (2003) pp 145, 151.

¹³ *Parliamentary Privileges Act 1987*, s. 14(1); see also *Evidence Act 1995*, s. 15(2).

exempt from jury service¹⁴. The immunities from arrest or detention in a civil case and from compulsory attendance before a court or tribunal also apply to officers and witnesses required to attend before a house or a committee¹⁵. For the purposes of these immunities a certificate signed by the relevant Presiding Officer stating that a person is or was an officer, is or was required as a witness, that a certain day is or was a day on which a House or committee met or will meet etc is evidence of the matter¹⁶.

Ability to punish contempts

2.6 Each House of the Commonwealth Parliament has the ability to punish contempts, a contempt being

... any act or omission which obstructs or impedes ...[a House] in the performance of its functions or which obstructs or impedes any Member or officer ... in the discharge of his duty, or which has a tendency ... to produce such results ...¹⁷

This power, also inherited from the House of Commons by virtue of s. 49 of the Constitution, is very important and allows either House to protect itself, its committees or members against a wide variety of actions, ranging from intimidation or attempted intimidation or punishment of members or witnesses to offences by witnesses or potential witnesses, such as refusing to obey an order to attend before a committee or giving false or misleading evidence.

2.7 The power is not available without restriction: conduct cannot be found to be an offence 'unless it amounts or is intended or likely to amount to an improper interference with the free exercise by a House or a committee of its authority or functions or with the free performance by a member of the member's duties as a member'.¹⁸

¹⁴ *Jury Exemption Act 1965*, s. 4.

¹⁵ *Parliamentary Privileges Act*, s. 14(2), 14(3).

¹⁶ *Parliamentary Privileges Act 1987*, s. 17.

¹⁷ *May*, 23rd Ed (2004), p 125.

¹⁸ *Parliamentary Privileges Act 1987*, s.4.

3. Privilege - general comment

- 3.1 The term Parliamentary privilege refers to 'the special rights and immunities which belong to the Houses, their committees and their members, and which are considered essential for the proper operation of the Parliament'¹⁹. Parliamentary rights and immunities, while part of the law, are in important ways exemptions from the general law²⁰.
- 3.2 In the third edition of *Parliamentary Practice in New Zealand*, David McGee, QC, Clerk of the House of Representatives, made very helpful comments on the nature of and justification for the laws of parliamentary privilege²¹. He notes that the law of privilege has helped make parliament what it is²². Among his other observations are that parliamentary privilege is only part of the law, that it must co-exist within the general body of legal rights, powers and immunities, that since it is of constitutional importance it is entitled to a high priority when it conflicts with other values – but that it is 'not a body of higher or fundamental law that automatically overrides all other law'²³.
- 3.3 While the law of parliamentary privilege is only one part of the wider law, it is still very important. It is important to individual members, for obvious reasons. It is also important to persons involved with parliamentary proceedings, whether in happy circumstances – for example a person hoping to have a wrong exposed or a grievance aired - or in less happy circumstances – such as a person criticised or attacked by a member or a committee witness: in all cases their rights are affected directly. Parliamentary privilege is also important for parliamentary staff – it helps set the framework within which they work. Some staff (for example those assisting committees when they must deal with and give advice to parliamentarians about submissions and evidence) are also involved directly in decisions about the application of significant immunities. Further, many of the actions of parliamentary staff would themselves be found to be protected by parliamentary privilege as matters 'incidental to ... the transacting of the business of a House or of a committee'²⁴.

¹⁹ *House of Representatives Practice*, p 707.

²⁰ *May*, 23rd edn, (2004), p.75.

²¹ McGee, *op cit*, pp 605-614. A particular feature is the wide range of cases cited.

²² McGee, *op cit*, *op cit it*, p 606.

²³ McGee, *op cit*, p 610.

²⁴ *Parliamentary Privileges Act 1987*, s 16, also s 11.

4. Privilege — two models

- 4.1 While a form of parliamentary privilege appears to have existed in ancient Rome²⁵, the range of immunities and rights now taken to form the law of parliamentary privilege are of more recent origin. Between them, the numerous national legislatures and the much larger number of state/regional/provincial houses now operating demonstrate a wide range of privilege/immunity powers and arrangements. It is possible however to distinguish two basic approaches.

The British approach

- 4.2 The features of the law of privilege applying in the United Kingdom have evolved over a very long time. Actions by each House of the Parliament, monarchs/governments and courts have created a significant body of law, a body of law which naturally reflects the political history of the country.

Freedom of speech

- 4.3 The privilege of freedom of speech is set out most famously in Article 9 of the Bill of Rights (1689), however a privilege of freedom of speech appears to have been enjoyed by the House of Commons since at least the later years of the 15th century²⁶. Although the immunity is now often thought of in terms of the protection it gives members and other participants in 'proceedings in Parliament' from being sued for defamation, its existence grew out of protracted conflict between the Parliament and the Crown,²⁷ conflict in which the right of the Crown to cause members to be called to account for their statements in Parliament was disputed and resisted. The provisions of Article 9:

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

confirmed Parliament's claims, and had the formal and explicit agreement of the Crown. The provision has been characterised as much

²⁵ To the extent that the 'tribunes of the people' were held to be sacrosanct and anybody who attacked or hindered them in doing their duty could apparently be executed by the first person to come along — Marc Van der Hulst *The Parliamentary Mandate* (2000), IPU, p 63.

²⁶ May *op cit*, p 79.

²⁷ May *op cit*, pp 79-82.

a political settlement as a statutory rule²⁸ and as a safeguard in the separation of powers²⁹.

- 4.5 For the purposes of this paper three points are particularly relevant. First, the immunity was not a 'personal' privilege of members, it was rather a corporate or institutional one which protected them in relation to their participation in parliamentary proceedings³⁰. Second, it came to be recognised and accepted by the courts as part of the law of the nation and not one which could be waived³¹. Finally, the expression of the immunity is to be noted – the key term is 'proceedings in Parliament, it does not refer directly to members. This is in contrast to the formulation of the equivalent immunity in France, and may help explain the element of flexibility in the British tradition which enables the immunity to be accepted as applying to persons other than members, such as witnesses³². (Recommended changes are noted at 6.8-6.9 below).

Other immunities of members

- 4.6 Freedom from arrest for members of the British Parliament was recognised as long ago as 1340³³. The immunity is limited to civil matters and its reach has been clarified and qualified by legislation³⁴. This immunity is also part of the law of the land and as such it cannot be waived. Another 'personal' privilege enjoyed by British members is

²⁸ McGee, *op cit*, p 618, 625-. Mr McGee has also commented on the relatively recent prominence given to Article 9, and on the use of 'parliamentary material' in courts in *The Scope of Parliamentary Privilege*, New Zealand Law Journal, March 2004, pp. 84-87. Mr McKay (then) Clerk Assistant in the House of Commons also commented on the emphasis on Art 9 in evidence to the UK joint select committee on parliamentary privilege and the effects this has had - HL 43, HC 214 II, pp 21-2.

²⁹ Odgers, *op cit*, p 33; relevant also in this regard in the US – evidence of Mr Johnson, Parliamentarian of the House of Representatives, to UK joint select committee – HL 43, HC 214 II, p 234.

³⁰ May, *op cit*, p 75; see also *Prebble v Television New Zealand Ltd* (1995) 1 AC 321 where the Privy Council made it clear that the privilege was that of the Parliament itself rather than that of the member at p 335.

³¹ *But see Defamation Act (UK) (1996)* which allowed, where the conduct of a person in parliamentary proceedings was an issue, that person to waive the immunity in so far as it concerned that person - May, *op cit*, pp 113, 197-8.

³² May, *op cit*, p 111.

³³ May *op cit*, p 83.

³⁴ May *op cit*, p 83.

the exemption from compulsory attendance as witnesses, whether in civil or criminal proceedings³⁵. The general immunity of members from jury service was ended by legislation in 2003³⁶ (and see 6.10 below for recommended changes).

Ability to punish contempts

4.7 Each House of the British Parliament has long held the power to try contempts. This power is said to derive from the 'medieval concept of Parliament as primarily a court of justice'³⁷. As such it was more readily recognised in respect of the House of Lords, but the House of Commons was recognised as having the power to fine and imprison offenders³⁸. Persons punished by the House have included members and others, including sheriffs, magistrates and judges³⁹. This capacity was seen as very important to the House's ability to defend the Parliament. For the purposes of this paper, its significance lies in the breadth of offences which could be punished: there was no list or closed set of actions which could be subject to punishment by the House. This power has been described as a 'quintessentially British institution'⁴⁰ (and see 6.11-12 below for recommended changes).

The British influence

4.8 Key features of the British model are seen in many parliaments, but primarily in nations which were once British colonies or possessions⁴¹. This group includes nations as diverse as the India, the United States of America, New Zealand, Canada, Malaysia, Singapore, South Africa and Malta. In some cases the constitutional law itself sets out similar provisions⁴², in others there are links in constitutional and other laws⁴³. In some cases there have been no such explicit provisions or links, and at common law the provisions available were limited to those of

³⁵ May *op cit*, p 125.

³⁶ May *op cit*, p 125.

³⁷ May *op cit* p 92.

³⁸ May *op cit* p 92.

³⁹ May, *op cit* p 92.

⁴⁰ Van der Hulst, *op cit*, p 129.

⁴¹ Van der Hulst, *op cit*, pp 66, 130.

⁴² US Constitution, Article 1(6).

⁴³ For example Australia, Canada, New Zealand, India, and Victoria, South Australia and Western Australia.

'reasonable necessity'⁴⁴. Considerable adaptation has taken place in many jurisdictions (and see 5.3-5.7 below).

- 4.9 The parliament of Scotland and the National Assembly for Wales, two of the most recently established parliaments, are interesting examples of adaptation. The laws establishing these bodies do not tie their privileges and immunities to Westminster, but instead set out in detail the provisions which apply. In each case, statements made during proceedings in parliament are absolutely privileged for the purposes of defamation: that is they cannot form the basis of an action in defamation. But actions such as incitement to racial hatred are not protected. Proceedings are subject to the law of contempt of court (that is, conduct that tends to interfere with the course of justice in certain proceedings), although the usual provision of strict liability for contempt of court does not apply to publications made in the course of proceedings in relation to a bill or subordinate legislation, or to the extent that they consist of a fair and accurate report of proceedings, made in good faith. These legislative bodies have not been given the broad power to punish contempts⁴⁵.

The French approach

- 4.10 In the French system members enjoy the critical immunity of freedom of speech, but the expression of the immunity is different from the British model. There are differences in respect of the immunity of members' persons and significantly in respect of the ability to punish contempts.

Non-accountability

- 4.11 Members of the French Parliament have long been immune from action on account of their statements in Parliament. The relevant term is best translated into English in this context as 'non-accountability'⁴⁶. The Clerk of the French Senate has observed that this immunity was a

⁴⁴ For example, New South Wales; *and see* Campbell, *op cit*, pp 2, 4; and Gareth Griffith *Principles, Personalities, Politics; Parliamentary Privilege Cases in NSW*.

⁴⁵ *Government of Wales Act 1998*, s 77; *Scotland Act 1998*, s 41; Scottish Parliament Business Bulletin, 38/1999 (available at www.scottish.parliament.uk). The ACT Legislative Assembly, another relatively recent parliament, has not been given the power to punish contempts.

⁴⁶ At a conference in 2005 the Secretary-General of the French Senate, Mme Ponceau presented a paper on parliamentary immunities. Unfortunately for a time the translators used the term 'parliamentary irresponsibility' to describe this immunity: ASGP meeting 17-19 October 2005, minutes pp 57-70.

legacy of a tradition created over past centuries by the British Parliament⁴⁷.

The effect of the immunity is that members cannot be prosecuted or tried elsewhere on account of their statements or votes in Parliament⁴⁸. It has been set out in successive French constitutions, article 26 of the 1958 constitution providing:

No Member of Parliament may be prosecuted, searched for, detained or be subject to judgment on the basis of opinions of opinions expressed or votes cast by him in the exercise of his duties⁴⁹.

Courts have been required to determine issues such as whether the repetition outside parliament by members, or by broadcast, of remarks made in Parliament are protected by force of this provision (they have been found not to be protected)⁵⁰.

- 4.12 It is notable that the form of words ...'No Member may be prosecuted...' is in contrast to the Bill of Rights with its reference to the activity 'proceedings in Parliament'. This may mean that questions such as whether other persons (for example committee witnesses) were covered by the immunity were more open there. In the event, however, court decisions have recognised the protection of witnesses⁵¹.

Inviolability

- 4.13 In France the immunity of the member's person has been recognised since the formation of the National Assembly, on 23 June 1789 the Assembly declaring 'the person of each deputy shall be inviolable'⁵². The justification of such a provision was the protection of deputies from actions by the crown/executive⁵³. Thinking on the extent and application of the immunity has apparently developed considerably, in the last several years particularly with regard to the interests (and tolerance) of others⁵⁴.

⁴⁷ *Ibid*, p 64.

⁴⁸ *Ibid*, p 64.

⁴⁹ *Ibid*, p 59.

⁵⁰ *Ibid*, p 65.

⁵¹ Van der Hulst, *op cit*, pp 67-8.

⁵² ASGP, *op cit*, p 67; Van der Hulst *op cit*, p 79.

⁵³ ASGP, *op cit*, pp 67-9.

⁵⁴ . ASGP *op cit*, p 67.

- 4.14 One constant element has remained: Parliament has had a role in the application of the immunity. In essence, and other than in criminal cases, where a member is captured red-handed or in respect of final sentencing, parliamentary approval is required for the arrest or detention of a member⁵⁵. The approval is given by the Bureau (Managing Group) of the House. One advantage of this is that confidentiality may be maintained, at least for a period⁵⁶.
- 4.15 An indication of the political and parliamentary sensitivity of these matters is given in the statement of one Senator:

To gnaw at inviolability is to hand over parliamentarians to the vengeance and arbitrary decisions of those who, with complete impunity, profit from the weakness of a state terrorised by excessive media coverage in order to set themselves up as a power independent of the law itself and to launch a concerted attack on the authorities and principles of the Republic. One can even bar parliamentarians from attending sittings on the grounds that they have to answer judges' summons⁵⁷.

Punishment of offences

- 4.16 Despite their authority in matters such as the immunity of members' persons, the houses of the French Parliament have never enjoyed the broad capacity to punish offences (contempts) possessed by the House of Commons⁵⁸.

The French influence

- 4.17 As would be expected, the key provisions of the French model appear to have had their greatest influence in continental Europe and in former French colonies.

⁵⁵ ASGP *op cit*, p 69.

⁵⁶ ASGP *op cit*, p 70.

⁵⁷ ASGP, *op cit* p 70.

⁵⁸ Van der Hulst, *op cit*, p 129-30.

5. Adaptation of traditional provisions

- 5.1 The privileges and immunities enjoyed in the UK and in France have evolved. Whether by enactment, such as specific legislation or constitutional provision, by judicial decision, or by parliamentary action, in each case important changes have been made to the privilege provisions and their application.
- 5.2 Similarly, and as would be expected, in other parliaments, whether they can be characterised as more within the French or the British tradition, significant adaptation of key features has been undertaken to ensure that the privilege provisions are appropriate to the particular local constitutional and legal framework.

The USA

- 5.3 The US Congress serves as a good illustration of the development of and from traditional provisions. When the constitution was developed the privilege of freedom of speech and the personal immunity of members were both well established in the UK⁵⁹. Article 1(6) provided:

The Senators and Representatives.....
shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other place.

- 5.4 The constitution is silent on the issue of the power to punish contempts. Although the Congress asserted, and the courts accepted, this power, differences were to emerge compared to the breadth of the power in the UK⁶⁰. In summary the courts' position was that this power was limited to protecting 'the exercise of legislative authority' expressly granted by the constitution⁶¹.
- 5.5 This restriction was not known in the British Parliament, but another limitation was shared: a person committed for contempt had to be released at the end of the session/congress (relevant for the House, if not for the Senate)⁶². To enable this problem to be overcome, in 1857 Congress enacted legislation to enable a person to be summonsed to

⁵⁹ K Bradshaw and D Pring, *Parliament and Congress*, 2nd ed, p 95.

⁶⁰ Bradshaw and Pring, *op cit*, pp 99-101; and see Louis Fisher *Congressional Investigations: Subpoenas and Contempt Power* - Report for Congress, April 2003, pp 1, 18 (available at www.senate.gov).

⁶¹ Fisher, *op cit*, pp 4-6.

⁶² Fisher, *op cit* p 5; and see Odgers *op cit*, p 62.

appear as a witness and answer questions; failure to obey was punishable by a court as a misdemeanour. Later legislation sought to ensure that court ordered imprisonment could have a coercive as well as a punitive effect so that, for example, persons could be released if they purged their contempts by agreeing to answer questions⁶³.

- 5.6 Such actions, and court decisions, reveal recognition of the importance of Congress' investigative role. The Supreme Court has described this role as 'an essential and appropriate auxiliary to the legislative function'⁶⁴. Louis Fisher states that federal courts 'give great deference to congressional subpoenas' and that if the inquiry 'falls within the "legitimate legislative sphere" the congressional activity – including subpoenas - is protected by the absolute prohibition of the Speech or Debate clause '[of the Constitution]⁶⁵. Another feature to note is that, consistent with the 5th Amendment, congressional witnesses may invoke the right not to incriminate themselves⁶⁶, a right typically not conceded in other parliaments in the British tradition.
- 5.7 This illustrates the adaptation of the law and practice necessary in any jurisdiction: in the case of the USA adaptation reflecting a nation with its distinctive constitutional structure and with a legislature that places emphasis on its investigatory work. Congressional investigatory attention has often focussed on the executive branch; there have been many references to findings of contempt against officers of the executive, although it appears that in practice much information has been obtained by Congress or compromise reached⁶⁷.
- 5.8 During 2006 a conflict of a different kind emerged between the congress and the executive. This concerned a search by FBI officers of the offices of Congressman William Jefferson⁶⁸. Although the search warrant contained procedures for material seized to be assessed by officials to identify any material subject to privilege, the Congressman was not present at the search and so he was unable at the time to make any claims of privilege. He sought an order from the District Court to

⁶³ *Ibid*, p 6, and see Senate Department submissions to Joint Select Committee (Clth) 1982-84.; and *Odgers op cit* pp 61-2.

⁶⁴ *Ibid*, p 6.

⁶⁵ *Ibid*, p 7.

⁶⁶ *Ibid*, p 5.

⁶⁷ *Ibid*, p 39.

⁶⁸ 'Constitutional alarm bell is wake up call' *Australian Financial Review*, 17-18 June 2006, p 29.

have all the seized material returned, but this action failed. On appeal the Court of Appeal made a remand order to allow the seized material to be assessed before any further action could be taken by the executive, and the Congressman was given the opportunity to claim privilege at that stage. On the legal issue the Court of Appeal found that the compulsory disclosure of privileged legislative material to the executive had violated the speech or debate clause and that the Congressman was entitled to the return of documents found to be privileged, but it rejected claims that remedying of the violation would require the return of the non-privileged documents⁶⁹ This decision reflected the Appeal Court's recognition of the privilege applying in respect of the Congress, but also of the validity of the executive interest in the administration of justice.

⁶⁹ *USA v Rayburn House Office Building*, Court of Appeal (DC) 06-3105, decision 3 August 2007.

6 What provisions does a contemporary Parliament need ?

6.1 It is not surprising that issues concerning the significant powers, privileges and immunities parliaments and parliamentarians enjoy are sometimes questioned. At least in Australia concerns have often been raised about the perceived abuse of privilege by members and other aspects of arrangements have been questioned⁷⁰. There have been reviews and assessments of privilege and related provisions in the Federal Parliament⁷¹, in New South Wales, Queensland and Western Australia.

Commonwealth review

6.2 In March 1982 a Joint Select Committee on Parliamentary Privilege was appointed to conduct a thorough review of the law and practice of parliamentary privilege in so far as the Commonwealth Parliament was concerned. It received co-operation from academia, from commonwealth and parliamentary staff members, and there was considerable interest from media firms and organisations. Unusually for a joint committee, after the 1984 election which saw a change of government, when the committee was reappointed in the new Parliament the former chair, Mr John Spender QC, by then an opposition member, was re-elected as chair⁷². The committee's final report, which had been preceded by an exposure draft on which comments were sought, contained 35 recommendations. Its whole focus was to recommend changes so that both the law and practice were adequate for the needs of a modern parliament, but so that the rights and interests of citizens were recognised and protected. Selected recommendations are discussed at paras 6.3 to 6.6 below.

6.3 Much consideration was given to the privilege of freedom of speech. The committee rejected arguments that letters from members to Ministers should be absolutely privileged, acknowledging that, by definition, any extension of absolute privilege reduced the rights of others correspondingly. The committee was concerned about the issue

⁷⁰ See Campbell, *op cit*; ch 5; *House of Representatives Practice, op cit* pp 711, 753.

⁷¹ Joint Select Committee on Parliamentary Privilege 1982-84, report PP 219 (1984).

⁷² While this gesture was notable, so too had been the first meeting of the committee in 1982 when a ballot was necessary to determine which of two nominated (government) members should be chair - Minutes 6 May 1982.

of misuse of privilege. It rejected arguments that members should be required to have some form of prima facie evidence before making allegations. It concluded that the immunity should be retained in its present form but recommended the adoption of a 'right of reply' procedure. This possibility had been put forward by a former Clerk of the Senate, Mr J R Odgers, and was accepted by the committee as not inconsistent with freedom of speech and as of value to those subject to attack in Parliament.

6.4 The committee proposed major changes to the law in respect of the minor immunities. It recommended that the period of immunity be reduced significantly – to sitting/committee meeting days and 5 days on either side of such days. This again was consistent with the desire that justified immunities should be retained, but confined to the minimum necessary to protect the practical operation of the Houses and committees.

6.5 Much discussion took place on the power of a house to punish contempts. The Clerk of the House, Mr J A Pettiffer, argued that a House should not have the ability to punish contempts itself:

the power to impose a fine..... and the power to impose a period of imprisonment ... should be passed to the courts [after examination by the House] and

... a modern democratic society ... will no longer readily accept the imposition by the Parliament of penal provisions ... [retention of the penal jurisdiction] was a denial of natural justice⁷³.

In the event the committee recommended retention of the penal jurisdiction, but with significant changes to guard against misuse: the houses should by resolution list matters that could be found to be contempts, the penal jurisdiction should be exercised as sparingly as possible, the category of contempt by defamation should be abolished, there should be detailed rules to protect witnesses before the Privileges Committees and, where a house committed a person for contempt, limited judicial review should be available. (Review would be available, the committee reported, if the particulars of any alleged

⁷³ Mr Pettiffer's concerns were echoed in advice given by Professor Lindell and Professor Carney to the House Committee of Privileges 25 years later – *Review of Procedures of the House of Representatives relating to the consideration of privilege matters and procedural fairness*, 23 February 2007 – available at <http://www.aph.gov.au/house/committee/priv/reports>.

contempt were required to be set out in a warrant of imprisonment. This was thought to have the effect of allowing a court to review the imprisonment of a person by a House for the determining whether, assuming the correctness of the facts stated in the warrant, the person's conduct was capable of constituting contempt⁷⁴. This would not affect the exclusive power of each House to determine the facts or generally to try the offence of contempt).

- 6.6 Many of the committee's recommendations were implemented (some with modifications) in the *Parliamentary Privileges Act 1987*, although the immediate triggers for this enactment were decisions of courts of New South Wales⁷⁵. At least one innovation recommended has had a wider effect: right of reply procedures have been adopted in each house of the Federal Parliament, in every Australian state and mainland territory and in New Zealand and Ireland.

British review

- 6.7 In 1997 the British Parliament appointed a joint select committee to review the law and practice of parliamentary privilege. The committee, chaired by a senior judge, conducted a thorough review and received considerable assistance from academia, from many Commonwealth parliaments and from British authorities. The committee sought to answer the questions 'Do the law and practice of parliamentary privilege meet present and future needs? Do the existing procedures satisfy contemporary standards of fairness and public accountability'⁷⁶. The committee reported in March 1999; selected recommendations are noted at paras 6.8-6.12 below.
- 6.8 The committee gave much thought to the freedom of speech immunity, including the issue of the use of parliamentary proceedings in court, an aspect which had received much attention in the 1980s and 1990s. It recommended that the 1995 amendment to the Defamation Act (which allowed a person to waive privilege in certain circumstances) be replaced by a provision which would instead allow a House to waive privilege. The committee also recommended that the term 'proceedings in Parliament' should be defined in statute on the basis of the

⁷⁴ Given effect by s 9 of the *Parliamentary Privileges Act 1987*; see also s 4 which sets a test for contempts; and see Professor Lindell 'Parliamentary Inquiries and Government Witnesses' (1995) *Melbourne University Law Review* 383 at 416-7.

⁷⁵ Odgers *op cit*, p 38. The Senate has also adopted detailed resolutions in response to the committee's recommendations (25 February 1988).

⁷⁶ HL Paper 43-1; HC Paper 214-I (1998-99) para 32.

Australian (Clth) definition and that communications between members and ministers should not be given absolute privilege.

- 6.9 It is rare to see it suggested that absolute privilege should not apply to proceedings, but an argument to reduce the extent of the immunity was put to the committee. Dr Geoffrey Marshall told the committee that the purpose of Article 9 was to protect members from actions by the executive and from criminal charges and that, accordingly, in civil actions qualified privilege was more appropriate. He said that this defence seemed to have protected adequately persons elected to local bodies. The committee rejected the argument. It acknowledged that the price of the immunity was that a person could be defamed unjustly and left without remedy, but said members should not be exposed to the risk of being brought before the courts to defend what they had said, saying that abuse of the immunity was a matter for internal self-regulation by parliament⁷⁷. The committee did not support the introduction of a 'right of reply' procedure, saying such a procedure could raise expectations that could not be fulfilled, and noted that the problem of criticism of individuals did not appear to be a great one in the UK and that the drawbacks of the proposal outweighed the advantages⁷⁸.
- 6.10 The committee recommended abolition of the privilege of freedom from arrest in civil cases. It also proposed that a subpoena requiring a member's attendance in court should not be issued without the consent of a judge⁷⁹.
- 6.11 Significant changes were recommended in respect of the power to punish contempts. Recommendations included codification of a definition of contempt, abolition of the Parliament's power to imprison a person, whether a member or not, that the Parliament's penal powers over non-members should, in general, be transferred to the High Court and that wilful failure to attend committee proceedings, answer questions or produce documents should be made criminal offences

⁷⁷ *Op cit*, p 18; Evidence of Dr G Marshall, *op cit* II, p 202, questions 774-6. Dr Marshall had referred to this possibility in 1979 in 'The House of Commons and its privileges' in *the House of Commons in the twentieth century* (S A Walkland (ed)), pp 213-4. In that contribution Dr Marshall identified with the label 'constitutional iconoclast' and said that there was no reliable evidence on which fears of time-consuming litigation could be based.

⁷⁸ *Ibid*, paras 217-223.

⁷⁹ *Ibid*, para 324.

punishable in the courts. The committee also recommended that procedural fairness before the Committee of Standards and Privileges be ensured and that each House should retain the power to make decisions on contempt matters, but that a penalty should not be able to exceed that recommended by the relevant committee (and that, while the committee members should be able to take part in the debate, they should not be able to vote)⁸⁰.

- 6.12 The committee recommended enactment of a Parliamentary Privileges Act to implement those recommendations requiring legislative action, such as the provision for waiver, the definitions of 'proceedings in Parliament', the codification of contempt, the abolition of the houses' power to imprison and the statement of their power to fine⁸¹. It saw the enactment of a short statutory code as valuable and helpful to members and non-members⁸².

⁸⁰ *Ibid*, para 324.

⁸¹ *Ibid*, paras 376-7.

⁸² *Ibid*, paras 378-385.

7 Impact of the modifications made in the provisions applying to the national parliament

- 7.1 Amendments made to the federal law by the *Parliamentary Privileges Act 1987* implemented several recommendations of the Joint Select Committee on Parliamentary Privilege (see paras 6.2-6.6 above) and gave effect to decisions to counter the impact of court decisions in New South Wales on the application of the privilege of freedom of speech. Matters such as the adoption of a statutory definition of contempt which must be satisfied for a matter to constitute a contempt, the enactment of a provision to allow limited judicial review of decisions by a house to imprison persons, abolition of the category of contempt by defamation and abolition of the power of a house to expel a member were each significant, and reductions were made in the extent of minor immunities. One change was effectively an addition to the parliamentary weaponry – this was the provision for the houses to impose fines for contempt⁸³. Other changes were made by resolutions, initially in the Senate, but later in the House, establishing right of reply procedures and in the case of the Senate setting down details of matters that could be found to be contempts, procedures for the protection of witnesses and procedures to be followed by the Committee of Privileges. While the House of Representatives has not adopted such resolutions, its committees and its Committee of Privileges have sought to operate with regard to the principles reflected in the recommended resolutions.
- 7.2 In various ways, and with the exception of the provisions for the imposition of fines by a house, these changes amounted to reductions in the extent of the powers and immunities previously available to each house and/or in the flexibility available to them in matters of privilege and contempt. Two Senators dissented from the majority on eight recommendations of the Joint Select Committee, arguing that the recommendations were unnecessary, undesirable or not justified, and expressing concerns that the enactment of some statutory provisions

⁸³ The majority of the joint committee concluded that as the House of Commons had not imposed a fine since 1666, and although it had not formally renounced the power, it could not be held that the Commons possessed the power in 1901, and so it was not available to the houses of the Australian parliament – PP 219 1984.

could open the way for court involvement in parliamentary matters (which they regarded as undesirable) ⁸⁴.

- 7.3 Still, as a result of a public and thorough examination of the inherited provisions, an assessment of the powers and immunities considered necessary for a modern parliament and an assessment of the most suitable means of dealing with matters of privilege and contempt, comprehensive changes were made. It may be that some of the reductions and modifications will come to be regretted⁸⁵, and it must be acknowledged that despite procedures and approaches designed to protect witnesses it would still be possible to find witnesses who have felt they had been subject to unfair or biased treatment by members and Senators. Nevertheless the national Parliament can point to its willingness to adapt to changed circumstances, to circumscribe inherited provisions and to make concessions to recognise the interests of citizens⁸⁶. Some may have felt that unnecessary changes were made, others were probably disappointed that more radical action was not taken - for example by transferring to the courts the power to punish contempts, but at least such a process shows a parliament willing to open these matters to the widest discussion and to make recommended changes. These processes mean, I suggest, that the parliament has been strengthened: the case for retention of great powers and immunities has been made out, some have been modified and safeguards against misuse put in place. All this goes to some enhancement of the credibility of the parliament in these matters and to the hope that when powers are exercised or penalties imposed both understanding and acceptance should be increased.

⁸⁴ Dissent by Senators Jessop and Rae, PP 219, pp 165-7.

⁸⁵ At the time of writing references had been made to the desire to have member of the parliament of Western Australia expelled – since 1987 this power has not been available to either house of the federal parliament, a matter on which opinion on the joint select committee was divided.

⁸⁶ Two Canadian writers have drawn attention to the significance of this review and the one conducted later in the UK and said that such an approach was preferable to having parliamentary law developed by court decisions: Charles Robert and Vince Macneil 'Shield or sword? Parliamentary privilege, Charter rights and the rule of law', *The Table*, vol 75 (2007), pp 17-38, available at http://societyofclerks/SCAT_Publish.asp

8 The future

8.1 Despite differences in detail and in the terminology used, there are substantial similarities around the world in respect of the privilege of freedom of speech. It is also notable that issues such as the extent of the immunity, the use of parliamentary material in courts and the misuse of privilege have been of concern in several parliaments. Differences are to be seen in respect of other immunities – but they are of lesser importance anyway -- at least in nations where the operation of parliament and the rights of members are recognised in practice as well as in theory. Differences are more pronounced in respect of the power to punish contempts. The similarities in thinking in the two major reviews mentioned are notable, especially the commitment to retaining those privileges and immunities judged to be necessary but to reconciling the retention and use of such provisions with the rights of citizens. It is not possible to predict the influences that are likely to be significant in the further development of the law and practice of parliamentary privilege, but there are many possibilities.

Legal developments

8.2 Wider legal developments could be relevant. The issue of international legal arrangements is one area⁸⁷. In Europe there have been cases where actions of national parliaments have been tested against the requirements of a larger legal framework in the form of the European Court of Human Rights. A finding of contempt by a national parliament has been held by the court to be in contravention of the Convention on Human Rights because two members who had been criticised by the person in question had not only raised the complaint in the House, they had participated in proceedings on the matter. The court held that this had denied the person's rights to a fair and impartial hearing⁸⁸. In 2002 a British citizen took action in the court on the ground that she had been subject to discrimination as a result of criticism of her family by a member of the House of Commons. She argued that her right to the determination of her civil rights and obligations by a fair and impartial hearing had been violated by the use of parliamentary privilege. Presumably because of the wider significance of this case, several European nations were permitted to

⁸⁷ Campbell, *op cit*, pp 204-8.

⁸⁸ *Demicoli v. Malta* (1992) 14 EHRR 47; May, *op cit*, p 155.

make submissions. The action failed, the court ruling that parliamentary privilege did not impose a disproportionate restriction on the right of access to a court⁸⁹. In 2003 the Court held that immunity did not apply to the repetition out of parliament by a member of Italy's parliament of a defamatory statement made during proceedings⁹⁰.

- 8.3 Human rights legislation at a national or state/territory level may also be important to a Parliament⁹¹. The *New Zealand Bill of Rights Act 1990* sets out rights and freedoms that the House must observe in exercising its privileges, although the Act does not abrogate any of the House's privileges⁹². Internal parliamentary processes, such as practices for the protection of witnesses before the Privileges Committee, take account of these requirements⁹³. Such issues have been given considerable attention in Canada since enactment of the *Canadian Charter of Rights and Freedoms* in 1982⁹⁴. A point of broader significance, noted by Professor Lindell in respect of the *Vaid* case, is the tendency of the court to define the content of parliamentary privilege by reference to the degree of autonomy necessary for the performance of the functions entrusted to the Canadian Parliament as finally determined by the court and not just the Parliament. A scholarly discussion of the position in Canada, and one which takes account of international developments, has been published in *The Table* for 2007⁹⁵. In Australia to date only the ACT and Victoria have enacted human rights laws. Technically legislation in this area may or may not be drafted with reference to parliamentary activities. It would seem however that, as a minimum, a parliament which enacted such a law would feel some obligation to ensure that its own operations were at least consistent with any general standards that it established for the wider community.

⁸⁹ May, *op cit*, p 199; *M Jack A. v the UK 'The Table'* (2003), pp 35-40; ASGP, *op cit*, p 66.

⁹⁰ ASGP, *op cit*, p 66.

⁹¹ See, for example *Canada (House of Commons) v Vaid* (2005) SCC 30 (Supreme Court of Canada, 20 May 2005).

⁹² McGee *op cit*, p 611.

⁹³ *Ibid*, pp 611, 667.

⁹⁴ Robert Marleau and Camille Montpetit *House of Commons Procedure and Practice*, pp 112 - 13; Joseph Maingot, QC, *Parliamentary Privilege in Canada* (2nd ed), ch 14; and see Robert and Macneil, *op cit*.

⁹⁵ Robert and Macneil, *op cit*. And see forthcoming paper by Nicholas MacDonald 'Parliamentarians and National Security', *Canadian Parliamentary Review*, Fall 2011. Mr MacDonald has made helpful comments on this paper.

The development of the law in respect of the implied constitutional guarantee of freedom of political communication will be of interest, including in respect of the *Parliamentary Privileges Act 1987*. Subsection 16(3), it has been argued, is in conflict with this freedom in so far as it prevents the analysis of the conduct of elected politicians in the courts or impedes the discussion of the same matters by non-parliamentarians given the legal consequences that may result in defamation⁹⁶.

Parliamentary developments

8.4 The way in which parliaments and parliamentarians discharge their responsibilities is also likely to be relevant to developments in relation to privilege. The issue of misuse of privilege, whether by members or by others such as committee witnesses, may continue to receive attention. Modern technology assists greatly in the dissemination of details of parliamentary activities. There are many positive aspects in this: the wider community is informed more easily and more quickly of parliament's work. One negative aspect is however that greater damage can be done because a false or reckless attack or the publication of personal details is also carried quickly and to a much wider audience, and false or unreasonably damaging published electronically can continue to 'live' in databases and systems even if it is withdrawn or corrected. An awareness of such risks has already caused House committees to consider carefully the publication of submissions – in some cases, for example, certain details have been omitted, the committees seeking to balance the interests of openness and accountability with the interests of individuals. Committee procedures, whether established by practice (House committees) or by resolution (Senate committees) allow for the protection of witnesses and for the rights of others. The challenge may be more in the application of the procedures rather than the procedures themselves, and in an awareness of the enhanced potential for damage to be done to individuals by the use of modern technologies, technologies which can be expected to evolve with great speed, and which may impact on the houses themselves and individual parliamentarians as well as on committees.

8.5 Care for the rights of others will need to be shown by Committees of Privileges, and by the relevant houses, if the community is to be

⁹⁶ Enid Campbell 'Contempt of Parliament and the Implied Freedom of Political Communication' (1999) 10 *Public Law Review* 196 and *Parliamentary Privilege* (2003), at 7, 64-5, and evidence by Professor Lindell to the UK Joint Committee HL 43 III, HC 214 – 111 (1998-99) at 168-9 paras 21(ii) and 19.

expected to accept that parliament should retain the broad power to punish contempts⁹⁷. It is also possible that parliaments may face new forms of obstruction or difficulties which will cause them to seek changes to the law or to the arrangements concerning privilege.

The courts

- 8.6 It is probable that Australian courts will continue to be required to give decisions about the law of parliamentary privilege. These could include decisions about the extent of absolute privilege (including, for example, interpretation and application of the phrase 'incidental to the transacting of the business of a House or a committee'), the effect (and validity) of subsection 16(3) of the 1987 Act in relation to court proceedings⁹⁸, the validity of a penalty imposed by a House, or a matter concerning a committee inquiry.
- 8.7 Much thought has been given in recent years to the impact of the freedom of speech immunity on the workings of courts. There is probably wide acceptance of the idea that the administration of justice requires that the courts have all relevant evidence before them. Through the application of the privilege of freedom of speech material that may be relevant is sometimes not available, and this may even cause cases to be stayed. It is likely that such issues will be raised in the future and it is possible that parliaments will be asked to amend the law to accommodate what can be called the 'administration of justice' interest.
- 8.8 Professor Lindell, one of Australia's leading constitutional scholars, who gave evidence to the UK joint committee at its request, noted in his submission that Article 9 has its origin in times 'when judges did not enjoy the tenure and independence they presently enjoy'. He noted also that as they can no longer be seen as servants and agents of the crown it can no longer be asserted that to allow judges to question proceedings would be to allow the executive to interfere in the freedom of Parliamentary proceedings. Accordingly, and in the context of the extent to which parliamentary privilege presently limits the admissibility of evidence in the ordinary courts of law concerning what

⁹⁷ Earlier this year a case for the substantial transfer of the penal jurisdiction to the courts on the grounds that determination of such matters by houses of parliament was not consistent with the principles of procedural fairness was set out in advice provided to the House Committee of Privileges- Professors Lindell and Carney, *op cit*.

⁹⁸ *And see* Campbell *op cit*, pp 99-104 and evidence of Professor Lindell to the UK Joint Committee, HL 43 III, HC 214-111 (1998-99), at 168-9 paras 18-23.

is said or done during the course of parliamentary proceedings, he raised the need to consider whether this area of the law should be absorbed as part of the wider law of public interest immunity⁹⁹. No doubt Professor Lindell would be quick to agree that any such proposal would only be applicable in some jurisdictions. Unfortunately in some parliaments around the world executive/parliamentary/judicial relationships are not so settled or secure and some parliamentarians can be at risk in very real ways¹⁰⁰, but it will be interesting to see the possibilities where this aspect is an issue.

- 8.9 Significant changes have been made in the law and practice relating to parliamentary privilege in the Commonwealth parliament. The extent of traditional powers and immunities, and the flexibility available to the houses in dealing with matters of privilege and contempt, have each been reduced. Paradoxically, although it has relinquished powers and reduced the flexibility it had in these matters the parliament can be said to have been strengthened, and is now able to point to a set of statutory and procedural arrangements that are not only more appropriate to contemporary parliamentary requirements but also more consistent with community expectations in terms of citizens' interests.
- 8.10 It is impossible to be confident about the issues that may arise in future about these matters in any jurisdiction, about how these issues will interact, or about how they will be responded to. The successful performance of representative, legislative and investigative/scrutiny functions will continue to be seen as justifying special immunities and powers, but the retention of such provisions will be best assured if members and committees use their powers responsibly and with an awareness of the interests of citizens and of the other arms of government. In these matters members' conduct will continue to influence public attitudes towards the parliament and community expectations of it, but parliamentarians will need to be aware of and responsive to these expectations and attitudes if they are to hope for community acceptance of the special immunities and powers the law gives them. In the case of Australia's national parliament, should it be

⁹⁹ H.L 43 III; H.C. 214-111 (1998-99), pp 164-173. Dr Marshall had recommended replacement of s 13 of the Defamation Act (UK) with a general provision to enable evidence to be given about proceedings in all cases that did not involve the 'protective function' of Article 9, but the committee did not favour this either, seeing a wider danger to the principle that members ought not to be called to account for their parliamentary actions - report, para 77.

¹⁰⁰ Van der Hulst *op cit*, p 143.

necessary to consider further changes – for example in connection with completely new threats to the houses, their committees or members-- it will be advantageous that the parliament has undertaken the difficult task of assessing the traditional provisions and justifying and agreeing to reductions and adaptations seen as necessary. Further changes may be more matters of updating or development from a relatively recent set of provisions.

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