Implications of the national human rights consultation for the powers and proceedings of parliament

Alison Clegg*

Introduction

Australia is now the only westernised liberal democracy without a national human rights act. Despite a lengthy history, debate over whether Australia's protection of human rights would be improved by such an act continues. During 2008-09 debate was fuelled by the Australian government's national human rights consultation. Supporters of a national act contend that it will provide a means for Australia to meet its international human rights obligations, promoting and protecting the rights of individuals and minorities. Opposition is frequently based on concerns that the very pillars of a Westminster-based parliamentary democracy, notably the doctrines of parliamentary sovereignty and the separation of powers, will be undermined by judicial review.

This paper considers the implications for the powers and proceedings of parliament of the national human rights consultation, specifically the recommendation for Australia to introduce a national act. Considerations draw on the experiences of selected jurisdictions that have adopted statutory instruments of human rights protection.

Report of the consultation

In 2008, coinciding with the 60th anniversary of the *Universal Declaration of Human Rights*, the Australian govern ment initiated a national human rights consultation.[1] The consultation 'aimed to seek a range of views from across Australia about the protection and promotion of human rights'. An independent committee, chaired by Father Frank Brennan AO, a long time advocate for human rights and civil liberties, was established to consider:

*Dr Alison Clegg, Committee Office, Department of the House of Representatives, Parliament of Australia.

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- which human rights and responsibilities should be protected and promoted?
- whether human rights are sufficiently protected and promoted?
- how could Australia better protect and promote human rights and responsibilities?

Over 35,000 submissions were received and, in September 2009, the committee published its report, making 31 recommendations.[2] Among the recommendations are some that, if implemented, would have significant implications for the powers and proceedings of parliament — notably, recommendations 18 and 19 which called for the introduction of a national human rights act based on a 'dialogue' model of protection. Recommendation 25 listed civil and political rights to be included in any national human rights act, including the right to privacy and reputation, the right to freedom of expression, the right to take part in public life and, the right to due process in criminal proceedings. Recommendations 6 and 7 called for increased pre-enactment parliamentary scrutiny of legislation to assess compliance with human rights obligations.

Models for the protection of human rights

There are essentially two structurally divergent models for the protection of human rights — constitutional and statutory. The feature of a constitutional model is that it gives the judiciary power to declare invalid any federal or state law which is deemed to be inconsistent with constitutionally entrenched human rights. For example, rights established under America's constitutional Bill of Rights prevail over all federal and state legislation. The Canadian Charter of Rights and Freedoms (the Charter) also has constitutional status, allowing for acts of parliament, both national and provisional, to be struck down due to inconsistency with Charter standards. Statutory models — such as those enacted in New Zealand (NZ), the United Kingdom (UK), the Australian Capital Territory (ACT) and Victoria — give the judiciary interpretative powers allowing for rulings of incompatibility or inconsistency, but do not enable the judiciary to invalidate legislation on these grounds. Although argued that constitutional models provide the strongest form of human rights protection, the terms of reference for Australia's national human rights consultation specifically precluded their consideration on the basis that the options identified should preserve the sovereignty of the parliament and not include a constitutionally entrenched bill of rights.[3]

Statutory protection

Although the Canadian Charter is constitutional in nature, as one of the first jurisdictions to introduce a national bill of rights, Canada (albeit unwittingly) established precedents which have influenced later statutory models of protection. Notably the following two features of the Canadian model have informed subsequent developments:

> ... firstly the concept of political rights review (a two-pronged concept that involves executive-based review of proposed bills from a rights perspective, combined with a requirement of alerting parliament about inconsistencies, thereby creating the stage for broader rights-based political and public scrutiny); and secondly the idea that a parliamentary system can recognise a judicial role to review legislation for its consistency with protected rights yet, at the same time, preserve opportunity for legislative disagreement with judicial interpretations.[4]

These two features, parliamentary pre-enactment review of legislation for human rights compliance and judicial review of compliance, with the option for political disagreement have been adopted and adapted by a number of jurisdictions with statutory human rights protection, including NZ, UK, ACT and Victoria. Both are integral to the dialogue model of human rights protection and, although there are structural and operational variations, all statutory dialogue models specify which rights are protected, whose rights are protected and who must comply with statutory obligations.

Statutory models of human rights protection in the UK, ACT and Victoria require each bill presented to parliament to be accompanied by a statement of human rights compatibility. Statements may be issued by the person introducing the bill or by the Attorney General. In NZ the obligation differs, with the Attorney General issuing a statement only if a bill appears to be inconsistent with the *NZ Bill of Rights Act* (NZBORA). In all jurisdictions, provisions ensure that parliament ultimately remains competent to enact legislation, even where it is incompatible with human rights. Nevertheless, this mechanism requires the executive to consider the human rights implications of proposed bills prior to their introduction into parliament. Some dialogue models (e.g. UK, ACT and Victoria) also contain provisions for pre-enactment review for human rights compliance by parliamentary committees. The experiences of those jurisdictions with mechanisms for independent parliamentary committee review indicate that despite statements of compatibility, there is still considerable scope for differential interpretation. Cross-party committee scrutiny ensures that legislative review occurs at the parliamentary level, as well as the executive level, ensuring that statements of compatibility do not become rubber stamp exercises.[5]

Human rights acts in NZ, UK, ACT and Victoria all include judicial interpretative provisions that require the courts to interpret legislation 'so far as it is possible to do so' in accordance with the protection of human rights. To address concerns that the purpose of legislation might be interpreted in such a way that its compliance with human rights effectively 'rewrites' the intent of the legislation, the ACT and Victoria have further specified that interpretation for human rights compatibility must also take into account the purpose of the relevant statute.

Where interpretation of statute in accordance with human rights is not possible, some jurisdictions (UK, ACT and Victoria) allow the courts to issue statements of incompatibility. While the requirement for response to these statements varies

between jurisdictions, importantly issuing of such a statement does not invalidate or alter the application of the legislation. To date there have been no judicial statements of incompatibility issued in the ACT or Victoria. In the UK, a 2009 report indicates that since the *Human Rights Act 1998* came into force there have been 26 declarations of incompatibility.[6]

Human rights and the powers and proceedings of parliament

Given the powers and immunities afforded to parliament by parliamentary privilege, in jurisdictions where the rights of individuals are protected by statute, it is not difficult to conceive that conflicts might arise. Essentially parliamentary privilege is intended to protect the institution of parliament by conferring on it the right to regulate its own affairs, free from interference by the government or the courts. Members of parliament also need to be able to speak freely, uninhibited by possible defamation claims. A well-established and fundamental principle, parliamentary privilege is often criticised on the basis that the scope of its application has become too wide. This has led to a perception that parliament has to some degree become a 'statute free zone'.[7] Where conflicts between privilege and individual rights arise, they most frequently involve the civil and political rights of individuals (e.g. the right to privacy and reputation; the right to freedom of expression; the right to take part in public life; and the right to due process in criminal proceedings).

Variations between models of human rights protection include differences in provisions for who must comply with statutory requirements. While provisions in Canada[8] and NZ[9] explicitly indicate application to their respective legislatures, provisions in the UK,[10] ACT[11] and Victoria[12] specifically exclude theirs. Competing claims of parliamentary privilege and assertions of breaches of human rights have arisen in Canada, NZ and, despite Parliament's exclusion from the requirement to comply with the *Human Rights Act 1998*, also in the UK.[13] The nature and scope of these challenges, and lessons for Australia are considered.

Experience of Canada, New Zealand and the United Kingdom

There are several cases in Canada that have involved the courts seeking to balance competing interests of parliamentary privilege and the rights of individuals protected by the Canadian Charter. According to Robert and MacNeil:

> ... the courts have been seized with numerous cases involving parliamentary privilege. In almost every case, the question to be resolved pits parliamentary privilege against Charter rights or the rule of law. Traditionally viewed as a shield against the Crown, privilege has thus been transformed into a sword that conflicts with constitutionally guaranteed rights.[14]

The case of *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly) (1993)* was founded on competing claims of traditional parliamentary prerogatives and Charter based rights of free expression.[15] In this case the media

wanted to cover proceedings of the Nova Scotia Assembly with independently operated hand-held video cameras. Arthur Donahoe, then Speaker, described this as a potential threat to the orderly conduct of legislative affairs. It was argued that the authority of an assembly to set rules of conduct and monitor access of the press is covered by traditional parliamentary privileges. This placed the following issues under review:

- whether the Charter applies to members of the Assembly when acting in their capacity as members;
- if so, whether excluding hand-held cameras from the Assembly contravenes freedom of the press and other media of communication as guaranteed by the Charter; and
- if so, whether such an exclusion is justified on the basis of reasonable limits prescribed by law in a free and democratic society.[16]

The Court held by a majority that the Charter provision of freedom of the press did not prevent the Assembly from asserting its privileges to exclude cameras from the Assembly. La Forest, L'Heureux-Dubé, Gonthier, McLachlin and Iacobucci JJ considered that the Speaker acted within the ambit of his constitutional power to control attendance in the House, refusing to allow the use of hand-held cameras on the basis that it would be disruptive to proceedings. The justices also considered that this constitutional power could not abrogated by the Charter.[17] However, there was division among the justices over whether the Charter should apply to Assembly proceedings. While the majority held that Charter should not apply as inherent privileges of the Assembly have constitutional status,[18] Cory J expressed a different opinion, stating:

> The legislative assembly is an institution that is not only essential to the operation of democracy but is also an integral part of democratic government. It is a public actor. It follows that the Charter should apply to the actions of the House of Assembly, which include not only the legislation passed by the Assembly but also its own rules and regulations.[19]

In *Harvey v New Brunswick (Attorney General) (1996)* the courts dealt with a challenge to the *New Brunswick Elections Act (1973)*.[20] The challenge came from Fred Harvey, a Member of the Legislative Assembly who was expelled following conviction of an offence under the *Elections Act (1973)* and consequently disqualified from running as a candidate for a period of five years. Harvey contended that the application of Section 119(c)[21] of the *Election Act* was contrary to Section 3 of the Charter which guarantees democratic rights.[22] While the Court was under no doubt that the actual expulsion of Harvey from the Assembly was not reviewable as it was clearly an exercise of parliamentary privilege, it was less clear whether the five year disqualification was similarly protected. Although the majority of the judges decided on grounds other than privilege,[23] consideration was given to the issue of whether the Charter prevails over the exercise of parliamentary privilege. Mclachlin J was of the view that as both parliamentary privilege and the Charter have constitutional status, neither should prevail over the other. As such,

where conflicts arise Mclachin J recommended that an approach to resolution should seek to reconcile differences, rather than subordinate one principle to another.[24] In concluding the case however, McLachlin J stated:

> I conclude that the power to disqualify members for corruption is necessary to the dignity, integrity and efficient functioning of a legislature. As such, it is protected by parliamentary privilege and falls outside the ambit of s 3 of the Charter. It is a matter for the legislature, not the courts, to determine.[25]

The third and most recent case of interest is *Canada (House of Commons) v Vaid (2005)* (*Vaid*).[26] The case concerned the reassignment and eventual dismissal of Satnam Vaid who between 1984 and 1995 worked as a chauffeur for three Speakers of the Canadian House of Commons. Vaid complained to the Canadian Human Rights Commission that workplace harassment and discrimination had led to constructive dismissal. His complaints were referred to the Canadian Human Rights Tribunal. However, the House of Commons challenged the Tribunal's jurisdiction, claiming that the Speaker's power to hire, manage and dismiss employees was privileged and therefore immune to external review. The main issue for consideration was whether the parliamentary privilege asserted could be established against the doctrine of necessity.[27] In this regard, Binnie J noted the argument which put that exempting the Speaker's decision from external review on the basis of parliamentary privilege in this case, trivialised the true role and function of privilege.[28] On examination the Court found that the parliamentary privilege asserted in *Vaid* had not been established against the doctrine of necessity. As noted by Binnie J:

> When the existence of a category (or sphere of activity) for which inherent privilege is claimed (at least at the provincial level) is put in issue, the court must not only look at the historical roots of the claim but also to determine whether the category of inherent privilege continues to be necessary to the functioning of the legislative body today.[29]

While the Court found that the Charter applies to all employees of the federal government (including employees of parliament), it concluded that Vaid's complaint of constructive dismissal was most appropriately dealt with through the grievance procedure available through the *Parliamentary Employee Staff Relations Act*. Although the Court did not uphold the asserted privilege and therefore *orbiter dicta*, Binnie J also noted the potential consequences of parliamentary privilege for individuals claiming to be adversely effected as a result of parliamentary proceedings, particularly the limited options for those seeking redress.[30]

The Canadian experience demonstrates the very real potential for conflict between parliamentary privilege and human rights. It also demonstrates that the courts, while respectful of the need to refrain from interfering with the workings of parliament, play an important role in determining whether an asserted parliamentary privilege does in fact exist. *Vaid* in particular has been instrumental in supporting the rigorous application of the test of necessity to determine the basis of an asserted privilege. What the Canadian experience also demonstrates, is the potential for the justices to arrive at different conclusions in relation the nature and scope of

privileges, and the extent to which the Charter applies to the legislature and its proceedings. While the judgement reached in *Vaid* was unanimous, judgements in *New Brunswick Broadcasting Co* and *Harvey* were majority rulings. Although *New Brunswick Broadcasting Co* and *Harvey* upheld parliamentary privilege, *Vaid* may indicate that views are evolving in relation to 'Charter versus privilege' as Charter rights become established.

In 1998 Mary Harris, then Clerk of the NZ House of Representatives, responded to an invitation issued from the UK Joint Committee on Parliamentary Privilege to submit evidence to its review of parliamentary privilege. In her memorandum Harris states:

> The enactment of the *New Zealand Bill of Rights Act 1990* has given impetus to the adoption of procedures that show greater concern for the interests of outside persons than formerly ... This was done partly to forestall challenges to the House's exclusive jurisdiction over its internal proceedings. While such challenges would be resisted, the existence of the Bill of Rights which expressly binds the legislature strengthens the argument that the court's supervisory jurisdiction could extend to the House. It was therefore felt that the House should give content in its rules to the procedural rights endorsed by the Bill of Rights.[31]

Despite these endeavours to 'forestall challenges to the House's exclusive jurisdiction over its internal proceedings', in 2007 a case arose under the NZBORA which did precisely that.[32] In *Boscawen, McVicar and Hide v Attorney General [2009],* Boscawen (at the time a candidate for the ACT Party in the 2008 NZ election) and others sought judicial review of the Attorney-General's decision not to bring to the attention of the NZ House of Representatives provisions of the *Electoral Finance Bill 2007* pursuant to section 7 of the NZBORA.[33] The appellants argued that provisions of the Bill (which had already been enacted by the time the Court made its decision) were inconsistent with rights and freedoms contained in the NZBORA. Specifically they argued that the (by then) *Electoral Finance Act 2007* was inconsistent with section 12 (right to vote) and section 14 (freedom of expression) of the NZBORA. The appellants also claimed that none of these restrictions were demonstrably justified in a free and democratic society, as allowed for in section 5 of the NZBORA. In the considering the basis for the case, O'Regan J noted:

> The essence of the appellants' case was that the Attorney-General's view that the Electoral Finance Bill was not inconsistent with the rights and freedoms in the NZBORA was wrong. The underlying assumption was that, if the Court reviewed that assessment, it would come to a different and, inferentially, better view.[34]

Importantly, one of the questions for consideration was whether the Court had the authority to review the exercise of section 7 of the NZBORA or whether this would contravene Article 9 of the English *Bill of Rights 1689*.[35] While noting that there is 'considerable uncertainty about the precise meaning of Article 9, especially the scope of the term proceedings in parliament',[36] the NZ Court of Appeal concluded that Attorney-General's role under section 7 of the NZBORA forms part of the legislative process, and as such the comity principle under which the courts refrain

from interfering in the proceedings of parliament was upheld.[37] The ruling also found that the appellants' case fails to acknowledge that opinions can legitimately vary on human rights issues, particularly on the issue of whether any limitations on rights are justified in a free and democratic society and on assessing the appropriate balance between rights and other values where these may be apparently in conflict.[38]

While in this case, the NZ Court of Appeal upheld the protection afforded by privilege, the NZ experience demonstrates the potential for challenges to arise in relation to processes of pre-legislative scrutiny for human rights compliance.

While the UK *Human Rights Act 1998* specifically states that Parliament is excluded from its application,[39] challenges can still arise due the UK's membership of the European Union and its obligations under the *European Convention on Human Rights* (ECHR). *A v The United Kingdom (2002)* illustrates the potential conflict between protections provided by parliamentary privilege and individual rights.[40] '*A*', a young woman living in Bristol, filed an application with the European Court of Human Rights (ECtHR) alleging human rights violations following defamatory statements made about her and her family by a Member of the House of Commons during a parliamentary debate. Specifically, the applicant alleged that the parliamentary privilege which prevented her from taking legal action against the member concerned, contravened her right to a fair and impartial hearing as provided for under Article 6(1) of the ECHR.[41] She also claimed that her rights to 'respect for private life' and 'prohibition of discrimination' as provided for under Articles 8[42] and 14[43] of the ECHR had been violated. In a majority ruling, the ECtHR concluded:

> ... the parliamentary immunity enjoyed by the MP in the present case pursued the legitimate aims of protecting free speech in Parliament and maintaining the separation of powers between the legislature and the judiciary.[44]

The Court also observed that victims of defamatory statements made in Parliament also have access to other means of redress, including the option seeking to secure a retraction through House.[45] However, in a dissenting opinion, Loucaides J stated:

> The [Government's] argument regarding encouragement of an uninhibited [Parliamentary] debate on public issues is understandable. But the opposite argument appears to me to be more convincing: the suppression of untrue defamatory statements, apart from protecting the dignity of individuals, discourages false speech and improves the overall quality of public debate through a chilling effect on irresponsible parliamentarians.[46]

Loucaides J reasoned that 'there should be should be a proper balance between freedom of speech in Parliament and protection of the reputation of individuals' and concluded with a statement that in his view Article 6(1) of the ECHR had been breached.[47]

Although in *A v United Kingdom* the ECtHR upheld parliamentary privilege, the potential for the Court to rule otherwise is demonstrated by *Demicoli v Malta (1992)* (Demicoli).[48] In *Demicoli* an application was lodged with the ECtHR in which the applicant submitted that proceedings against him taken by Malta's House of Representatives were in breach of Article 6(1) of the ECHR. In brief, following publication of an article commenting on a parliamentary debate in the Maltese House of Representatives and in the process criticising two MPs, Demicoli (a journalist) was found guilty of contempt of parliament and had a penalty imposed upon him. Notably in this case, as the same two Members of the House that had been criticised by Demicoli participated in the proceedings against him, the Court held unanimously in favour of the applicant, finding that Demicoli had been denied a 'fair and public hearing ... by an independent and impartial tribunal'.[49]

Also, although not strictly a 'privileges versus rights' conflict, an interesting situation arose in the UK which illustrates the importance to MPs of the protections afforded to them by parliamentary privilege and by instruments of human rights. On 23 June 2009, in the wake of the UK MPs expenses scandal, the Parliamentary Standards Bill was introduced to the House of Commons.[50] The Bill was intended to create a system of independent regulation of MPs' salaries, allowances and financial interests. Provisions included a new Commissioner for Parliamentary Investigations (CPI) to investigate breaches of the rules on allowances and interests, and an Independent Parliamentary Standards Authority (IPSA) which could sanction MPs in response to a Commissioner's report, or recommend sanctions to the House of Commons. According to the Ministry for Justice:

> The chief purpose of the Parliamentary Standards Bill is to end the self-regulation of Parliament in areas where self-regulation has demonstrably failed. Privilege is concerned with ensuring Parliament is free to regulate its own proceedings. It is therefore impossible to end self-regulation without affecting privilege in some way. To be too conservative about privilege would derail this reform.[51]

Pre-enactment scrutiny of the Bill involved four parliamentary select committees, including the House of Commons Justice Committee, the Lords Constitution Committee and the Joint Committee on Human Rights. The Clerk of the House of Commons, Malcolm Jack, made a submission to the Justice Committee highlighting his concerns regarding the implications of the Bill for parliamentary privilege.[52] The Clerk prefaced his specific comments with the following statement:

> Since the Bill seeks to make statutory provision in relation to matters which fall with Parliament's exclusive cognisance or may affect proceedings in Parliament, it affects the established privileges of the House of Commons, thereby upsetting the essential comity established between Parliament and the Courts.[53]

The Clerk identified specific issues relating to a number of clauses in the Bill. Clauses 6 (MPs' code of conduct) and 10 (Proceedings in Parliament) were of particular concern. With regard to clause 6 which sought to express code of conduct principles for Members in legislation, the Clerk argued that it raised constitutional issues, providing a basis for the judiciary to interpret meaning and so question parliamentary proceedings.[54]

With regard to clause Clause 10(c) which sought to allow proceedings in parliament to be admissible as evidence in criminal proceedings relating to Members allowances, expenses and financial interests, the Clerk contended that this would have 'a chilling effect on the freedom of speech' of Members and witnesses before committees, as well as impeding the ability of parliamentary officials to give advice to Members.[55] During its passage through the House of Commons, the controversial clauses 6 and 10 were dropped from the Bill.

During pre-enactment consideration of the Bill, the Joint Committee on Human Rights identified provisions in clause 7 (Investigations) that it considered to be incompatible with human rights.[56] Specifically, the Committee expressed the view that the Bill was not compatible with provisions in the European Convention on Human Rights relating to the right to a fair hearing, recommending that the Bill be amended to include procedural safeguards and right of appeal against decisions of the CPI.[57] The Committee predicted that if the Bill was enacted without amendment 'it is only a matter of time before Strasbourg makes a finding of a violation of a member's right to a fair hearing in Article 6(1) ECHR.'[58] During the Bill's third reading an amendment moved in the Lords to insert a requirement for fair procedures into clause 7 was accepted by the Government.

As with Canada and NZ, the experiences of the UK (and Malta) demonstrate the potential for challenges to parliamentary privilege to arise as a result of perceived conflicts with the statutory rights of individuals. While *A v The United Kingdom* ruled by a significant majority to protect the absolute privilege of freedom of speech in Parliament, dissent from Loucaides J shows the potential for disagreement. *Demicoli* also shows that when pitted against possible breaches of human rights, the defence of parliamentary privilege is not invincible. Furthermore, the vigorous debate and scrutiny associated with the passage of the Parliamentary Standards Bill, shows the value placed on the protections afforded to MPs by parliamentary privilege. MPs also readily sought protection of their own individual human rights by reference to potential violations of the ECHR. Given the protections already afforded to parliamentarians, it is not difficult to imagine that MPs seeking the 'refuge' of human rights protection when facing independent external regulation of their finances might be viewed with a degree of public cynicism. As observed by one commentator: '... nothing could be less attractive than MPs trying to use human rights law to cause trouble for the government's plans to bring in independent scrutiny'.[59]

Lessons for Australia

Jurisdictions that have already implemented instruments of human rights protection can offer valuable insights for Australia. As the experiences of Canada, NZ and the UK indicate that in a burgeoning human rights environment, individuals are increasingly likely to challenge parliamentary privilege if they believe it has compromised their individual rights. While the courts have demonstrated continued regard for parliamentary privilege, dissenting reports from some justices show that

there are there are still many areas of ambiguity. Cases such as *Vaid* and *Demicoli* also demonstrate that the defence of parliamentary privilege is not impregnable.

As noted, the UK, the ACT and Victoria have sought to reduce the possibility of conflict by specifically excluding their legislatures from the requirement to comply with statutory human rights obligations. An Australian human rights act could similarly exempt the parliament from the requirement to comply. Nevertheless, and as observed by the UK Joint Committee on Parliamentary Privilege: 'This exclusion makes it particularly important for Parliament to review its own procedures to check whether they attain the standards now imposed by Parliament on others'.[60]

The approach taken in NZ, where the NZBORA applies to the legislature, is to reduce the likelihood of conflict between parliamentary privilege and statutory rights by enhancing provisions for due process and natural justice. Specifically, the NZ Parliament has introduced measures to:

- clarify contempt by providing a general definition and a list of the types of conduct likely to be regarded as contempt in its Standing Orders;
- introduce a right of reply procedure whereby a person who is named in Parliament, and claims to have suffered damage to his reputation as a result, may have a response entered into the parliamentary record;
- reduce bias by debarring members with pecuniary interest or who have made serious allegations against individuals from serving on committee investigating related issues;
- inform persons whose reputations are attacked before a select committee, giving them full access to relevant committee documents and allowing them full opportunity to respond and the opportunity to comment at the draft report stage if required; and
- allow any person appearing before a select committee to be accompanied and assisted by counsel.[61]

While Australia has also sought to clarify aspects of parliamentary privilege through the *Parliamentary Privileges Act 1987*, there is still potential for provisions in the Act to be viewed as inconsistent with human rights. For example Section 13 of the Act which gives parliament the power to punish the unauthorised disclosure of evidence, and Section 16(3) which limits the use of parliamentary proceedings as evidence in any court or tribunal, may be seen to unduly restrict freedom of expression, including the freedom to criticise the parliament and its proceedings. In addition, the majority of Australian legislatures have introduced provisions for a 'citizen's right of reply'.[62] While details of the processes for accessing the right of reply vary slightly, in essence it provides an opportunity for a person who claims to have been adversely affected through being named or otherwise identified in parliamentary proceedings to have their response incorporated in the parliamentary record. Despite the improved clarity provided by the *Parliamentary Privileges Act*

1997 and the redress available via right of reply, the question remains whether Australia should do more to protect the rights of individuals by enhancing procedural fairness in parliamentary procedures and practices.

Although, in response to the outcomes of the national human rights consultation the Australian government has elected to implement a human rights framework, it is clear that there is mounting pressure for a national human rights act. It is debatable how long Australia can continue to withstand this pressure. Should Australia pursue a national act in the future, there are likely to be significant implications for the powers and proceedings of parliament. While parliament needs to be free to conduct its business without interference, it is possible to see how there might be a general perception that parliament is 'above the law', particularly as parliamentary privilege is not well understood. One common belief is that parliamentary privilege does not change and that privileges remain 'a mirror of the times when they were first gained'.[63] Although this is not the case, it highlights the need to recognise that parliamentary privilege must continue to evolve in order to remain consistent with contemporary values. As with other jurisdictions, the introduction of a national act in Australia may provide the impetus needed to drive further review of parliamentary procedures and privilege. If so, review will have to consider protecting the rights of all individuals in the parliamentary context. As observed by Wright:

> It would seem however that, as a minimum, a parliament which enacted such a law [i.e. a statutory bill of rights] 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.[64]

Simply put, to protect its integrity and reputation the Australian parliament must not only do the right thing, but be seen to be doing the right thing. ▲

Notes

1 National Human Rights Consultation Website, accessed on 3 September 2009 at: http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/About_the_Consultation

2 Brennan, F et al., National Human Rights Consultation Report, 30 September 2009.

3 National Human Rights Consultation Website, accessed on 3 September 2009 at: http://www.humanrightsconsultation.gov.au/www/nhrcc/nhrcc.nsf/Page/About_the_Consultation

4 Heibert, J L 2006, 'Parliamentary Bills of Rights: An Alternative Model' *Modern Law Review* 69(1) p. 11.

5 Ibid., p. 15.

6 United Kingdom Government response to the Joint Committee on Human Rights, *Thirty-first Report of Session 2007–08, Responding to Human Rights Judgements*, p. 41.

7 Lock, G 1998, Statute Law and Case Law Applicable in Parliament, in D Oliver and G Drewry (eds), *The Law and Parliament*, p. 55.

[8] *Canadian Constitution Act 1982,* Schedule B, Canadian Charter of Rights and Freedom, section 32(1).
[9] *New Zealand Bill of Rights Act 1990*, section 3.
[10] *United Kingdom Human Rights Act 1998*, section 6(3).
[11] *ACT Human Rights Act 2004*, section 40(2).
[12] *Victorian Charter of Human Rights and Responsibilities Act 2006,* section 4(1)(i).
[13] The challenge arose in the context of the UK's obligations under the *European Convention on Human Rights*.
[14] Robert, C and MacNeil, V 2007, 'Shield or Sword? Parliamentary Privilege, Charter Rights and the Rule of Law' *The Table* p. 2.
[15] *New Brunswick Broadcasting Co. v Nova Scotia Case (Speaker of the House of Assembly) (1993)*, 1 SCR 319.
[16] Ibid., p. 4.
[17] Ibid., p. 5.
[18] Ibid., p. 4.
[19] Ibid., p. 12.
[20] *Harvey v New Brunswick (Attorney General) [1996]*, SCR 876.
[21] Section 119 reads: Any person who is convicted of having committed any offence that is a corrupt or illegal practice shall, during the five years next after the date of his being convicted ... be disqualified from and be incapable of ... (c) being elected to or sitting in the Legislative Assembly and, if at such date he has been elected to the Legislative Assembly, his seat shall be vacated from the time of such conviction.
[22] Section 3 reads: Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.
[23] *Harvey v New Brunswick (Attorney General) [1996]*, SCR 876, para. 20.
[24] Ibid., para. 69.
[25] Ibid., para. 88.
[26] *Canada (House of Commons) v Vaid (2005)*, SCC 30.
[27] The doctrine of necessity requires that where the existence and scope of privilege has not been authoritatively established, the claimant must show that the sphere of activity for which privilege is claimed is so closely and directly connected with the fulfilment by the assembly or its members of their functions as a legislative and deliberative body that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their legislative work with dignity and efficiency.
[28] *Canada (House of Commons) v Vaid (2005)*, SCC 30, para. 22.
[29] Ibid., para. 29(6).
[30] Ibid.,para. 30.
[31] Memorandum Clerk of the House of Representatives (New Zealand) to the UK Joint Committee on Parliamentary Privilege, accessed on 16 December 2009 at: http://www.parliament.the-stationery-office.co.uk/pa/jt199899/jtselect/jtpriv/43/43ap27.htm
[32] *Boscawen, McVicar and Hide v Attorney General of New Zealand [2009]*, NZCA 12.
[33] Section 7 provides that Attorney General report to Parliament where Bill appears to be inconsistent with Bill of Rights. See also: New Zealand Standing Orders of the House of Representatives, SO 261.
[34] *Boscawen, McVicar and Hide v Attorney General of New Zealand [2009*], NZCA 12, para. 18.

[35] Article 9 states: That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any Court or place out of Parliament..
[36] *Boscawen, McVicar and Hide v Attorney General of New Zealand [2009*], NZCA 12, para. 26.
[37] Ibid., para. 42.
[38] Ibid., para. 18.
[39] *United Kingdom Human Rights Act 1998*, section 6(3).
[40] *A v The United Kingdom (2002)*, (application no. 35373/97).
[41] Article 6(1) of the ECHR provides: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.
[42] Article 8 of the ECHR provides: 'Everyone has the right to respect for his private and family life, his home and his correspondence.'
[43] Article 14 of the ECHR provides: 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.'
[44] *A v The United Kingdom (2002), (application no. 35373/97)*, para. 77.
[45] Ibid., para. 86.
[46] Ibid., p. 31.
[47] Ibid., p. 32 & p. 34.
[48] *Demicoli v Malta (1992) 14 EHRR 47*.
[49] Ibid., para.41.
[50] The Parliamentary Standards Bill as introduced in the House of Commons on 23 June 2009, accessed on 16 December 2009 at: http://www.publications.parliament.uk/pa/cm200809/cmbills/121/09121.i-i.html
[51] Ministry of Justice, *Written evidence submitted to the House of Commons Justice Committee*, Ev. 14, accessed on 16 December 2009 at: http://www.publications.parliament.uk/pa/cm200809/cmselect/cmjust/791/791.pdf
[52] Jack M, *Written Evidence submitted to the House of Commons Justice Committee*, accessed on 16 December 2009 at: http://www.publications.parliament.uk/pa/cm200809/cmselect/cmjust/memos/constref/ucm102.htm
[53] Ibid., para. 1.
[54] Ibid., para. 8.
[55] Ibid., para. 17.
[56] UK Joint Committee on Human Rights, *Nineteenth Report — Legislative Scrutiny: Parliamentary Standards Bill*, 2009.
[57] Ibid., p. 3.
[58] Ibid., p. 11.
[59] Gardner, C *Parliamentary Standards Bill: crying wolf about human rights,* accessed on 16 December 2009 at: http://www.headoflegal.com/2009/06/30/parliamentary-standards-bill-crying-wolf-about-human-rights/
[60] UK Joint Committee on Parliamentary Privileges, Parliamentary Privilege First Report, 1999, para. 29, accessed on 13 December 2009, at: http://www.publications.parliament.uk/pa/jt199899/jtselect/jtpriv/43/4305.htm

[61] Memorandum Clerk of the House of Representatives, New Zealand to the UK Joint Committee on Parliamentary Privilege, accessed on 16 December 2009 at: http://www.parliament.the-stationery-office.co.uk/pa/jt199899/jtselect/jtpriv/43/43ap27.htm.

[62] Exceptions being the Northern Territory Legislative Assembly and the Tasmanian House of Assembly.

[63] Joint Select Committee on Parliamentary Privilege, *Final Report*, 1984, p. 25.

[64] Wright B, *Patterns of Change — Parliamentary Privilege*, p. 23.