

Pegging Parliamentary Privilege in Western Australia[#]

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Abstract

This paper discusses the original basis of parliamentary privilege in Western Australia and the rationale for pegging privilege; the specific amendments made in the Western Australian Parliament, the rationale for choosing 1 January 1989 as the date to peg privilege in Western Australia and the alternative approaches to pegging parliamentary privilege to various historical dates of significance; whether, and what threats to freedom of speech have been diminished as a result of pegging privilege to 1 January 1989; and what freedom of speech issues remain uncertain in Western Australia.

Introduction

On Wednesday, 18 August 2004, the Honourable Philip Pental, MLA¹ introduced a Private Member's Bill² into the Legislative Assembly of Western Australia to amend the *Constitution Act 1889* (WA) and the *Parliamentary Privileges Act 1891* (WA). The effect of the Bill's amendments was to peg the parliamentary privilege enjoyed by the Legislative Council and Legislative Assembly to that of the House of Commons as at 1 January 1989.

The Governor assented to the Bill on 3 November 2004,³ and in doing so froze the privilege nexus that existed for over a century between the House of Commons and the Western Australian Parliament. The basis of the nexus was the proviso that the privileges enjoyed by the Houses and members of the Western Australian Parliament could not exceed those for the time being held and exercised by the House of Commons.

The original basis of parliamentary privilege in Western Australia and the rationale for pegging privilege

Prior to November 2004, Section 36 of the *Constitution Act 1889* (WA) stated:

It shall be lawful for the Legislature of the Colony, by any Act to define the privileges, immunities, and powers to be held, enjoyed, and exercised by the Legislative Council and Legislative Assembly, and by the members thereof respectively.

Provided no such privileges, immunities, or powers shall exceed those for the time being held, enjoyed, and exercised by the Commons House of Parliament, or the members thereof.

A parliamentary privileges Act was in operation by virtue of the *Constitution Act* making it lawful for a separate Act to define the Parliament's privileges within the constraints of the proviso. The Western Australian *Parliamentary Privileges Act 1891* re-stated the nexus and proviso in its preamble and in Section 1. Such a provision, which was also in place in Queensland prior to amendment in 2001, has been described as an 'ambulatory' adoption of House of Commons privilege.⁴ Put simply, a change in the statutory law or interpretation of parliamentary privilege in the United Kingdom would have immediately translated to an equivalent change in Western Australia. A change in the law would thus be effected without the Western Australian people and their Parliament exercising sovereignty over the law operating in Western Australia.⁵

The Western Australian Parliament had two very good reasons to amend the privilege proviso in its Constitution Act, which had stood since Western Australia had achieved responsible government in 1890. Firstly, parliamentary privilege is essential for the Houses and members thereof to properly discharge their functions and a diminution of privilege is not in the public interest. Secondly, the proviso contradicts the principle of the sovereignty of the Western Australian Parliament.

Parliamentary privilege is described in Erskine May as:

...the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals.⁶

There are various commentators and participants in the parliamentary process who have been able to succinctly describe how these functions are relevant to the protection of the public interest⁷ in terms of members legislating and scrutinising the executive. In the introduction to its review of the rights and immunities held by members, the United Kingdom Joint Committee on Parliamentary Privilege (UK Joint Committee) observed that:

Without this protection members would be handicapped in performing their parliamentary duties, and the authority of Parliament itself in confronting the

executive and as a forum for expressing the anxieties of citizens would be correspondingly diminished.⁸

Australia's system of government, like many other countries which have inherited British ideals, is based on a separation of powers. As McGee points out from a comparable, New Zealand perspective, 'privilege is part of the way in which the separation of powers is delineated in our political system ...'⁹

Although Section 36 of the Western Australian *Constitution Act* makes it lawful for the Parliament to define its privileges, immunities and powers, both the Privileges Act and the Western Australian Criminal Code¹⁰ are only general in providing powers,¹¹ including penalties, and immunities.¹² Neither statute is a comprehensive or consolidated statutory codification of the privileges, immunities and powers held, enjoyed and exercisable by the Houses and members thereof in the manner recommended by the UK Joint Committee in 1999.¹³ For example, 'proceedings in Parliament', and 'place out of Parliament' are not defined, but both terms are critical to applying freedom of speech immunities. By way of further example, legislation is silent on prohibitions or exclusions from article 9 of the Bill of Rights, such as the Courts' capacity to rely on the proceedings of the Houses to interpret legislation.

As such, the Western Australian Parliament, until 2004, was not only unable to exercise privileges that exceeded the privileges of the House of Commons, but, in the absence of greater codification of privilege, was also drawing upon conventions, precedents and interpretations from the House of Commons. The UK Joint Committee described this as the 'law and custom of Parliament'.¹⁴

The introduction of the Honourable P. Pendal's amending Bill followed the Legislative Assembly's Procedure and Privileges Committee's (PPC) examination of the nexus and its report to the House in 2004.¹⁵ In its report, the Committee stated that, 'for the Western Australian Parliament.....the issue of the linkage of its privileges to those of the House of Commons is as much about sovereignty as about parliamentary privilege.'¹⁶

The nexus and the contradiction of sovereignty that it represented was not seen to be a problem for many decades after the enactment of the Western Australian Constitution and the *Parliamentary Privileges Act*. However, by the 1990s the nexus was being described as the 'House of Commons conundrum'.¹⁷ It had become a conundrum and only raised issues of sovereignty because of developments in the United Kingdom (UK) Parliament and Courts and in the European Union (EU), which flowed onto the UK as a member of the EU.

The PPC observed that the privilege link was contrary to the spirit of Section 1 of the *Australia Act 1986 (UK)* which states:

No Act of the Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to the Commonwealth, to a State or to a Territory as part of the law of the Commonwealth, of the State or of the Territory.¹⁸

As evidence of the danger posed, the Committee cited the case of *Demicola v Malta*, in which the European Court of Human Rights overturned a decision of the Malta House of Representatives in relation to a finding of contempt and subsequent penalty imposed on a journalist, held to have defamed two members of the House.¹⁹ By making reference to the Malta case it can be implied that the issue of sovereignty being described by the PPC is also related to ‘exclusive cognisance’,²⁰ that aspect of parliamentary privilege that provides that Parliament must have sole control over all aspects of its own affairs, including punitive powers.

Having established the issue of sovereignty as core to the reason for amending the State’s privilege provisions, a number of further issues, described as ‘subsidiary’²¹ to the nexus, were reported by the PPC. The Committee’s main source for the subsidiary issues was the recommendations and directions being set in relation to privilege in the UK by the UK Joint Committee Report (1999). The PPC’s concerns about the UK Joint Committee’s report can broadly be summarised in terms of the Report’s endorsement of: waiver of freedom of speech (article 9) by the House on a case by case basis in relation to defamation proceedings; statutory waiver of immunity for members in relation to corruption and bribery legislation covering the Parliamentary conduct of members; and the codification of parliamentary privilege.²²

The PPC noted that these developments all posed potential risks of intended and unintended diminution of privilege, which the Western Australian Parliament needed to carefully consider, rather than simply inherit.

Of particular concern was section 13 of the *Defamation Act 1996* (UK), which states, in part

(1) Where the conduct of a person in or in relation to proceedings in Parliament is in issue in defamation proceedings, he may waive for the purposes of those proceedings, so far as concerns him, the protection of any enactment or rule of law which prevents proceedings in Parliament being impeached or questioned in any court or place out of Parliament.

As will be discussed below, the issues of waiver of privilege relating to use of proceedings and whether the codification of privilege is advantageous to the Parliament or not, are particularly relevant to freedom of speech and the terms ‘impeach’, ‘questioning’ and ‘proceedings in Parliament’ that have been interpreted inconsistently by courts. The issue of freedom of speech more generally, will be discussed in terms of how the choice of pegging privilege to 1 January 1989 affects the exercise of the privilege and immunity of freedom of speech in Western Australia.

The specific amendments made in the Western Australian Parliament, the rationale for choosing 1 January 1989 as the date to peg privilege in Western Australia and the alternative approaches to pegging parliamentary privilege to various historical dates of significance

The PPC concluded its report by recommending that Section 36 of the *Constitution Act 1889* (WA) be amended by the deleting the proviso that parliamentary privilege in Western Australia not exceed that ‘for the time being held, enjoyed and exercised by the Commons House of Parliament and members thereof’.

This amendment was taken up in the amending Bill introduced by the Hon. P. Pental and was passed, unopposed, through both Houses. Section 36 of the Act, as amended, now states

It shall be lawful for the Legislature of the Colony, by any Act to define the privileges, immunities, and powers to be held, enjoyed, and exercised by the Legislative Council and Legislative Assembly, and by the members thereof respectively.

The Committee also recommended that the same proviso be deleted from the preamble of the *Parliamentary Privileges Act 1981*. This too was taken up by the amending Bill and enacted.

Thirdly, the Bill, reflecting the recommendation of the Committee, pegged privilege in WA to that in the UK as at 1 January 1989, but only to the extent that UK privilege was not inconsistent with any privileges contained in the *Parliamentary Privileges Act 1891*. Subsequently, Section 1 of the Act now states

The Legislative Council and the Legislative Assembly of Western Australia, and their members and committees, have and may exercise —

a) the privileges, immunities and powers set out in this Act; and

to the extent that they are not inconsistent with this Act, the privileges, immunities and powers by custom, statute or otherwise of the Commons House of Parliament of the United Kingdom and its members and committees as at 1 January 1989.

The PPC’s recommendation that privilege be pegged to the UK House of Commons at 1 January 1989 was not explained at length in the text of the Report. As discussed above, the Report cited concerns with developments in the UK in the 1990s, such as section 13 of the *Defamation Act 1996* (UK) and the superiority of the EU’s jurisdiction. The Committee was clear that the date should be post 1986, pointing to the passage of the *Australia Act 1986* (UK), its underpinning of the issue of sovereignty, and stating,

This further reinforces the argument for the removal of the linkage so that changes to parliamentary privilege made after 1986 or a later date in the UK do not apply in Western Australia.²³

The Committee noted that the 21st Edition of Erskine May's *Treatise on the Laws, Privileges, Proceedings and Usage of Parliament*, published in 1989, would be used as a primary reference if the Committee's recommended amendments were enacted.

When the Bill, reflecting the Report's draft amendments, was introduced into the Legislative Assembly, it was an Independent member of the House, rather than the Attorney General, who sponsored the Bill. The Hon. P. Pental introduced the Bill and in his second reading speech²⁴ reiterated the PPC's concerns about the privilege provisions being contrary to the concept of sovereignty. He also cited subsidiary events in the UK threatening to diminish the application of freedom of speech. Both the Hon. P. Pental and Ms D. Guise²⁵ (Deputy Speaker and Deputy Chairman of the PPC) provided further rationale for the need for change, citing the very recent decision of the Privy Council in the New Zealand case of *Jennings v Buchanan*,²⁶ which was published in the three month period between the PPC's report being tabled and the introduction of the Amendment Bill. The Privy Council judgement in relation to a fundamental aspect of article 9 freedom of speech, noted that there is no distinction to be drawn between the law of New Zealand and the law of the UK.

However the only rationale for specifically nominating 1 January 1989 as the date for pegging privilege was the very practical purpose of being able to refer to the 21st Edition of Erskine May.

This choice of date was critiqued by one member, the Honourable Peter Foss, MLC,²⁷ who sponsored the Bill through the Legislative Council, following its passage through the Assembly. The Hon. P. Foss was in agreement with the principle that the basis of privilege in Western Australia had to be changed, that it was no longer appropriate to have an ambulatory adoption of UK privilege. However he was critical of the choice of 1 January 1989 at which to peg privilege, describing it as one of 'convenience rather than for any constitutional or legal reason'. He was even more critical of the associated reliance on the 21st Edition of Erskine May, stating, 'this seems a little lazy and, given the extensive errors in that book, not a very reliable source of parliamentary law'.²⁸

The alternative dates at which to peg privilege proposed by the member were all of historical significance, such as 1889, being the year of enactment of the Western Australian Constitution, and 1 January 1901, the date of federation.

There is very little to be found in other jurisdictions to assist an analysis of the legal implications of the date at which privilege is pegged, because the major factor in the choice of dates appears to have been historical significance. The Commonwealth chose 1 January 1901 as the date at which to peg privilege and so more recently had Queensland chosen the date of federation to peg its privilege after deleting its previous ambulatory adoption of privilege. In Victoria (21 July 1855) and South

Australia (24 October 1856) privilege was and remains pegged to the historically significant dates of enactment of both colonies' constitutions.

Western Australia's choice of pegging privilege at 1 January 1989 is unusual, with the exception of Queensland's 2001 amendment to its privilege, for its consideration of legal benefits and complete absence of any historical symbolism. Queensland's choice of 1 January 1901 was not solely motivated by choosing a historically significant date in preference to an ambulatory adoption of privilege. In its *First Report on the Powers, Rights and Immunities of the Legislative Assembly, Its Committees and Members* the Queensland Members' Ethics and Parliamentary Privileges Committee noted that a number of submissions to the Committee were in favour of pegging at the date of Federation, particularly because it would be consistent with the date adopted by the Commonwealth Parliament. The Queensland Committee agreed that such an approach was simpler than choosing other dates because 'Commonwealth precedents which have clarified the privileges which apply at the federal level could be drawn upon to determine the scope of the powers, rights and immunities of the Queensland Legislative Assembly'.²⁹

In Western Australia a number of Parliamentary and Government reviews of parliamentary privilege were undertaken throughout the late 1980s and the 1990s, a period overlapping significant developments in privilege in the UK, as discussed above. These reviews certainly pointed to a desire to repeal the privilege proviso, but provided no context for the choice of 1 January 1989 at which to peg privilege.

In 1989 the Western Australian Parliamentary Standards Committee³⁰ examined the issue of the privilege nexus and the proviso that the privilege in WA not exceed the privilege for the time being in the UK. The Committee recommended that the proviso be repealed, but no legislative action followed the Report. Three years later an impasse developed between the Parliament and the Royal Commission into Commercial Activities of Government and other Matters (1992),³¹ which wanted to examine the *Hansard* record of members of Parliament and committee proceedings on matters within its terms of reference.³²

The impasse led to a specific reference for the Commission on Government (COG), a wide ranging commission that emanated from the Royal Commission. The reference stated

The Commission on Government examine the Parliamentary Privileges Act 1891 with a view to permitting proceedings in Parliament to be questioned in a court or like place while preserving the principle of free speech in Parliament.³³

The COG recommended that the privilege proviso be repealed and that the Privileges Act be amended by further specifying the privileges to apply in WA. This included support for the adoption of the statutory definition of 'proceedings in Parliament', as contained in the Commonwealth's *Parliamentary Privileges Act 1987*.³⁴

The Royal Commission's desire for a diminution of the application of article 9 was not fulfilled, but nor were the COG's recommendations in relation to privilege taken up by the Government.

In their examination of the 'House of Commons conundrum', Phillips and Black noted the legislative inaction that followed the above reviews throughout the 1990s and the emerging view, particularly of the UK Joint Committee, to confine and codify privilege. The authors concluded that,

Overcoming the House of Commons conundrum would require the specification of a suitable date which would mark the privileges, immunities and powers of the Parliament of Western Australia being determined within its own jurisdiction.....
A date immediately prior to the enactment of section 13 of the Defamation Act 1996 (UK), could be chosen.³⁵

While the literature and official reviews continued to make a case for privilege to be pegged at a specific date, there was little insight into when that date should be.

Whether, and what threats to freedom of speech have been diminished in Western Australia as a result of pegging parliamentary privilege to that in the UK House of Commons on 1 January 1989

Freedom of speech and freedom of debate are the most important aspects of parliamentary privilege. In modern terms article 9 provides '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'.

Article 9 protects members of Parliament from being subjected to any penalty, civil or criminal, in any court or tribunal for what they have said in the course of proceedings in Parliament. As previously mentioned the primary rationale for the PPC's recommendation that the House of Commons nexus be frozen in Western Australia was that it was contrary to the State's sovereign interests. However, the subsidiary issues that flowed from the nexus, were dominated by freedom of speech issues, the immunity enjoyed by members, in their capacity as members of the House, for what they say in proceedings of the House. These issues are evident in the UK Joint Committee Report of 1999 and in comparing the 21st and 23rd Editions of Erskine May.

UK Joint Committee Report

The PPC was concerned about a number of privilege cases and trends unfolding in the UK in the 1990s. These were analysed by the UK Joint Committee on Privilege in its Report of 1999. In some instances the UK Joint Committee's report compounded the concerns of the PPC by recommending that some of the trends and legal precedents be endorsed and codified as privilege law.

In the case of *Pepper v Hart* the UK Joint Committee found the Court's use of parliamentary proceedings to be 'benign' (see paragraph 45 of the UK Joint Committee's Report) and recommended that Parliament not disturb the decision, but equally warned that the decision should not lead to any general weakening of article 9.

The Joint Committee viewed the effect of the decision on matters relating to 'judicial review of ministerial decisions', meaning the lawfulness of ministerial decisions, such as whether a minister acted within the scope of their powers (see paragraphs 46–55) and matters relating to 'other court proceedings and ministerial decisions', meaning, for instance, the effect of a decision on the rights or welfare of a person (see paragraphs 56–59). The Committee recommended in both instances that article 9 should not be interpreted as precluding the use of proceedings in Parliament in court.

Going on to examine the *Defamation Act 1996* (UK) the UK Joint Committee examined the question, 'should article 9 protect a speech made in Parliament from critical examination in court even though this would not expose the member to any legal liability?' (see paragraph 60).

Section 13 of the *Defamation Act 1996* (UK) (see extract on page 4 of essay) was intended to remedy a perceived injustice highlighted by the aborted defamation case of *Hamilton v Hencke; Greer v Hencke (1995)* in which the judge stopped proceedings because relevant evidence could not be admitted without breaching article 9. The member, seeking to sue a newspaper for its allegations made against him, was seen by the UK Parliament to have been denied justice because he was unable to admit his own words, spoken in proceedings of the House, into evidence before the Court. The subsequent enactment of Section 13 enabled an individual member to waive parliamentary privilege so far as he is concerned, for the purposes of defamation proceedings. The UK Joint Committee found Section 13 to be flawed because it undermined the principle that freedom of speech is the privilege of the House as a whole, and not for the individual to waive (see paragraph 68). However the Committee stopped far short of finding that waiver of the privilege should be precluded outright, preferring instead to recommend that only the House as a whole be enabled by statute to consent to waiver. The Committee emphasised (see paragraph 73) that this should only be available when there is no question of the member or other person making the statement being exposed in consequence to a risk of legal liability.

The UK Joint Committee arrived at this conclusion, in part, out of dissatisfaction with the law enunciated in the *Prebble v Television NZ* case (see paragraph 70) and particularly a concern that a member, criticised outside of Parliament in relation to parliamentary misconduct, would be unable to clear their name.

How the commentary on freedom of speech in the 23rd Edition of Erskine May (2004) differs from the 21st Edition of Erskine May (1989)

In 2004 the 23rd Edition of Erskine May was published. The 23rd Edition incorporates some of the precedents and trends that concerned the PPC and provides a useful contrast with the 21st Edition, the Edition that the PPC foreshadowed would become the primary reference for the application of privilege in Western Australia if its privileges were pegged to 1989.

The 23rd Edition of May has additional text under the heading of ‘what constitutes privilege’, commenting that there are occasions when the House(s) does not insist upon its privileges, either generally or in a particular instance (see page 76). However, it goes on to state that ‘an area where such considerations do not arise, Article IX of the Bill of Rights 1689, lays on courts an obligation not to ‘impeach or question’ proceedings in Parliament’.³⁶ Further, May makes the point that because this prohibition is statute law, it could only ever be waived by amending legislation. The decision of the Privy Council in 1994 to overturn the decision of the New Zealand Court in *Television New Zealand v Prebble* is cited in support of the proposition that waiver of freedom of speech cannot be by mere resolution of the House (see page 77).

In the introduction to the chapter dedicated to freedom of speech in both publications (Chapter 6 ‘Privilege of freedom of speech’), further variations in the text are evident. The 21st Edition saw fit to highlight only the significance of the expression in article 9, ‘proceeding in Parliament’.³⁷ However the 23rd Edition, reflecting the developing trend for courts to use proceedings, considered it necessary to highlight the significance of the various expressions in article 9, ‘proceeding in Parliament’, ‘impeaching’, ‘questioning’ and ‘court or place out of Parliament’.³⁸ The 23rd Edition notes that ‘none of these critical terms is defined, so that it has often fallen to the courts to arrive at judgements about their meaning’.³⁹ May is equivocal about the meaning of ‘impeaching’ and ‘questioning’ in particular, having to contrast two conflicting interpretations: that which was usually applied until the 1990s, that proceedings should only be introduced to establish the fact of what was said,⁴⁰ contrasted with the emerging principle in the 1990s that ‘impeaching’ was limited to cases where a member would be liable for what they had said and that ‘questioning’ did not extend to what a member meant by words used in proceedings.⁴¹

Not surprisingly, the 23rd Edition is more international in its analysis of freedom of speech. Under the heading ‘freedom of speech in debate’ the 23rd Edition has added reference to the case of *A v United Kingdom 2002*, in which the European Court of Human Rights concluded that the absolute nature of parliamentary privilege did not violate articles 6 or 8 of the European Convention on Human Rights, however objectionable the statements.⁴² The decision and its reference in the most recent May do not indicate a need to peg privilege to 1989, except that decisions, such as

Demicoli v Malta ((1991) 14 EHRR 47), have demonstrated that the European Court is willing to review the exercise of privilege by constituent parliaments in the European Community.⁴³

The 23rd Edition repeats the qualification made in the 21st Edition that if a member publishes separately from the rest of the debate, a speech made by him in the course of proceedings in Parliament, he is responsible under the law for any libellous matter in it. However the 23rd Edition adds that recent cases have ‘raised the issue of how much protection is enjoyed by reference outside the legislature to what had been said within its walls, short of full separate republication or repetition.’⁴⁴ In its footnote to this further qualification of freedom of speech, May cites the case of *Jennings v Buchanan* (2003) 3 NZLR 145, in which the words ‘I do not resile’, spoken outside the House to media, were held to be effective repetition of what the member had said in the House, in the course of proceedings.

One of the most significant variations from the 21st Edition, contained in the 23rd Edition of May, is reference to *Pepper v Hart* (1993) AC 593, in which the precedent was set for courts to refer to proceedings for the purposes of judicial interpretation of ambiguous legislation. May highlights *Pepper v Hart* as a sub section of its section headed ‘Exclusive Cognizance of Proceedings’. The 21st Edition discusses ‘the right to exclusive cognizance of proceedings’ predominantly in terms of the court’s inability to inquire into the internal proceedings and procedures of the House. Reference in the courts to proceedings of Parliament for the purpose of accurately interpreting legislation does not appear as an issue for analysis in the 1989 Edition.⁴⁵

The relevance of this issue to the Western Australian Parliament was evident even before the Constitution (Parliamentary Privileges) Amendment Bill 2004 was assented to by the Western Australian Governor. In October 2004, the statutory Gas Review Board of Western Australia had to consider whether or not parliamentary privilege applied to a document tendered by the applicant party to a review of the WA Independent Gas Pipeline Access Regulator. The Review Board was charged with reviewing administrative decisions of the Gas Regulator, in particular important matters of tariffs to be applied to a privatised gas pipeline. The applicant party, the gas pipeline operator, sought to introduce parliamentary proceedings for the purpose of using a Minister’s statements to the House to support its assertion about what the State was seeking to achieve in the sale of the pipeline.

The Board sought the views of the Speaker of the Legislative Assembly and reported the Speaker’s clear view that:

... it would not be lawful for any statement made in the course of the proceedings in the Legislative Assembly to be tendered in the evidence to the Western Australian Gas Review Board for any purpose other than to establish the fact that a statement was made.

For all practical purposes, the enunciation of the law of privilege on this matter which is contained in section 16 of the Parliamentary Privileges Act 1987 (Cth) can be regarded as the situation which applies in Western Australia.⁴⁶

Section 16(3) of the Commonwealth Act provides definition of what constitutes questioning of 'proceedings in Parliament' and makes it unlawful for such proceedings to be questioned in 'any court or tribunal'. The Board found that although the Commonwealth Privileges Act does not apply to WA and that legislation in WA does not contain the equivalent of Section 16(3), the Section is declaratory of the effect of article 9 of the Bill of Rights which does apply to WA. The Board agreed with the Speaker's submission that this declaratory principle was to be found in *Prebble v Television New Zealand*.

It is unclear as to whether the *Pepper v Hart* decision is in itself inconsistent with the principles of Section 16(3) of the Commonwealth Act which have been held to indirectly apply to WA. The principal matter in *Pepper* of statutory interpretation is arguably different to the unsuccessful proposition put to the WA Gas Review Board that it should admit proceedings for the purpose of interpreting Government policy underlying administrative decisions. The Board would not allow the proceedings to be admitted in October 2004, even before the legislative amendments to privilege in WA had taken effect. More importantly, the decision further illustrated the reliance in WA on the current application of article 9 of the Bill of Rights. By pegging privilege in WA to the privileges enjoyed in the UK at 1 January 1989, the WA Parliament has sought a greater degree of certainty in its exercise of parliamentary privilege and particularly its application of the article 9 immunity.

Remaining 'freedom of speech in debate' issues in Western Australia

The *Constitution Act 1889* and the *Parliamentary Privileges Act 1891* make it lawful for the Western Australian Parliament to define its privileges, immunities and powers as it sees fit. It has the privileges that it chooses to enact and in addition, has the privileges, immunities and powers of the Commons House of Parliament at 1 January 1989, but only to the extent that they are not inconsistent with any privileges contained in the *Parliamentary Privileges Act 1891*. In other words, pegging privilege to 1 January 1989 is only significant to the extent that the Western Australian Parliament chooses not to codify its privileges and chooses instead to draw upon the customs and laws of privilege in the UK.

The PPC specifically rejected the idea of codification of privilege in WA in the short term, stating that

In Western Australia, informed discussion with the Solicitor General in the past leads your Committee to conclude that codification is unwise in the short to medium term and we should await the benefits of the considered application of the Commonwealth's attempts at codifying privilege contained in the Parliamentary Privilege Act 1989.⁴⁷

The Western Australian Parliament will most likely choose to express its privileges only in broad legislative terms while ever this is seen to successfully hold off attempts to diminish freedom of speech immunities. From the impasse reached with the 'WA Inc' Royal Commission in 1991 to the very recent attempts to have parliamentary proceedings introduced before the Gas Review Board (both discussed above), the WA Parliament has resisted the views that have emerged in the UK that freedom of speech and article 9 be applied more flexibly and in the context of the times.

The UK Joint Committee examined the relationship between the legislature and the judiciary, particularly in the context of freedom of speech. The Committee stated

Mutual respect is important, but there are still grey areas where the position of the boundary is unclear. One instance concerns the meaning of 'proceedings in Parliament' in article 9 of the Bill of Rights.

There is merit, in particularly important areas of parliamentary privilege, in making the boundaries reasonably clear before difficulties arise. Nowadays people are increasingly vigorous in their efforts to obtain redress for perceived wrongs....If Parliament does not act, the courts may find themselves compelled to do so.⁴⁸

Comparison of the analysis of freedom of speech between the 21st Edition (1989) and the 23rd Edition (2004) of May, suggests that there is little to be gained in pegging privilege to 1989 in terms of clarity of what is meant by 'proceedings in Parliament', other than by indirect reference to Section 16 of the *Commonwealth Parliamentary Privileges Act 1987*.

McGee describes article 9 as being more of a 'political statement' than a precise legal rule. Legislative restatement of the article may not protect the Parliament from courts willing to push constitutional boundaries relating to article 9, an apparent trend since 1972.⁴⁹

Evidence of McGee's point was provided by the case of *Buchanan v Jennings*, in which a member of the New Zealand Parliament made a statement in the proceedings of the House attacking a person and then later, in an interview with a journalist, being quoted as saying that he 'did not resile' from the claims made in the House.

The Court found that Jennings had effectively repeated his comments made inside the House, by the making the statement 'I do not resile' outside the House. This finding was used as the premise for admitting Jennings' statement in the House (proceedings of the Parliament) into evidence before the Court. McGee has described the 'so-called doctrine of effective repetition as applied in *Buchanan* [as] a legal fiction', and the fact that the action was grounded on a parliamentary statement as 'a direct attack (an impeachment) of parliamentary proceedings and thus members' freedom of speech'.⁵⁰

Despite this significant departure from the application of article 9, the Privy Council⁵¹ upheld both the decision of the New Zealand High Court and of the Court of Appeal that a member may be held liable in defamation if the member makes a defamatory statement in the House and later affirms the statement (without repeating it) on an occasion which is not protected by parliamentary privilege.⁵²

The New Zealand *Legislature Act 1908* pegs parliamentary privilege to that of the House of Commons on 1 January 1865. This provision did not provide a barrier to the Court's narrow reading of freedom of speech and impeaching of proceedings. *Buchanan* represented a new and different threat to freedom of speech than any of the trends to emerge in the 1990s that the Western Australian Privileges Committee was so keen to avoid.

The New Zealand Privileges Committee regarded the threat to freedom of speech posed by the *Buchanan* decision so seriously that in May 2005 it recommended

.... that the Legislature Act be amended to provide that no person may incur criminal or civil liability for making any oral or written statement that affirms, adopts or endorses words written or spoken in proceedings in Parliament where the oral or written statement would not, but for the proceedings in Parliament, give rise to criminal or civil liability.⁵³

In effect, the New Zealand Parliament has been forced to be more prescriptive of its privileges, at least in terms of its immunities, because the courts have chosen to depart from conventional interpretation and application of members' freedom of speech.

The Western Australian Parliament has sought, for the short term at least, to avoid being prescriptive of its privileges, immunities and powers, being mindful of the potential for this to lead to even greater judicial review and ultimately a more narrow view of privilege. The repeal of its ambulatory adoption of the privileges of the House of Commons does not make the Western Australian Parliament immune from future threats to and courts' interpretation of the application of freedom of speech in debate. However, it has ensured, for now, its capacity to legislate for its own privilege should it wish to do so and, as such, has preserved an important principle of the Western Australian Parliament's sovereignty. ▲

End Notes

From the 2004 ANZACATT/QUT Parliamentary Law, Practice and Procedure Program. The remainder of the pieces will be published over the next 12 months as well as pieces from the 2005 program in forthcoming editions.

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² Constitution (Parliamentary Privileges) Amendment Bill 2004

- ³ No. 41 of 2004
- ⁴ G. Carney, 'Reform of Parliamentary Privilege' in *Peace, Order and Good Government: state constitutional and parliamentary reform*, September 2001, p.292
- ⁵ Notwithstanding the fact that the Western Australian people, through their parliament, could and did legislate to change the ambulatory provision inherited by the constitution conferred by the United Kingdom one hundred and fifteen years earlier.
- ⁶ W. McKay (ed.) *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, Twenty-third Edition, LexisNexis, UK, 2004, p.75
- ⁷ See G. Carney, 'Reform of Parliamentary Privilege', *op. cit.*; and D. McGee, *Parliamentary Practice in New Zealand*, 2nd edn, 1994, p.472 "...the creation of legislative assembly necessarily carries with it a guarantee of free speech and that public policy requires that such a body determines what is and what is not discussed before it free of outside restraint."
- ⁸ JAG Griffiths and Michael Ryle, *Parliament — Functions, Practice and Procedures* (1989), p.85, cited in House of Lords and House of Commons Joint Committee on Parliamentary Privilege, *Report: Volume 1 — Report and Proceedings of the Committee*, March 1999 (paragraph 3)
- ⁹ D. McGee QC, 'The Scope of Parliamentary Privilege', *The New Zealand Law Journal*, March 2004, p.84
- ¹⁰ Schedule to the *Criminal Code Act Compilation Act 1913*
- ¹¹ Privileges Act provides the Houses with power to order the attendance of persons (s.4); to issue summons (s.5); to punish for certain contempts (s.8); to issue warrants for apprehension and imprisonment (s.9); to apprehend without warrant (s.10) and to direct the Attorney General to prosecute before the Supreme Court any person other than a member who commits certain crimes (s.14) or other contempts (s.15). Criminal Code provides penalties of imprisonment for various acts, including interfering with the legislature (ss. 55 and 56); providing false evidence before Parliament (s.57); threatening witnesses (s.58); and bribery of a member of Parliament (s.61)
- ¹² Criminal Code provides absolute protection from liability as for defamation for a member of either House for what they have said in a speech in Parliament (s.351(1)); provides absolute protection for a person who presents a petition to either House for any defamatory matter contained in the petition (s.351(2)); and provides absolute privilege as for defamation for a person who publishes a paper, by order or under the authority of either House (s.351(3))
- ¹³ House of Lords and House of Commons Joint Committee on Parliamentary Privilege, *Report: Volume 1 — Report and Proceedings of the Committee*, March 1999 (paragraphs 376 and 377)
- ¹⁴ *ibid.* (paragraph 5)
- ¹⁵ Legislative Assembly Procedure and Privileges Committee, Western Australia, *Parliamentary Privilege and its Linkage to the UK House of Commons*, Report No.5, May 2004
- ¹⁶ *ibid.* p.5
- ¹⁷ Described by H. Phillips and D. Black, 'Parliamentary Privilege in Western Australia: the House of Commons conundrum', *Australian Parliamentary Review*, Spring 2002, Vol 17(2) pp.175–89
- ¹⁸ Cited in Legislative Assembly Procedure and Privileges Committee, *op. cit.*, p.5
- ¹⁹ Campbell has compared this effect of article 6 of the European Convention on Human Rights with the potential effect of article 14 of the International Covenant on Civil and Political Rights, to which Australia is a part, arguing that Australian Houses might

similarly need to consider whether their contempt jurisdiction contravenes the ‘fair and public hearing’ provision of article 14. See E. Campbell, ‘Contempt of Parliament and Implied Freedom of Political Communication’, in *Public Law Review*, Vol 10, 1999

20 see paragraphs 13 and 14, House of Lords and House of Commons Joint Committee on Parliamentary Privilege, *Report: Volume 1 — Report and Proceedings of the Committee*, March 1999

21 Legislative Assembly Procedure and Privileges Committee, *op. cit.*, p.5

22 See House of Lords and House of Commons Joint Committee on Parliamentary Privilege, *op. cit.* pp.6–8.

23 Legislative Assembly Procedure and Privileges Committee, *op. cit.*, p.5

24 Hansard, Legislative Assembly, 18 August 2004, p.5165

25 Hansard, Legislative Assembly, 25 August 2004, p.5618

26 14 July 2004

27 Hon. Peter Foss, QC, former Attorney General in previous Court Government and member of the Liberal Party in Opposition.

28 Hansard, Legislative Council, 27 August 2004, p.5785.

29 Queensland Members’ Ethics and Parliamentary Privileges Committee, *First Report on the Powers, Rights and Immunities of the Legislative Assembly, Its Committees and Members*, Report 26, 9 January 1999, p.8

30 *Parliamentary Standards Committee*, Vol 1, 1989

31 ‘WA Inc’ Royal Commission

32 see H. Phillips and D. Black, ‘Parliamentary Privilege in Western Australia: the House of Commons conundrum’, *Australian Parliamentary Review*, Spring 2002, Vol 17(2) pp.175–76

33 WA Royal Commission, 1992: II 5.8.7, cited in *Parliamentary Privilege and Judicial Proceedings, Specified Matter: 19*, Commission on Government, Discussion Paper No.4, March 1995, p.5

34 Section 16(2) defines ‘proceedings in Parliament’; Section 16(3) prohibits the ‘questioning’ of ‘proceedings in Parliament’.

35 See H. Phillips and D. Black, *op. cit.* p.186

36 W. McKay (ed.) *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, Twenty-third Edition, LexisNexis, UK, 2004, p.77

37 C.J. Boulton (ed.) *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, Twenty-first Edition, Butterworths, UK, 2004, p.84

38 23rd Edition, p.95

39 23rd Edition, p.108

40 23rd Edition cites *R v Secretary of State for Trade and others, ex p Anderson Strathclyde plc*, 1983, 2 All ER 233, in which it was held that a report in the Official Report of the House of Commons of what had been said in proceedings could not be used for judicial review of something which had occurred out of Parliament. (see page 194 of May)

41 See pages 109 and 110.

42 *A v United Kingdom 2002* (Application No 35373/97), cited in Erskine May, 23rd Edition, pp.96–7

43 The European Court of Human Rights held that art. 6 of the European Convention on Human Rights had been infringed when Malta’s House of Representatives had adjudged Demicoli, a journalist, guilty of contempt and had imposed a penalty upon him. The main reason why the court held that art 6 had been violated was that the two members of the House who had been defamed by what Demicoli had written had participated in the adjudicatory proceedings before the House. See E. Campbell, ‘Contempt of Parliament

and Implied Freedom of Political Communication', in *Public Law Review*, Vol 10 pp.198–99, 1999.

⁴⁴ Erskine May, 23rd Edition, p.99

⁴⁵ Erskine May, 21st Edition, see pp.90–91

⁴⁶ Economic Regulation Authority — Decision regarding admission of material subject to Parliamentary Privilege in Appeal 1 of 2004, *Epic Energy (WA) Nominees Pty Ltd (Receivers and Managers Appointed)(Administrators Appointed) and Epic Energy (WA) Transmission Pty Ltd (Receivers and Managers Appointed)(Administrators Appointed) and Western Power Corporation*) 18 October 2004, available at www.era.wa.gov.au, — see pp.4 and 5.

⁴⁷ Legislative Assembly Procedure and Privileges Committee, *op. cit.*, p.8

⁴⁸ Report, 1999, paragraphs 25–6

⁴⁹ D. McGee QC, 'The Scope of Parliamentary Privilege', *The New Zealand Law Journal*, March 2004, p.85

⁵⁰ D. McGee *op. cit.*, p.86

⁵¹ 14 July 2004

⁵² New Zealand House of Representatives Privileges Committee, *Question of privilege referred 21 July 1998 concerning Buchanan v Jennings*, 47th Report, 31 May 2005, p.3

⁵³ *ibid.*, p.9