

# Parliamentary Privilege: First Principles and Recent Applications

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## *Introduction*

The focus of this paper is on the relationship between parliamentary privilege and the courts. In particular, it looks at how have the courts dealt with parliamentary privilege in selected recent cases, notably *Canada (House of Commons) v Vaid*,<sup>1</sup> *Erglis v Buckley*,<sup>2</sup> *Toussaint*,<sup>3</sup> *Mees v Roads Corporation*<sup>4</sup> and *President of the Legislative Council (SA) v Kosmas*?<sup>5</sup>

Three cautionary notes can be made. One is that different constitutional settings apply over jurisdictions, as between the UK, Australia, Canada and New Zealand. Second, the jurisprudence in one jurisdiction may not be a reliable guide to that in others. Certainly decisions outside Australia are not precedents for our courts to follow. However, they can be persuasive and influential, and important as points of departure and comparison. Thirdly, only very few privilege related issues are litigated, and therefore a review of recent cases is not representative of the full complement of privilege matters at issue at any time.

Parliamentary privilege can be defined as concerning the powers, privileges and immunities from aspects of the general law conferred on the Houses of Parliament, their members, officers and committees. The principal powers and privileges are:

- Freedom of speech in Parliament
- Exclusive cognisance (jurisdiction) over internal affairs
- Power to discipline members

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<sup>1</sup> [2005] SCR 667.

<sup>2</sup> [2004] 2 Qd R 599.

<sup>3</sup> [2007] 1 WLR 2825.

<sup>4</sup> (2003) 128 FCR 418.

<sup>5</sup> [2008] SAIRC 41.

### Power to punish for contempt

In Australia the law of parliamentary privilege varies across jurisdictions. To take three examples: at the Commonwealth level it is codified under the *Parliamentary Privileges Act 1987*; in Victoria it is defined by statute under s 19(1) of the *Constitution Act 1975* by reference to the privileges of the House of Commons as at 1855; in New South Wales, Article 9 of the Bill of Rights of 1689<sup>6</sup> applies further to s 6 of the *Imperial Laws Applications Act 1969*,<sup>7</sup> but otherwise the privileges of its Houses are largely on a common law basis, to be implied by reasonable necessity.<sup>8</sup>

This makes for an area of law that constitutes an interesting combination of statutory law, the conferral of privilege on an inherent basis, and by the law and custom of Parliament as this developed in the United Kingdom, as part of the common law yet not made by the common law courts.

By way of a general opening statement, the 1999 First Report of the UK Joint Committee on Parliamentary Privilege commented:

Parliamentary privilege is, in its detail, a complex, technical and somewhat arcane subject. This is partly because of its historic origins and partly because of the multifarious functions of Parliament.<sup>9</sup>

### *First Principles*

The UK Joint Committee's report is mentioned at the outset for a number of reasons. First, it is worth emphasising just how influential it has been, in particular in Privy Council decisions, and also for the Supreme Court of Canada. The Committee was chaired by Lord Nicholls of Birkenhead, one of the Law Lords, and there may be a sense in which the courts, when citing the report, are referring to the extra-curial observations of one of their own.

A second reason for placing emphasis on the Joint Committee report is that it is representative of the current judicial tendency to associate parliamentary privilege primarily, if not exclusively, with its statutory formulation in Article 9 of the Bill of Rights of 1689.<sup>10</sup> David McGee comments in this respect: 'The greater focus on

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<sup>6</sup> 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'.

<sup>7</sup> For other statutes relevant to parliamentary privilege in NSW see – G Griffith, *Parliamentary privilege: major developments and current issues*, NSW Parliamentary Library Background Paper No 1/07, pp 11-16.

<sup>8</sup> *Kielly v Carson* (1842) 4 Moo PC 63; 13 ER 225.

<sup>9</sup> Joint Committee on Parliamentary Privilege, *Report: Volume 1 – Report and Proceedings of the Committee*, UK Parliament, Session 1998-99, HL Paper 43 –1, HC 214-1, Ch 1, para 11.

<sup>10</sup> For a commentary on the current judicial tendency see *Erkine May Parliamentary Practice*, 23<sup>rd</sup> edition, Lexis Nexis UK 2004, p 177.

Art 9 may be part of a tendency to look for an authoritative legislative or judicial expression of law in a form recognisable to the practising lawyer.<sup>11</sup>

More fundamentally, it might be asked whether the tendency to associate parliamentary privilege with Article 9 directs attention towards statutory interpretation, the usual domain of the courts, and away from constitutional first principles – the ‘why’ of parliamentary privilege. For the courts, Article 9 might be said to set a boundary around what is to be an exception to the general law. If the language of Article 9 is not transparent, its interpretation does raise questions familiar to the courts. This is unlike the conferral of privilege on the basis of the inherent rights of Parliament, an approach that is more open-ended and nebulous, making for an uneasy fit with the rule of law.

A third reason for discussing the Joint Committee report derives from its use of the test of necessity – a test more usually associated with those privileges claimed for Parliament on an inherent or implied basis. In the report it is used as a means of limiting the exemption provided to Parliament from the operation of the general law.

The touchstone applied by the Joint Committee was that Parliament should be vigilant to retain necessary rights and immunities, and equally rigorous in discarding all others.<sup>12</sup>

And further it was said that the legal immunity provided by Article 9 is ‘comprehensive and absolute’: ‘Art 9 should therefore be confined to activities justifying such a high degree of protection, and its boundaries should be clear.’<sup>13</sup>

In other words, the exemptions provided from the general law should be no greater than is really necessary. Based on the UK Joint Committee, the test can be expressed as whether any particular power or privilege is necessary today, in its present form, for the effective functioning of a House of Parliament?<sup>14</sup>

This approach was applied by the Canadian Supreme Court in *Vaid*. The Court established a ‘purposive’ approach,<sup>15</sup> by which necessity had to be tested by reference to the functions of Parliament, as understood in a contemporary setting:

... 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

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<sup>11</sup> D McGee, ‘The scope of parliamentary privilege’ (March 2004) *The New Zealand Law Journal* p 84.

<sup>12</sup> Joint Committee on Parliament Privilege, n 9, Executive Summary.

<sup>13</sup> *Ibid*.

<sup>14</sup> *Ibid*, n 9, Ch 1, para 4.

<sup>15</sup> [2005] SCR 667 at para 43.

the functioning of the legislative body today. Parliamentary history, while highly relevant, is not conclusive. (emphasis in original)<sup>16</sup>

In *Vaid* parliamentary privilege is set in a broader constitutional context. The justification for parliamentary privilege is that the freedom to control their own proceedings and the freedom of speech in Parliament are necessary if the Houses of Parliament are to perform their constitutional functions effectively – that is, to inquire, debate and legislate. The Supreme Court of Canada said that parliamentary privilege is ‘necessary’

to protect legislators in the discharge of their legislative and deliberative functions, and the legislative assembly’s work in holding the government to account for the conduct of the country’s business.<sup>17</sup>

The UK Joint Committee had this to say:

Without this protection, members of Parliament would be handicapped in performing their parliamentary duties, and the authority of Parliament itself in confronting the executive and as a deliberative forum would be diminished.<sup>18</sup>

### ***Parliament and the Courts***

The historical relationship between the courts and Parliament is set out in *Erskine May’s Parliamentary Practice*, where the landmark 19<sup>th</sup> century cases are explained, notably *Stockdale v Hansard* (1839) and *Bradlaugh v Gossett* (1884).<sup>19</sup> From these cases it emerged that the Houses of Commons had exclusive jurisdiction over its own internal proceedings. At the same time it was held that, whenever a claim of privilege arose in determining the rights and liabilities of individual subjects, the courts had no option but to determine the correctness of a claim of privilege. In effect, the courts claimed they had the jurisdiction to declare what were the powers, privileges and immunities of the House of Commons. Parliamentary privilege was therefore part of the general law of the land and it was for the courts to apply and interpret the law.

To that extent, the Houses of Parliament ‘yielded’ to the courts. As Sir William Anson pointed out in 1909, the claim that no court has jurisdiction to discuss the

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<sup>16</sup> [2005] SCR 667 at para 29.6. Strictly speaking, by the Supreme Court’s reference to the earlier authority of *New Brunswick Broadcasting and Harvey v New Brunswick (Attorney General)* [1996] 2 SCR 876, the rule was restricted to Provincial legislatures.

<sup>17</sup> [2005] 1 SCR 667 at para 41.

<sup>18</sup> Joint Committee on Parliamentary Privilege, n 9, p 8.

<sup>19</sup> *Erskine May*, n 10, Chapter 11. For further historical analysis see - M Groves and E Campbell, ‘Parliamentary privilege and the courts: questions of justiciability’ (Winter 2007) 7(2) *Oxford University Commonwealth Journal* 175.

legality of anything ordered by a vote of a House of Parliament was rejected, with Anson commenting 'it is safe to say that the courts have won the day'.<sup>20</sup>

Sir William Holdsworth, writing in 1924 about the 19<sup>th</sup> century cases, stated in a similar vein:

All these cases illustrate the determination of the courts to assert the supremacy of the law over the working of all parts of the constitution. They show that the privileges of each of the Houses of Parliament are as much subject to the rule of law as the prerogatives of the Crown; and that a subject, who complains that he is oppressed by an undue exercise of privilege, has the same right to apply to the courts for redress as a subject who complains that he is oppressed by an undue exercise of the prerogative. The courts are subject to the enactments passed by King, Lords and Commons, for they are law; but they are subject to no other authority.<sup>21</sup>

The jurisdiction of the courts to determine privilege questions was never in dispute in Australia. The broad rule is that the existence of a privilege is justiciable, but its exercise is not. As Dixon J said in *R v Richards; Ex parte Fitzpatrick and Browne*:

[I]t is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise. ...<sup>22</sup>

To quote Lamer CJ, the general rule is that 'the courts will inquire into the existence and extent of privilege, but not its exercise'.<sup>23</sup>

These rules do not always provide a clear guide. What is an 'undoubted privilege' one might ask if, as in *Vaid*, the courts query whether a particular category of 'inherent privilege continues to be necessary...'? More particularly, grey areas exist between where Parliament enjoys exclusive jurisdiction and where the courts may intervene. The distinction between what are 'internal' and 'external' affairs may not be clear, just as the extent of a privilege may not be distinguishable from its exercise.

The role of the courts was explained by Justice Gray in *Mees v Roads Corporation*, stating:

The fundamental rationale of a court is the resolution of legal disputes through the exercise of impartial decision-making power and the ability to enforce the resulting decisions. Courts have a duty to resolve the disputes that are brought to them. There is therefore obvious scope for conflict between the duty of a court to decide a particular case according to law and the privilege of parliament to retain control

<sup>20</sup> Sir WR Anson, *The Law and Custom of the Constitution*, 4<sup>th</sup> ed, Clarendon Press, 1909, vol 1, p 147; cited with approval by McHugh J in *Egan v Willis*, p 459.

<sup>21</sup> Sir W Holdsworth, *History of English Law, Volume VI*, 2<sup>nd</sup> ed, Methuen and Co Ltd 1937, p 272.

<sup>22</sup> (1955) 92 CLR 157 at 162.

<sup>23</sup> *New Brunswick Broadcasting v Nova Scotia* (1993) 1 SCR 319 at 350.

over its own proceedings in a case which raises, or has the potential to raise, an issue about what has occurred in parliamentary proceedings.<sup>24</sup>

As a rule the courts are apt to pay closer attention to those claims to privilege which impact on non-parliamentarians than to those which involve matters entirely internal to the Parliament. This principle was affirmed in *Canada (House of Commons) v Vaid*, where the Canadian Supreme Court observed:

That the role of the courts is to ensure that a claim of privilege does not immunize from the ordinary law the consequences of conduct by Parliament or its officers and employees that exceeds the necessary scope of the category of privilege.<sup>25</sup>

Quoted with approval was this statement from *Stockdale v Hansard*:<sup>26</sup>

All persons ought to be very tender in preserving to the Houses all privileges which may be necessary for their exercise, and to place the most implicit confidence in their representatives as to the due exercise of those privileges. But power, and especially the power of invading the rights of others, is a very different thing: it is to be regarded, not with tenderness, but with jealousy; and, unless the legality of it be clearly established, those who act under it must be answerable for the consequences.<sup>27</sup>

### ***Two Lines of Thought***

From this a conflict emerges between two different lines of thinking: one based on the administration of justice and the rights of citizens to have their cases heard before the courts, with all available evidence before the courts; the other based on the exclusive rights of Parliament which operate as an exception to the general law. Put another way, the tension is between the administration of justice, on one side, and the powers and immunities of Parliament, on the other.

As Geoffrey Lock wrote in 1998:

Two lines of thinking, which are not easy to reconcile, are perceptible in judicial attitudes to these matters: the need to safeguard the interests of litigants, and the desirability of avoiding a conflict between Parliament and the courts.<sup>28</sup>

For the most part, conflict has been avoided by the courts and Parliament exercising mutual respect and understanding for their respective rights, privileges and constitutional functions. In this context, the principles underlying the separation of

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<sup>24</sup> (2003) 128 FCR 418 at para 78.

<sup>25</sup> [2005] 1 SCR 667 at para 29.11.

<sup>26</sup> (1839) 9 Ad & E 1 (112 ER 1112)

<sup>27</sup> (1839) 9 Ad & E 1 (112 ER 1112 at 1192); *Canada (House of Commons) v Vaid* [2005] 1 SCR 667 at para 39.

<sup>28</sup> G Lock, 'Statute law and case law applicable to Parliament' in *The Law and Parliament* edited by D Oliver and G Drewry, Butterworths 1998, p 54.

powers find expression in the ideas of ‘comity’ or ‘non-intervention’.<sup>29</sup> In *Office of Government Commerce v Information Commissioner* Justice Burnton observed that the law of parliamentary privilege is ‘essentially based on two principles’:

The first is the need to avoid any risk of interference with free speech in Parliament. The second is the principle of the separation of powers, which in our Constitution is restricted to the judicial function of government, and requires the executive and the legislature to abstain from interference with the judicial function, and conversely requires the judiciary not to interfere with or to criticise the proceedings of the legislature. These basic principles lead to the requirement of mutual respect by the Courts for the proceedings and decisions of the legislature and by the legislature (and the executive) for the proceedings and decisions of the Courts.<sup>30</sup>

### ***Prebble v TV New Zealand***<sup>31</sup>

Traditionally, the decisions of the courts on parliamentary privilege tended to be mostly favourable to Parliament, as re-affirmed in the 1995 case of *Prebble*. There a New Zealand Minister had brought a defamation case, in answer to which the defendants wished to assert that the Minister had made misleading statements in the House of Representatives to the effect that the government did not intend to sell state assets when he was conspiring to do just that. The question was really about what constitutes a fair trial under the rule of law where, by the operation of parliamentary privilege, evidence relevant to the case is rendered inadmissible.

In *Prebble*, the submissions of the defendants were rejected. The ‘basic concept’ was that members of the House and witnesses before committees should be able to:

speak freely without fear that what they say will later be held against them in the courts. The important public interest protected by such privilege is to ensure that the member or witness *at the time he speaks* is not inhibited from stating fully and freely what he has to say.<sup>32</sup>

In terms of the broader issues involved Lord Browne-Wilkinson for the Privy Council said the case illustrated ‘how public policy, or human rights, issues can conflict’. Three issues were in play: (i) the need to ensure that the legislature can exercise its powers freely on behalf of its electors; (ii) the need to protect freedom

<sup>29</sup> A recent application of the comity principle is found in the New Zealand case of *Boscawen and others v Attorney-General* [2009] NZCA 12 at para 42. On that basis it was decided that the Attorney-General’s obligation under s 7 of the *New Zealand Bill of Rights Act 1990* to bring a provision of a Bill which appears to be inconsistent with that Act was non-justiciable.

<sup>30</sup> [2008] EWHC 737 at para 46. The statement was cited with approval in *R (on the application of Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 at para 46. In that case the claimant contended he had a legitimate expectation that the Treaty of Lisbon of 2007 would not be ratified without a referendum. The claim was founded on various governmental assurances that the Constitutional Treaty of 2004 would be treated in that way.

<sup>31</sup> [1995] 1 AC 321.

<sup>32</sup> [1995] 1 AC 321 at 334.

of speech generally; and (iii) the interests of justice in ensuring that all the relevant evidence is available to the courts. It was declared: ‘Their Lordships are of the view that the law has been long settled that, of these public interests, the first must prevail...’.<sup>33</sup>

That would seem to be clear enough – a bright exclusionary line was apparently drawn where admissibility questions were raised. But note in this respect that two caveats were added to the exclusionary rule in *Prebble*, leaving the door ajar for a judicially creative approach, which might redefine the relationship between the administration of justice and the exclusionary rule.

In *Prebble* it was said, first, that the two other interests cannot be ‘ignored’;<sup>34</sup> and, second, that the exclusionary principle ‘does not exclude all references in court proceedings to what has taken place in the House’.<sup>35</sup>

From this, Lord Browne-Wilkinson in *Prebble* went on to argue against a stay of proceedings, saying that there was no problem with the defendant at trial alleging that certain events occurred or words were said in Parliament, so long as this was not accompanied by an ‘allegation of impropriety or any other questioning’. The relevant passage reads:

their Lordships wish to make it clear that if the defendant wishes at the trial to allege the occurrence of events or the saying of certain words in Parliament without any accompanying allegation of impropriety or any other questioning there is no objection to that course.<sup>36</sup>

### ***The Historical Exception Doctrine***

David McGee calls this ‘the historical exception doctrine’. He argues, by reference to two later New Zealand defamation cases – *Peters v Cushing*<sup>37</sup> and *Buchanan v Jennings*<sup>38</sup> – that this supposed ‘exception’ has since become the ‘rule’.

What does the historical exception mean? Is it only that judicial notice can be taken of the parliamentary record to ascertain that something was said or done on a certain date, or does it involve reference to the substance or meaning of what was said or done? By reference to the New Zealand Court of Appeal’s decision in *Buchanan v Jennings*, Gray J said in *Mees v Roads Corporation*:

At one time, there was a controversy as to whether the court could receive evidence of the words spoken, as distinct from evidence that something was said, but this

<sup>33</sup> [1995] 1 AC 321 at 336.

<sup>34</sup> [1995] 1 AC 321 at 336.

<sup>35</sup> [1995] 1 AC 321 at 337.

<sup>36</sup> [1995] 1 AC 321 at 337.

<sup>37</sup> [1999] NZAR 241.

<sup>38</sup> [2002] 3 NZLR 145. The reference was to the decision of the New Zealand Court of Appeal.



appears to have been resolved in favour of the view that the words spoken can be tendered in evidence.<sup>39</sup>

Is there a change taking place here, redefining the relationship between the courts and Parliament, at least as far as freedom speech cases are concerned. Or is it the case that our perception can be skewed by the emphasis on defamation cases? Are there any trends to be found in the conflict between Lock's two lines of thought in recent cases?

How far, if at all, have we strayed from the rule expressed in the UK case of *Church of Scientology of California v Johnson-Smith*?<sup>40</sup> It was 'held that what was said or done in Parliament in the course of proceedings there could not be examined outside Parliament for the purpose of supporting a cause of action, even though the cause of action itself arose out of something done outside Parliament'.<sup>41</sup>

### ***Recent Applications***

#### **Toussaint v Attorney General of St Vincent and the Grenadines**<sup>42</sup>

At issue in the case was whether the courts could admit a Prime Ministerial statement made in the House of Assembly into evidence for the purposes of the review of Executive action? It is an unusual case, therefore, which asks whether parliamentary privilege could act as a bar to the review of a decision made by the Executive. The answer, on the facts of the case, was 'no' it could not. In effect, the jurisdiction of the court to engage in the judicial review of administrative action was not to be curtailed or impeded by parliamentary privilege.

The facts were that Toussaint brought an action against the government claiming that the acquisition of his land was unconstitutional and unlawful. Toussaint was a former commissioner of police in St Vincent. In 1990 he bought a parcel of land in the Grenadines for about \$6,500 from a government instrumentality (the Development Corporation). In 2002, following a change of government, it was demanded that Toussaint pay a further \$84,200 for the land. It was claimed that because of his close relationship with the former government, the price Toussaint paid for the land was far below market value. Toussaint refused to meet the demand. On 5 December 2002, during a televised budget speech in the House of Assembly, the Prime Minister said that the land would be compulsorily acquired. In the statement the Prime Minister read the draft wording of the Governor's declaration compulsorily acquiring the land for educational purposes. Immediately afterwards, the declaration was published in the Gazette. No compensatory payment was mentioned in the declaration, but the Lands and Surveys Department informed

<sup>39</sup> (2003) 128 FCR 418 at para 80.

<sup>40</sup> [1972] 1 QB 522.

<sup>41</sup> *Church of Scientology* was a case where support for an allegation of malice to refute a plea of fair comment was sought, unsuccessfully, from a reading of Hansard.

<sup>42</sup> [2007] 1 WLR 2825.

Toussaint that just over \$9,700 had been deposited in the Treasury Department in his name — the original price plus interest of 5% over 10 years.

As the Privy Council emphasised, the case did not concern proceedings against a member of Parliament but, rather, ‘against the executive for action taken outside the House’, of which the PM had given prior notice in his budget speech.<sup>43</sup> No one was seeking to sue the PM for damages.

For his part, Toussaint claimed that, taken as a whole, the PM’s statement during the budget debate showed the true reasons for the acquisition. He alleged that these were political. He also alleged that the educational purpose cited in the Governor’s declaration was ‘a sham and a stratagem to deprive him of his land unlawfully’.

The privilege issue in the case arose from the fact that Toussaint wished to rely on the statement made by the PM in the House of Assembly explaining why the compulsory acquisition had been made.

In addition, in a second limb to the privilege issue, by s 16 of the local Privileges Act no evidence of proceedings in the House of Assembly was admissible ‘unless the court ... is satisfied that permission has been given by the Speaker for such evidence to be given’. Read with s 3 of the same Act, in the exercise of any power conferred on him the Speaker was made immune from the jurisdiction of the court. This can be interpreted as an expression of the control by the Houses of Parliament over ‘debates or proceedings in the House’, a doctrine based either on Article 9 or on the wider doctrine of exclusive cognisance. The Speaker had refused permission for Toussaint to use evidence of the PM’s statement in court proceedings. For Toussaint, it was claimed that the Privileges Act had to be read in a qualified manner, so as not to bar his constitutional right of access to the court to enforce his property rights.

In summary, the judgment for the Privy Council (delivered by Lord Mance) held, first, that Toussaint should be able to rely on the statement as a record of what was said as to the reasons for acquisition, although it would not be permissible to impugn the statement itself. In other words, the ‘meaning’ of the words spoken was to be admitted into evidence, but no ‘judgment’ was to be made about that meaning. Secondly, it was held that Toussaint’s right of access to the courts would be unduly undermined if he could not rely on the statement, which meant that s 16 of the Privileges Act had to be adapted to enable evidence of such statements to be admissible, in order to enable judicial review and to explain executive action.

***The administration of justice:*** The Privy Council therefore combined a concern for the right of access of non-parliamentarians to the courts with the ‘administration of justice’ policy issue in *Prebble*, namely the interests of justice in ensuring that all the relevant evidence is available to the courts. McGee’s historical exception

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<sup>43</sup> [2007] 1 WLR 2825 at paras 8 and 19.

doctrine was again in play therefore. Indeed, the reasoning in *Prebble* was central to the decision in *Toussaint*. For the Privy Council, Lord Mance explained:

the Board observes that the meaning of the Prime Minister's statements to the House is an objective matter. Mr Clayton accepts that Mr Toussaint can only *rely on the statements for their actual meaning*, whatever the judge may rule that to be. While no suggestion may be made that the Prime Minister misled the House by his statement, Mr Toussaint also remains free to deploy any evidence available to him on the issue whether the public purpose recited in the declaration was a sham – for example, evidence as to the nature and location of the land and the likelihood or otherwise of its being required for a Learning Resource Centre. The Prime Minister's statement to the House is potentially relevant to Mr Toussaint's claim as an admission or explanation of the executive's motivation. If the Prime Minister were to suggest that he expressed himself incorrectly, and did not intend to say what he said, then it would not be Mr Toussaint who was questioning or challenging what was said to the House. (emphasis added)<sup>44</sup>

One comment is that this leaves a lot of work for the trial judge in guiding counsel away from areas likely to infringe parliamentary privilege. It also assumes that statements made in Parliament can be used in evidence without inferences being drawn from these. 'The actual meaning' of what the Prime Minister said was admissible, although this was defined in terms of 'whatever the judge may rule that to be'. Perhaps it is misleading to claim that the statement is founded on a naïve philosophy of language. Does it however suggest an exaggerated confidence in the courts to guide counsel through the admissibility maze created by the historical exception doctrine?

***The separation of powers:*** The use of a ministerial statement for the purposes of the judicial review of administrative action introduced a constitutional dimension to *Toussaint*, concerning the respective roles of the Parliament, the Executive and the courts. In particular, the case raised the accountability of the Executive to Parliament, as well as its accountability to the rule of law by means of judicial review.

Reference in *Toussaint* was made to the report of the UK Joint Committee, specifically to its view that Parliament should 'welcome' the use of ministerial statements in judicial review, on the basis that 'Both parliamentary scrutiny and judicial review have important roles, separate and distinct, in a modern democratic society'.<sup>45</sup> Further quoting from the UK Joint Committee's First Report, Lord Mance said:

'The contrary view would have bizarre consequences', hampering challenges to the 'legality of executive decisions by ring-fencing what ministers said in Parliament', and 'making ministerial decisions announced in Parliament ... less readily open to examination than other ministerial decisions'... The Joint Committee observed, pertinently, that

<sup>44</sup> [2007] 1 WLR 2825 at para 23.

<sup>45</sup> According to the Joint Committee on Parliament Privilege, n 9, Ch 2 para 50:

That would be an ironic consequence of article 9. Intended to protect the integrity of the legislature from the executive and the courts, article 9 would become a source of protection of the executive from the courts.<sup>46</sup>

Is a different kind of test being applied here, one that does not proceed, logically, from the concern to protect freedom of speech in Parliament but, rather, from a broader ‘public interest’ standpoint? The concern of the court is, in essence, with its own jurisdiction, with its capacity to undertake judicial review of administrative decisions, the public interest in which overrides any considerations arising from Article 9.

Reflecting on the admissibility of ministerial statements made in Parliament, the UK Joint Committee commented:

The development represents a further respect in which acts of the executive are subject to a proper degree of control. It does not replace or lessen in any way ministerial accountability to Parliament ... Parliament must retain the right to legislate and take political decisions, but only the courts can set aside an unlawful ministerial decision.<sup>47</sup>

The UK Joint Committee explained:

Article 9 becomes germane when judicial review proceedings relate to a ministerial decision announced, or subsequently explained, in the House. Typically, in the court proceedings the applicant quotes an extract from the official report and then sets out his grounds for challenging the lawfulness of the decision in the light of the reasons given by the minister.<sup>48</sup>

In *Toussaint*, the Joint Committee was quoted with approval as saying:

Use of *Hansard* in this way has now occurred sufficiently often for the courts to regard it as established practice. Some examples will suffice as illustrations. In several cases challenges were made to the lawfulness of successive policy statements, announced in Parliament, regarding changes in the system for the parole of prisoners. In each case the court proceedings involved scrutinising the ministerial decisions and the explanations given by the minister in Parliament<sup>49</sup> ... In none of these cases does any argument seem to have been advanced, by the government or anyone else, about the admissibility in evidence or the use in court of the statements made in Parliament. Indeed, the practice in court is for both the applicants and the government to use the official reports of both

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<sup>46</sup> [2007] 1 WLR at para 17.

<sup>47</sup> Joint Committee on Parliament Privilege, n 9, Ch 2 para 50.

<sup>48</sup> Joint Committee on Parliamentary Privilege, n 9, Ch 2 para 48.

<sup>49</sup> *In re Findlay* [1985] AC 318; *Pierson v Home Secretary* [1997] 3 AER 577; *R v Home Secretary, ex parte Venables* [1998] AC 407; and *R v Home Secretary, ex parte Hindley* [1998] QB 751. Reference was also made to *R v Home Secretary, ex parte Brind* [1991] 1 AC 696; *R v Secretary of State for Foreign Affairs, ex parte World Development Movement* [1995] 1 WLR 386; and *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513.

applicants and the government to use the official reports of both Houses to indicate what is the government's policy in a particular area.<sup>50</sup>

### **Mees v Roads Corporation**<sup>51</sup>

*Toussaint* bears comparison with the Australian case of *Mees v Roads Corporation*. The facts were, pursuant to Commonwealth legislation,<sup>52</sup> the applicant (Mees) sought to restrain the respondents (the Victorian Roads Corporation – VicRoads) from taking further action relating to the Scoresby Freeway or Eastern Ring Road in Melbourne. The second respondent in the case was the Victorian Minister for Transport (Peter Batchelor), a Member of the Legislative Assembly. In that House he had made a statement in October 2001 denying that the Government had any intention of linking the Eastern Freeway with the Greensborough Bypass. An answer to the same effect was given in the Legislative Council in March 2002 on behalf of the Minister for Transport. An injunction was sought by Mees on the ground that false and misleading information had been provided to avoid the Transport Minister having to refer the road construction proposal to the Commonwealth Environment Minister.<sup>53</sup>

The Federal Court held it had a duty to resolve the issue whether misleading information had been provided to the Commonwealth Environment Minister at any stage. A finding to this effect would indirectly call into question what had been said by the Victorian Minister for Transport in Parliament (evidence of which could be admitted only to establish that the words had been spoken as a matter of historical fact). As Gray J said:

As long as the Court refrains from making a finding, or drawing an inference, to the effect that Parliament has been misled, it commits no breach of parliamentary privilege and does not trespass upon the area for which Parliament alone has responsibility, namely control of its own proceedings.<sup>54</sup>

Referring to the relevant English cases, Justice Gray commented:

The English courts do not appear to have found it difficult to examine the content of a statement to parliament in one circumstance. That is where the statement contains a minister's reasons for a decision of which judicial review is sought. Apparently, examination of the content of such a statement, even for the purpose of considering whether the decision is so unreasonable that no reasonable decision-

<sup>50</sup> [2005] 1 AC 115 at para 16; Joint Committee on Parliamentary Privilege, n 9, Ch 2 para 49. *Toussaint* has been referred to with approval in several cases: *Federation of Tour Operators v Her Majesty's Treasury* [2007] EWHC 2062 at para 115; *Office of Government Commerce v Information Commissioner* [2008] EWHC at 737 at para 44; and *R (on the application of Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 at para 53.

<sup>51</sup> (2003) 128 FCR 418.

<sup>52</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 475.

<sup>53</sup> In contravention of s 489 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

<sup>54</sup> (2003) 128 FCR 418; [2003] FCA 306 at para 87.

maker could have made it, is not considered to be impeaching or questioning the statement. See *R v Secretary of State for the Home Department; Ex parte Brind* [1991] UKHL 4; [1991] 1 AC 696. With this exception, it seems that any form of critical examination of the content of what has been said to parliament will not be undertaken by a court. It is certainly not permissible to tender the content of a statement to parliament for the purpose of proving that it was false or misleading.<sup>55</sup>

The same ground was covered by the Privy Council in *Toussaint*, but without reference to *Mees v Roads Corporation*. It seems that in *Mees v Roads Corporation* the parliamentary statements were used in judicial review proceedings merely to establish the Victorian government's policy or position on the matter under review. The ministerial statement itself did not provide the ground for judicial review.<sup>56</sup> The same would appear to be the case in *Toussaint* where the applicant wished to rely [on the PM's statement] to explain the motivation of executive action taken outside Parliament. Indirectly, however, the court's findings in both *Mees* and *Toussaint* call into question the truthfulness of the statements made and the motivations behind them.

### **R (Bradley) v Secretary of State for Works and Pensions<sup>57</sup>**

*Mees v Roads Corporation* was concerned with parliamentary privilege under s 19(1) of the Victorian Constitution Act. Not in issue was the Commonwealth *Parliamentary Privileges Act 1987*. On the same subject of the admissibility of ministerial statements made in Parliament, comment was made in the recent English High Court case of *Bradley* on the potential operation of the Commonwealth legislation.

A number of privilege questions were at issue in *Bradley*, a case in which the litigants sought to use critical comments made about the Government's winding up of a pensions scheme, made first, by the Ombudsman in evidence to a parliamentary committee and, subsequently, in the report of the Public Administration Select Committee [PASC]. The Ombudsman's evidence was inadmissible, it was decided, with Justice Bean stating:

I agree with Mr Speaker that to allow the evidence of a witness to a Select Committee to be relied on in court would inhibit the freedom of speech in Parliament and thus contravene article 9 of the Bill of Rights.<sup>58</sup>

On the other hand, citation from the Select Committee report was admissible, with Justice Bean's saying:

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<sup>55</sup> (2003) 128 FCR 418; [2003] FCA 306 at para 80.

<sup>56</sup> D McGee, *Parliamentary Practice in New Zealand*, 3<sup>rd</sup> ed, Office of the Clerk of the House of Representatives, 2005, p 629.

<sup>57</sup> [2007] EWHC 242 (Admin).

<sup>58</sup> [2007] EWHC 242 (Admin) at para 34.

It seems to me unlikely that a Committee would be inhibited from expressing its view, whether critical or supportive of the actions of the government, by the thought that its report might be referred to in support of a party's submissions in civil litigation.<sup>59</sup>

It was said further that reliance would not be placed on the Select Committee report on other grounds, with Justice Bean striking a jurisdictional note in saying:

My view is that I should not place reliance on the PASC report for an entirely different and more fundamental reason, which is that, in the words of the Privy Council in *Prebble*, the courts and Parliament are both astute to recognise their respective constitutional roles. It is for the Courts, not the Select Committee, to decide whether the Secretary of State has acted unlawfully in rejecting the findings and recommendations of the Ombudsman in this case. I note and respect the views of the Select Committee but in the end they are not of assistance on the questions of law which I have to determine.<sup>60</sup>

In the course of his judgment, Justice Bean touched on the interpretation of s 16(3)(c) of the Commonwealth privileges legislation. The sub-section provides:

(3) In proceedings in any court or tribunal, it is unlawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purposes of...

(c) drawing, or inviting the drawing of, inferences or conclusions wholly or partially from anything forming part of those proceedings in Parliament.

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<sup>59</sup> [2007] EWHC 242 (Admin) at para 35.

<sup>60</sup> [2007] EWHC 242 (Admin) at para 35. Similar ground was covered by Justice Burnton in *Office of Government Commerce v Information Commissioner* [2008] EWHC at 737. One question in that case was whether the Information Tribunal could rely on the conclusions of a parliamentary Select Committee as authority for supporting its decision on a contested issue before it. It was concluded that: 'If the evidence given to a Committee is uncontentious, i.e., the parties to the appeal before the Tribunal agree that it is true and accurate, I see no objection to its being taken into account. What the Tribunal must not do is refer to evidence given to a Parliamentary Committee that is contentious (and it must be treated as such if the parties have not had an opportunity to address it) or to the opinion or finding of the Committee on an issue that the Tribunal has to determine. Nor should the Tribunal seek to assess whether an investigation by a Select Committee, which purports to have been adequate and effective, was in fact so' (at para 64). In *R (on the application of Wheeler) v Office of the Prime Minister* [2008] EWHC 1409 at para 54 'some differences of approach' were noted on the question of the admissibility of committee evidence in recent cases. However, the judgment went on to say: 'but we derive these two points from them: first, that the *opinion* expressed by a Parliamentary committee will generally be irrelevant to the issue of *fact* to be decided by the court; and, secondly, that reliance by one party on the opinion expressed by a Parliamentary committee creates the risk that the other party will contend that the opinion was wrong and will therefore give rise to, or risk giving rise to, the questioning of proceedings in Parliament, in breach of Parliamentary privilege'.

Justice Bean said that, 'if read literally' the sub-section 'is extremely wide'. He continued:

It would seem to rule out reliance on or a challenge to a ministerial statement itself on judicial review of the decision embodied in that statement (which was permitted in *R v Secretary of State for the Home Department; Ex parte Brind* [1991] 1 AC 696, and to which no objection has been raised in the present case) ... or to assist in establishing the policy objectives of an enactment (*Wilson v First County Trust Ltd* [2004] 1 AC 816). It would also prohibit reliance on reports of the Joint Committee on Human Rights, which ... have been cited in a number of appellate cases in this jurisdiction ... As Lord Nicholls of Birkenhead observed in *Wilson*, 'there are occasions when courts may properly have regard to ministerial and other statements made in Parliament without in any way 'questioning' what has been said in Parliament, without giving rise to difficulties inherent in treating such statements as indicative as the will of Parliament, and without in any other way encroaching upon Parliamentary privilege by interfering in matters properly for consideration and regulation by Parliament alone'. I therefore do not treat the text of subparagraph (c) of the Australian statute as being a rule of English law.<sup>61</sup>

Justice Bean added:

In *Hamilton v Al-Fayed* Lord Woolf MR, giving the judgment of the Court of Appeal said ([1999] 1 WLR 1569 at 1586F) that 'the vice to which Article 9 is directed (so far as the courts are concerned) is the inhibition of freedom of speech and debate in Parliament that might flow from any condemnation by the Queen's Courts, being themselves an arm of government, of anything there said.' The case went to the House of Lords but their Lordships' speeches do not appear to cast doubt on the accuracy of Lord Woolf's observations.

Commenting on Justice Bean's interpretation, in *Office of Government Commerce v Information Commissioner* Justice Burnton observed:

In *Bradley* ... Bean J said that section 16(3)(c) of the Australian statute does not represent the law of England and Wales. I would prefer to say that if given a broad literal interpretation it is an over-general statement of the law. It must be interpreted somewhat narrowly, ... and as subject to the exceptions or qualifications to which Bean J himself referred. This is consistent with its endorsement by the Privy Council in *Prebble* and by the House of Lords in *Hamilton v Al Fayed*, and the approval in *Prebble* the Privy Council of the decision in *Comalco*.<sup>62</sup>

The interpretation of s 16 of the Commonwealth Act remains to be authoritatively decided by the Australian High Court. In *Mees*, Gray J doubted 'whether s 16(3) is merely a codification of the law',<sup>63</sup> but that was not a matter upon which he had to rule.<sup>64</sup>

<sup>61</sup> [2007] EWHC 242 (Admin) at para 32.

<sup>62</sup> [2008] EWHC 737 at para 60.

<sup>63</sup> (2003) 128 FCR 418; [2003] FCA 306 at para 84.

<sup>64</sup> On the constitutional validity of the Commonwealth legislation generally, see E Campbell, *Parliamentary Privilege*, The Federation Press 2003, Ch 15.



**Buchanan v Jennings**<sup>65</sup>

The same ground as in the British cases on the admissibility of ministerial statements in Parliament for judicial review purposes was covered in the New Zealand case of *Buchanan v Jennings*. Again, extensive reference was made to the relevant discussion in UK Joint Committee report, effectively to bolster the use made of the historical exception doctrine. This led the Privy Council to conclude: 'Thus it cannot now be said, as it once perhaps could, that mere reference to or production of a record of what was said in Parliament infringes Article 9.'<sup>66</sup>

Whether parliamentary proceedings should have been admissible in *Buchanan* is another matter. It might be argued that, by piecemeal means, and in a quite perfunctory way, the line of reasoning concerning ministerial statements in Parliament was used to dilute the exclusionary rule against the use of parliamentary proceedings beyond anything contemplated in *Prebble*, or indeed in *Pepper v Hart*.<sup>67</sup>

In a brief judgment delivered by Lord Bingham of Cornhill the Privy Council found that a member is liable in circumstances where they say that they 'do not resile' from what they said in the House.

The facts of the case were that, in December 1997 the MP, Jennings, alleged abuse of expenditure and an illicit relationship on the part of officials involved in the sponsorship of a sporting tour. He was subsequently interviewed by a journalist who then published an article recording that Jennings withdrew some of his financial allegations, and reported him as saying that he 'did not resile' from his claim about the illicit relationship between the officials and the sponsors. The affirmation or 'effective repetition' was admitted into evidence and damages were awarded against Jennings in both the New Zealand High Court and the Court of Appeal. From there it went to the Privy Council, which upheld the earlier rulings. There was no doubt that what Jennings said in the House was protected by absolute privilege. However, that privilege did not extend to cover his republication of that statement by reference outside the House. The Privy Council concluded:

A statement made out of Parliament may enjoy qualified privilege but will not enjoy absolute privilege, even if reference is made to the earlier privileged statement. A degree of circumspection is accordingly called for when a Member of Parliament is moved or pressed to repeat out of Parliament a potentially defamatory statement previously made in Parliament. The Board conceives that this rule is well understood, as evidenced by the infrequency of cases on the point.

By any standards *Buchanan v Jennings* is a controversial decision.

<sup>65</sup> [2005] 1 AC 115.

<sup>66</sup> [2005] 1 AC 115 at paras 16 and 131.

<sup>67</sup> [1993] AC 593.

It has been the subject of trenchant criticism, most recently in the July 2008 Senate Privileges Committee report on *Effective Repetition*. Reviewing the case law – including *Beitzel v Crabb*<sup>68</sup> and *Laurence v Katter*<sup>69</sup> – the report commented:

The potential impact of these decisions, in the committee's view, is to redraw the boundary between privileged and unprotected speech to the detriment of the institution of Parliament. The concept of incorporation or adoption by reference, applied to privileged speech, undermines the basis of the privilege as it has been previously understood to apply. It allows an unprotected statement which, on its face, contains nothing actionable to become a cause of action through reliance on a privileged statement.<sup>70</sup>

As such, the decision seems to dilute *Prebble*, at least to the extent that it indicates a re-assessment of the relationship between the three public interests at issue in privilege cases, away from freedom of speech in Parliament and towards the interests of justice in ensuring that all relevant evidence is available to the courts.<sup>71</sup>

### **Erglis v Buckley**<sup>72</sup>

In another controversial decision heard before the Queensland Court of Appeal, McPherson JA said that the approach taken by the Court of Appeal in New Zealand in *Buchanan v Jennings* supported the conclusion he had reached in *Erglis v Buckley*.<sup>73</sup>

<sup>68</sup> [1992] 2 VR 121.

<sup>69</sup> (1996) 141 ALR 447.

<sup>70</sup> Parliament of Australia, Senate Privileges Committee, *134<sup>th</sup> Report: Effective Repetition*, June 2008, p 5.

<sup>71</sup> The NZ Privileges Committee recommended appropriate amendment of the *Legislature Act 1908*. That the Act be amended to provide that no person may incur criminal or civil liability for making any statement that affirms, adopts or endorses words written or spoken in proceedings in Parliament where the statement would not, but for the proceedings in Parliament, give rise to criminal or civil liability (Privileges Committee, *Final Report on the question of privilege referred 21 July 1998 concerning Buchanan v Jennings*, May 2005, p 9). For a commentary see A Geddis, 'Parliamentary privilege: *quis custodiet ipsos custodes?*' [Winter 2005] *Public Law* 696; A Geddis, 'Defining the ambit of the free speech privilege in New Zealand's Parliament' (2005) 16 *Public Law Review* 5; J Harker, 'The impact of Jennings v Buchanan on freedom of speech and defamation: the erosion of parliamentary privilege?' (2005) 11 *Auckland University Law Review* 27. In April 2006 these concerns were endorsed by the Procedure and Privileges Committee of the Western Australian Legislative Assembly. It recommended: (a) that the *Parliamentary Privilege Act 1891* be amended to include a provision which ensures that parliamentary proceedings cannot be used to establish what was 'effectively' but not actually said outside Parliament; and (b) that a uniform national approach be adopted through the auspices of the Standing Committee of Attorneys General - Western Australia, Legislative Assembly, Procedure and Privileges Committee, *Effective Repetition: Decision in Buchanan v Jennings*, Report No 3, 2006.

<sup>72</sup> [2004] 2 Qd R 599.

<sup>73</sup> *Erglis v Buckley* [2004] 2 Od R 599; [2004] QCA 223. The issue was considered in *Thomson v Broadley* [2000] QSC 100, but there the reasoning of Jones J seemed to be more relevant to a wider question of admissibility.

The novel question in that case was whether parliamentary proceedings could be admitted into evidence for the limited purpose of claiming greater damages in defamation proceedings.

The facts were that the Health Minister had tabled in the Assembly a copy of a letter written by a group of nurses, responding to claims made by the plaintiff about a ward at the Royal Brisbane Hospital. In these earlier proceedings, Erglis claimed she had been defamed and sought to have the tabling of the letter admitted into evidence. On the other hand, the defendants claimed immunity for the document on the grounds that its admission into evidence would amount to a questioning of parliamentary proceedings. The specific issue before the Court of Appeal was whether certain paragraphs in Erglis' statement of claim should be struck out. These sought substantially greater damages on the basis of the publication of the letter to the Minister, in circumstances where the defendants knew that the Minister would be likely to read it in Parliament, with all the consequent publicity in the media that would follow. The issue was whether admission of the fact of the tabling of this letter – an act in itself protected by parliamentary privilege – for the purposes of claiming greater damages, constituted an impeaching or questioning of parliamentary proceedings?

By a 2:1 majority the Queensland Court of Appeal held that, for the specific purpose at issue, the tabling of the letter was admissible. McPherson JA found that the tabling of the letter was relied on by the plaintiff (Erglis) only as 'a matter of history', and that such limited purpose did not impeach, question or impair parliamentary freedom of speech and debate.<sup>74</sup> Fryberg J found that neither the allegation of indirect damage caused by the tabling of the letter, nor that of publication of defamatory material in Parliament caused the statement of claim to constitute an impeachment of parliamentary freedoms.<sup>75</sup>

Dissenting, Jerrard JA held that, where proof of publication of words in Parliament is relied on, even in an action brought against third parties, the proceedings in Parliament are called into question. Jerrard JA reasoned that 'Proving that the Minister was the medium for the defendant's message means that a sufficient reason for the Minister's making the statement to Parliament is established to the court's satisfaction'.<sup>76</sup> He further argued that a foreseeable consequence of allowing the appeal would be unwillingness of citizens to provide information to MPs, with consequences for proceedings in Parliament.<sup>77</sup>

In contrast, McPherson JA found that parliamentary democracy in Australia is 'sufficiently vigorous' not to be threatened by such considerations. He stated that the plaintiff's statement of claim involved no allegation that the Minister's motives

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<sup>74</sup> [2004] 2 Od R 599; [2004] QCA 223 at para 9.

<sup>75</sup> [2004] 2 Od R 599; [2004] QCA 223 at para 89.

<sup>76</sup> [2004] 2 Od R 599; [2004] QCA 223 at para 31.

<sup>77</sup> [2004] 2 Od R 599; [2004] QCA 223 at para 34.

were improper. The adverse consequences asserted were not against the Minister but against those who provided the letter to her, knowing it would become public knowledge. McPherson JA continued:

That does not reflect, nor is it intended to reflect, on the Minister, who was simply informing Parliament of what the letter said. Nor do I consider that she was or would have been inhibited in any way by the risk, if she had contemplated it, that, by doing so, the defendant's might, if the plaintiff brought these proceedings for defamation, be likely to incur liability for larger damages by reason of the potential for greater publicity following the Minister's action.<sup>78</sup>

It should be said, however, that the views of Jerrard JA would seem to be more consistent with the continued provision of information to Members of Parliament, the flow of which should not be impeded if parliamentary democracy is to remain vigorous. Writing in a similar vein, Campbell and Groves comment:

The reasoning of the majority of the court in *Erglis* does not sit easily with the wider purpose of parliamentary privilege. The fundamental purpose of the freedom of speech embodied in Art 9 of the Bill of Rights and its successors is to grant members the freedom to say in parliament what they wish without incurring possible legal liability. That right can be impeded if people who provide information to members of parliament face liability, or increased liability, when a member who receives information subsequently uses it in proceedings of parliament. This possibility might inhibit the conduct of members of parliament and is, therefore, in tension with the freedom of speech and debate in parliament. The right of citizens to complain to members of parliament about a wide range of issues is a cornerstone of modern democratic government. That right might be hampered if citizens could face increased legal liability as a result of having complained to a member of parliament.<sup>79</sup>

It is an instance of where the courts by piecemeal, case by case means arrive at conclusions which strike at the *raison d'être* behind parliamentary privilege.

### **Canada (House of Commons) v Vaid<sup>80</sup>**

Vaid is a different category of privilege case, one concerning the exclusive cognisance of Parliament over its own 'internal affairs' – or more specifically the exclusive jurisdiction over 'the management of employees'.<sup>81</sup> The case involved the Speaker's chauffeur who claimed he had been constructively dismissed, contrary to the Canadian Human Right Act. There were two limbs to the case.

***Abrogation of parliamentary privilege:*** One question was whether express statutory words are needed for the abrogation of parliamentary privilege? Traditionally, the interpretive rule is that unmistakable and unambiguous language is required to

<sup>78</sup> [2004] 2 Od R 599; [2004] QCA 223 at para 11.

<sup>79</sup> E Campbell and M Groves, 'Correspondence with Members of Parliament' (2006) 11(3) *Media and Arts Law Review* 227 at 235.

<sup>80</sup> [2005] SCR 667.

<sup>81</sup> [2005] SCR 667 at para 50.

abrogate parliamentary privilege.<sup>82</sup> The rule is a shield for the protection of parliamentary privilege against the inadvertent or implied operation of legislative measures, as in the case of statutory secrecy provisions.

In *Vaid*, the ‘express abrogation’ rule was decisively rejected by the Court on two grounds. First, it was explained that the argument ‘presupposes the prior establishment of a parliamentary privilege, which has not been done’. Secondly, the Court said that the ‘presumption’ suggested by Lord Hatherley 135 years ago ‘is out of step with modern principles of statutory interpretation in Canada’. Referred to in this context was the second edition of Driedger’s *Construction of Statutes*, which states:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.<sup>83</sup>

The argument appears to be therefore that an Act of Parliament can by necessary implication limit parliamentary privilege, where this is perceived to be consistent with ‘the intention of Parliament’. The fact therefore that the Canadian Human Rights Act did not expressly indicate that it was intended to extend to employees of Parliament was not determinative of the issue. Indeed, that Act was said to be a ‘quasi-constitutional document’ and any exemption from it had to be ‘clearly stated’.<sup>84</sup>

This is an important finding. On one view, it is the thin end of the wedge, with *Odgers’ Australian Senate Practice* commenting, if the ‘express words’ rule is abandoned, ‘there is no end to the provisions which may be interpreted as inhibiting the powers of the Houses and their committees’.<sup>85</sup>

**Exclusive cognisance:** The second limb in *Vaid* was whether Parliament is a statute-free zone? This is a matter of debate. Geoffrey Lock has argued that only in the *Graham-Campbell* case in 1935<sup>86</sup> was it asserted that Parliament is a statute-free zone for all purposes. In that English case the court would not hear a complaint about the selling of liquor in the parliamentary precincts without the necessary licence. The provision of ‘refreshment for the mind in the library and refreshment for the body in suitable places’ was judged to be ‘connected with the affairs of the House’.

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<sup>82</sup> *Criminal Justice Commission v Parliamentary Criminal Justice Commissioner* (2002) 2 Qd R 8 at 23; *Duke of Newcastle v Morris* (1870) LR 4 HL 661.

<sup>83</sup> [2005] SCR 667 at para 80.

<sup>84</sup> [2005] SCR 667 at para 81.

<sup>85</sup> H Evans ed, *Odgers’ Australian Senate Practice*, 11<sup>th</sup> ed, Department of the Senate 2004, pp 51-52.

<sup>86</sup> [1935] 1 KB 594.

In *Vaid*, the Canadian Supreme Court reconsidered the issue and rejected the ‘fundamentalist’ interpretation of the exclusive cognisance doctrine. Applying the ‘test of necessity’ it was held that exclusive and unreviewable jurisdiction over all House employees was not necessary to protect the functioning of the House of Commons. The attachment of privilege to ‘some’ parliamentary employees was undoubtedly necessary, but not those who were only indirectly connected to the legislative and deliberative functions of the House.<sup>87</sup> This was the case in respect to the Speaker’s chauffeur. Distinguishing the *Graham-Campbell* case, Binnie J concluded that

British authority does not establish that the House of Commons at Westminster is immunized by privilege in the conduct of all labour relations with all employees irrespective of whether those categories of employees have any connection (or nexus) with its legislative or deliberative functions, or its role in holding the government accountable.<sup>88</sup>

On behalf of the Court, Binnie J formulated of the test of necessity in these terms:

In order to sustain a claim of parliamentary privilege, the assembly or member seeking its immunity must show that the sphere of activity for which privilege is claimed is so closely and directly connected with the fulfillment by the assembly or its members of their functions as a legislative and deliberative body, including the assembly’s work in holding the government to account, that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their work with dignity and efficiency.<sup>89</sup>

In its analysis the Court relied heavily on the UK Joint Committee’s First Report. Quoted with approval was the Joint Committee’s account of the difficulties involved in drawing a ‘dividing line’ between privilege and non-privileged activities. It said:

Perhaps the nearest approach to a definition is that the areas in which the courts ought not to intervene extend beyond proceedings in Parliament, but the privileged areas must be so closely and directly connected with proceedings in Parliament that intervention by the courts would be inconsistent with Parliament’s sovereignty as a legislative and deliberative assembly.<sup>90</sup>

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<sup>87</sup> [2005] SCR 667 at para 75.

<sup>88</sup> [2005] SCR 667 at para 70.

<sup>89</sup> [2005] SCR 667 at para 46.

<sup>90</sup> Joint Committee on Parliamentary Privilege, n 9, Ch 5 para 247; *Vaid* para 44. The UK Joint Committee recommended legislation clarifying that, as to activities which are not related to the internal proceedings of Parliament, ‘there should be a principle of statutory interpretation that in the absence of a contrary expression of intention Acts of Parliament bind both Houses’. Consistent with its general approach, the report said, ‘For the future, whenever Parliament is to be exempt, a reasoned case should be made out and debated as the legislation proceeds through Parliament’. (Joint Committee on Parliamentary Privilege, Ch 5 para 251) The onus therefore should be on Parliament to establish its case for exemption.

The Joint Committee's argument appears to be that Parliament's control of its internal affairs derives exclusively from the immunity for freedom of speech in Article 9.

What emerges from *Vaid* is that some employees and officers of Parliament, those directly connected with the fulfilment of Parliament's constitutional functions, would come under the exclusive cognisance doctrine, as belonging to the 'internal affairs' of Parliament. Other employees would not. And it is for the courts to decide either way on the extent of the immunity granted to Parliament from the general law in each particular instance.

### **Bear v State of South Australia**<sup>91</sup>

Australian authority is thin on the ground. In *Bear* a single judge of the State's Industrial Court rules that an injury to a waitress in the parliamentary dining room was not part of the internal business of Parliament and was not protected by privilege. The relationship in question was one between 'Parliament and a stranger'.

### **President of the Legislative Council (South Australia) v Kosmas**<sup>92</sup>

Recently, the question was revisited in *Kosmas*. The facts were that George Kosmas worked as a committee secretary to the Legislative Review Committee. He claimed, further to the *Fair Work Act 1994*, that he was not paid overtime over a period from April 2003 to May 2005. He applied to the Industrial Relations Court for relief. In response it was claimed on behalf of the Legislative Council that, on the grounds of parliamentary privilege, a person working in such a capacity had no access to the Court to enforce any rights they might otherwise have claimed. The nature of the work done by Kosmas was directly connected to the business of Parliament: 'It was therefore within the "internal affairs" of Parliament'. At first instance, it was further argued that parliamentary privilege exists in respect of all employees of Parliament (para 44), but this does not seem to have been pursued on appeal to the full Court.

At first instance, a single judge of the Industrial Court – Judge Gilchrist – found in favour of Kosmas. It was said that the privilege sought was not established by any authority. *Vaid* was considered, about which it was said that

the observations made in *Vaid* about parliamentary privilege extending to some employees of Parliament were *obiter*, not clearly explained and were declared by a Court that has no authority over this Court.<sup>93</sup>

On appeal, this finding was overturned. The arguments submitted by Kosmas were as follows:

<sup>91</sup> (1981) 48 SAIR 604.

<sup>92</sup> [2008] SAIRC 41.

<sup>93</sup> *Kosmas v Legislative Council (SA) and Others* [2007] SAIRC 86 at 61.

The principle question for determination was whether there was an established privilege of the House under which his circumstances fell.

The only established principle was that of ‘proceedings in Parliament’, as embodied in Article 9. This was primarily a technical parliamentary term, it was submitted, which referred to formal action, usually a decision taken by the House in its collective capacity but also the process of debate by which the House reached a decision. It was really quite a limited area.

A narrow approach was argued for in respect to ‘proceedings in Parliament’. Moreover it was submitted the term ‘internal affairs’ did not expand the scope beyond what was included in ‘proceedings in Parliament’.

The circumstances under contest involved what was described in *Vaid* as “management of employees” and that was not encompassed by the privilege.

To attract the privilege the connection needed to be to an actual part of the proceedings in Parliament.

The employment of the Secretary to a Committee or a Research Officer did not fall within that scope. Kosmas contended at most only 10% of his duties with the Legislative Review Committee would meet that description. He acknowledged there were employees in the House with respect to whom privilege would operate, (though not his own position), the question was determined not by labels but by the predominance of the actual function discharged.

In the alternative, Kosmas argued that, if the privilege was to be relied on, it had to be proved by reference to the necessity test that such a privilege was required.

The Full Court’s analysis was based on the judgment of McHugh J in *Egan v Willis*,<sup>94</sup> where he reviewed the exclusive cognisance doctrine by reference to the case law, notably *Stockdale v Hansard* and *Bradlaugh v Gosset*. The latter is authority for the proposition that Parliament has control over the administration of its own internal proceedings even when this contradicts a statutory provision. In the last case *Bradlaugh*, an atheist, was disqualified from membership of the Commons after refusing to take the oath, even where the Parliamentary Oaths Act 1866 permitted the making of an affirmation. ‘The jurisdiction of the Houses over their own members, their right to impose discipline within their walls’ was declared to be ‘absolute and exclusive’.<sup>95</sup> McHugh J put it thus:

the common law courts will not examine the administration of the law — including statute law — within the walls of Parliament when the matters involved relate only to the internal procedure of a House of Parliament.<sup>96</sup>

The law laid down in *Bradlaugh* was said by McHugh J to state correctly the relationship between the courts and Parliament in NSW.<sup>97</sup> It was also taken by the South Australian Industrial Relations Court to correctly state the same relationship in that State.

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<sup>94</sup> (1998) 195 CLR 424.

<sup>95</sup> (1884) 12 QBD 271 at 275 (per Lord Coleridge CJ).

<sup>96</sup> (1998) 195 CLR 424 at p 461.

<sup>97</sup> (1998) 195 CLR 424 at p 462.



Against Kosmas, it was said that the term ‘internal affairs’ is not reducible to ‘proceedings in Parliament’, just as Article 9 is not the only source of the privileges of the South Australian Parliament. The main statutory provision is s 38 of the *Constitution Act 1934*, by which the privileges of the South Australian Parliament are defined in terms of those of the UK House of Commons as at 1856. However, as those privileges are not themselves defined by statute, the basis of the asserted privilege can be assumed to be ‘inherent’ in nature. One might further assume from this that the test of necessity would be applied. In fact, this was rejected by the Full Court which took the view, by reference to *Kielly v Carson*,<sup>98</sup> that the test would place the South Australian Parliament on the same footing as a ‘colonial legislature’<sup>99</sup>

The rejection of the necessity test may seem odd in the light of the Full Court’s reliance on *Vaid*. The relevance of *Vaid* was acknowledged when it was noted that the Canadian House of Commons, like the South Australian Parliament, takes ‘its privileges as they existed in the House of Commons of the UK at a particular date’.<sup>100</sup> Whereas Judge Gilchrist at first instance had declined to follow that decision, the Full Court said ‘We are of a different view as to the application of that authority to the facts before us’.<sup>101</sup> Justices McCusker, Hannon and Farrell went on to say:

The matters we draw from *Vaid* applicable to the matter we must decide include the following. Firstly the claimed privilege has been authoritatively established in relation to certain employees of the House of Commons at Westminster. That is where the employment activity for which the 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 including the Assembly’s work in holding the Government to account 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. (emphasis added)

The Full Court continued

*Certainly that matter is a question of fact and perhaps degree.* It is approached in our view by notionally dividing those engaged in the House into two groups. Those engaged in the direct business of the House, the investigation, debate and legislating and those indirectly engaged. The latter are not included in the privilege. The decisions, particularly *Vaid*, recognise there is no bright line that always divides the two classes of employees. (emphasis added)<sup>102</sup>

And further

On that basis the chauffeur in *Vaid* would be clearly indirect as would be the catering staff in *Bear v State of South Australia*. The management function

<sup>98</sup> (1842) 4 Moo PC 63; 13 ER 225.

<sup>99</sup> (1981) 48 SAIR 604 at para 37.

<sup>100</sup> (1981) 48 SAIR 604 at para 35. The Canadian Parliament defines its privileges by reference to those of the UK House of Commons as at 1867 (*Parliament of Canada Act*, s 4).

<sup>101</sup> (1981) 48 SAIR 604 at para 39.

<sup>102</sup> (1981) 48 SAIR 604 at para 40.

regarding the provision of services to the House would also be indirect. In contrast a primary function closely and directly associated with the fulfilment of the key function of the legislature as undertaken by the respondent here would seem directly connected.<sup>103</sup>

The Full Court concluded:

The characterisation of the respondent's function is determined by what he was engaged to do even if he does not attend to such duties all the time. The job specifications detailed in the evidence make clear that he acts as manager of the Committee on behalf of the members and his duties included ensuring the, 'Committee's investigations are undertaken efficiently and expeditiously', as well as researching, reporting and supervising other Committee staff. That is he was directly engaged in the purpose and the business of Parliament. The jurisdiction of this Court is in our conclusion therefore removed by privilege.<sup>104</sup>

Thus, the case was treated as 'internal' to Parliament, and one to which the rule of non-intervention by the courts applied. Whether it was correctly decided is a matter for debate. At the very least it indicates that there is life yet in the exclusive cognisance doctrine, as formulated by reference to Parliament's constitutional role.<sup>105</sup> As Lord Nicholls of Birkenhead observed in *R (Jackson) v Attorney General*:

This principle [the sovereign right of the courts to interpret statutes] is as fundamental in this country's constitution as the principle that Parliament has exclusive cognisance (jurisdiction) over its own affairs.<sup>106</sup>

### ***Concluding Comments***

Case law is rarely compact or tidy, a process of reasoning all pointing in the one direction. Nonetheless, at least in relation to certain categories of cases – freedom of speech in Parliament and the use of ministerial statements in Parliament – there is something akin to a pattern emerging, away from the exclusionary rule and towards the administration of justice. This may be viewed as peculiar to the law of Parliament or as part of broader trend. According to Goldsworthy 'For causes that are obscure, an increase in both the ability and willingness of judges to control the other organs of government appears to be a worldwide phenomenon'.<sup>107</sup> A similar observation is found in the 23<sup>rd</sup> edition of *May's Parliamentary Practice*, which noted 'an expansion in the role of the courts which has led them into broader areas

<sup>103</sup> (1981) 48 SAIR 604 at para 41.

<sup>104</sup> (1981) 48 SAIR 604 at para 44.

<sup>105</sup> The same might be said in respect of such cases as *Halden v Marks* (1995) 17 WAR 447 and *Crane v Gething* (2000) 169 ALR 727. These cases are discussed in M Groves and E Campbell, 'Parliamentary privilege and the courts: questions of justiciability' (Winter 2007) 7(2) *Oxford University Commonwealth Journal* 175.

<sup>106</sup> [2005] 3WLR 733 at para 51. Supporters of fox hunting argued that the Hunting Act 2004 was not a valid Act, on the ground that the 1949 amendments to the *Parliament Act 1911* were invalid and that the procedures used to pass the Hunting Act — without the consent of the House of Lords — were also invalid.

<sup>107</sup> J Goldsworthy, *The Sovereignty of Parliament: History and Philosophy*, Clarendon Press 1999, p 3.

of public life than was the case half a century ago...'.<sup>108</sup> It is claimed that the rule of law is now the dominant constitutional principle, as much in the UK, as it is in Australia with its written constitution.<sup>109</sup> Comity and non-intervention notwithstanding, it may be that anything lying to one side of general law, the vestiges of history embodied in the prerogatives of the Crown and the privileges of Parliament will be led by a firm hand into the jurisdiction of the courts. This may be by reliance on Article 9 or other statutory formulations of parliamentary privilege, or by other means.

In relation to the freedom of speech immunity, Bernard Wright has suggested that Parliament may be 'asked to amend the law to accommodate what can be called the "administration of justice" interest'. He also quotes Professor Lindell as suggesting that 'this area of the law should be absorbed as part of the wider law of public interest immunity'.<sup>110</sup>

Whether a root and branch change of this kind occurs remains to be seen. Do the courts really need assistance from Parliament in this respect? It may be that in *Toussaint*, where the use of ministerial statements in Parliament was at issue, first steps have already been taken in the direction of some kind of public interest test. A final observation is that, for its part, the common law tends to develop, not by leaps and bounds, but by less spectacular means, by what JWF Allison calls 'the economy of the common law', by which he means the pragmatic, piecemeal development of the law, where the courts avoid any semblance of radical change.<sup>111</sup> ▲

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<sup>108</sup> Erskine May, n 10, p 177.

<sup>109</sup> *Jackson* [2005] 1 AC 262 at para 107 (Lord Hope).

<sup>110</sup> B Wright, *Patterns of change: parliamentary privilege*, ANU Parliamentary Studies Paper 2, 2008, at 8.7-8.8.

<sup>111</sup> JWF Allison, *The English Historical Constitution*, Cambridge University Press 2007, pp 125-127.