The Role of the Clerk in Releasing the Record of Parliamentary Proceedings: Identifying and Controlling the Risks

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Introduction

This paper identifies some legal and practical issues arising from the widespread dissemination of the record of parliamentary proceedings,[1] with a particular focus on the audiovisual record. It discusses risks associated with the use of the parliamentary record in light of changing technologies and the role that is played by clerks in responding to the threats and opportunities.

Background

The ACT Legislative Assembly Secretariat has extended its webstreaming service and now allows users to download material from a page on the Assembly's website providing near instant durable audio visual access to what is said in the chamber or a committee hearing. The Assembly has relied on advice provided by the Australian Capital Territory Government Solicitor that 'the publication or broadcasting of the proceedings of the Assembly and of its committees, whether *via* the Internet or otherwise, attract the broad protections provided by section 9 of the LA(B) Act'.[2] This seems to be a 'legal clearance' for employees of the Secretariat to broadcast the Assembly's proceedings in any electronic format, including via a downloadable audio visual record on the Internet, apart from a reference to a slight risk posed by the High Court's decision in *Dow Jones and Company Inc. v Gutnick*,[3] relating to publication in another jurisdiction. However, the fact that other Australian parliaments have not rushed to offer this service has prompted this review of legal and policy issues and risks relating to the dissemination of the record of parliamentary proceedings.

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Purpose of Paper

The question of whether a parliament should authorise the reuse or rebroadcast of the record of parliamentary proceedings is raised by parliamentary officers from time to time. An agreement between at least some parliaments on an approach that recognises competing interests and attempts to mitigate identified risks may go some way towards protecting the reputation of parliaments, parliamentarians and other individuals, while meeting the public interest in ensuring an open and transparent democratic system. Whilst the focus of the paper may appear to be more practical than academic, it will be informed by traditional and contemporary thinking on relevant legal issues.

The Story of Hansard

For centuries the record of 'things done' was available in the printed *Votes and Proceedings* of the House of Commons but the publication of 'things said' was punishable as a breach of the privileges of the House. By the middle of the 18th century demand for reports of parliamentary proceedings led to thinly disguised accounts of debates being printed in monthly magazines. [4]

> William Cobbett, the English farmer, pamphleteer, journalist and parliamentary reformer gave Thomas Curson Hansard the contract to print *Debates*, the first structured attempt to record the proceedings of the British Parliament in 1809. Notwithstanding a spell in King's Bench prison following a conviction of treasonous libel in another of Cobbett's publications, Hansard bought out Cobbett's interest in *Debates* in 1812 and the publication, based on reprints of press reports, flourished.[5]

The landmark case *Stockdale v Hansard*[6] in which it was held that publications authorised by the House of Commons did not attract parliamentary privilege led to the enactment of the Parliamentary Papers Act 1840.[7] The Act provides that publications or correct copies thereof made under the House's authority enjoy absolute privilege against civil or criminal proceedings and that extracts are protected by qualified privilege.[8]

In 1907 a Select Committee recommended the establishment of the *Official Report* and took control of the production of the record of parliamentary debates. Similar provisions apply in Australian jurisdictions which have taken their lead from parliamentary practices established by the House of Commons.

Absolute privilege exists where no action may lie for a statement, even if made with malice; it is not limited to action for defamation. Qualified privilege exists where a person is not liable to a successful action for defamation if certain conditions are fulfilled, for example, if the statement is not made with malicious intention.[9]

Under the UK Act absolute privilege is enjoyed by a person making a statement in the course of proceedings in parliament or by a person publishing a copy of

proceedings provided its 'correctness'[10] can be verified, even if malice is intended, and qualified privilege applies to extracts which are published 'bona fide and without malice'.

Development of Audio and Visual Records

The New Zealand and Australian parliaments were ahead of the UK in radio broadcasting of parliamentary proceedings and the Australian House of Representatives commenced strictly controlled official radio broadcasts in 1946. Since 1988 all radio stations or networks have also been permitted to broadcast excerpts from proceedings, again in accordance with certain conditions. According to House of Representatives Practice,[11]

> Only qualified privilege may be held to attach to the broadcast of excerpts of proceedings, and it may be considered that this situation is appropriate given the fact that those involved in the broadcasting of excerpts act essentially on their own initiative, whereas those involved in the official radio broadcast and re-broadcast of proceedings have no discretion in the matter…

Live televising of House of Representatives was authorised in 1992 and other parliaments have followed suit. Television coverage has generally been strictly controlled with parliaments using their own resources to provide a live feed to external organisations, although in the Queensland and ACT parliaments television camera operators are allowed to film from the floor of the chamber. Guidelines for camera operators are designed to ensure that coverage is appropriate. Live webstreaming over the Internet is now common practice.

Public versus Private Interest in Proceedings of Parliament

An individual's right to sue for defamation

Two well known cases, the aforementioned Stockdale v Hansard and Lange v the Australian Broadcasting Corporation[12] illustrate competing interests at play in making parliamentary proceedings widely available, and the application of the defence of privilege. In the first, a private citizen wanted to protect his own reputation by suing the publishers of a Hansard report which claimed he had circulated indecent material in Newgate prison. The conferring of absolute privilege on the Hansard report removed future potential for action.

In Lange the High Court established an expanded form of qualified privilege which serves to make the common law of defamation conform with the implied constitutional freedom of communication, according to Justice McHugh '… a freedom from laws that effectively prevent the members of the Australian community from communicating with each other about political and government matters relevant to the system of representative and responsible government provided for by the Constitution.'[13]

In these cases an individual's right to take civil action against publishers or broadcasters of political material gives way to the wider public interest. Ian Loveland[14] draws on aspects of Lange v ABC and commends the experience that may be drawn from other jurisdictions when arguing that English libel law has defended the reputations of politicians and been insufficiently alert to the legitimate interest of the electorate in consuming political information about those who govern us.[15]

There is probably no need for a clerk to seek to protect the reputation of his members by not recommending the widest possible dissemination of the parliamentary record.

Effective repetition

In *Buchanan v Jennings*[16] the New Zealand Privy Council considered that the established principle that re-publication outside Parliament of a statement previously made in Parliament is not protected by absolute privilege applied also to later statements outside the House that relate to, but do not repeat in full, what was said in the House and that using the parliamentary record in these circumstances to prove what was effectively said outside the House did not infringe Article 9 of the Bill of Rights 1688 (Imp.) which prevents proceedings in Parliament being impeached or questioned in any court.[17]

On 31 May 2005 the New Zealand Privileges Committee reported that this development could have a potentially 'chilling' effect on public debate, with members and witnesses being reluctant to submit themselves to subsequent interview for fear of losing their parliamentary immunity. The committee believed that news media are also subject to the principle of 'effective repetition' so a television or radio broadcast carrying an 'effective repetition' would open up the possibility of an action against the media.[18]

But a Clerk might feel that any concern relating to a 'chilling effect on public debate' would not be realised merely by making more widely available and in different mediums the proceedings which may be judged in court. A rebroadcast of those proceedings, by a news organisation, by the member involved, on a personal website for example, or by any other individual would attract qualified privilege if it was a fair and accurate report.

Proceedings of Parliament — what constitutes proceedings?

A Clerk might be concerned about what constitutes proceedings in parliament. The *Parliamentary Privileges Act* 1987[19] provides that 'proceedings in Parliament' mean all words spoken and acts done in the course of, or for the purposes of or incidental to the transacting of the business of a House.

Are all words spoken in a parliamentary chamber 'words spoken in the course of, or for the purposes of or incidental to the transacting of the business of a House? Not necessarily. Interjections for example are recorded in *Hansard* only if they are responded to by the member who has the call or if attention is drawn to them by the Speaker, usually in the form of a warning. Most of them are ignored and do not become part of the record of proceedings. *House of Representatives Practice* states that this practice has been followed since 1904.[20]

If the audio-visual record of proceedings is captured in-house it is possible to exclude from the live broadcast the recording channels carrying the extraneous words and they are unlikely to form part of the audio visual record. External broadcasters usually take the live audio feed which is being streamed by the parliament but there appears to be nothing to stop them recording their own audio which may include comments deemed not to be part of proceedings by virtue of their omission from the Hansard record. In fact, *House of Representatives Practice* expressly provides that 'Any person permitted by a committee to attend a hearing may make an audio recording of the proceedings. It is the responsibility of the person concerned to ensure that the recording is not used improperly…'

Would absolute or qualified privilege attach to an audio recording captured by someone attending a parliamentary committee hearing and replayed via a community radio station if that recording contained defamatory words that were not recorded in the official Hansard transcript of evidence? What if someone took exception and sued the re-broadcaster for defamation? This could have unfortunate, albeit unlikely, consequences for a person acting responsibly in rebroadcasting parliamentary proceedings. There is uncertainty which could only be removed if all interjections and unreported comments made within a debating chamber were included in a statutory definition of proceedings in parliament.

There are examples of this kind of dilemma. An exchange of words in the Main Committee of the House of Representatives between the member for Robertson and the member for Indi on 29 May 2008 was referred to the House of Representatives Standing Committee of Privileges and Members' Interests.[21] At issue was the comment that 'Evil thoughts will turn your child into a demon'. The comments were clearly audible but, in accordance with Hansard editorial policy,[22] were not recorded in the official record. The member for Robertson was called upon to withdraw but did not do so; however, she apologised the following day. The incident was widely reported in the media including on YouTube.

In this case no action was sought other than a withdrawal of the comments; however the potential for action in defamation could well arise in a similar situation and it is difficult to predict a court's interpretation of proceedings in Parliament in such a case. The Deputy Clerk of the House of Representatives believes that a court would not step lightly into such an interpretation but concedes that the possibility exists.[23]

The potential risk becomes even more apparent when referenced by a recent exchange between the Speaker of the ACT Legislative Assembly and WIN News Pty Ltd, the Speaker having observed some footage of members interjecting during a division in the Assembly proceedings which did not conform to the broadcasting guidelines.[24] In defence the news reporter claimed to understand that 'if Division is called for, an action requiring the vote of all Members, then all present MLAs become inherently referred to in debate. As such allowing the filming of reactions.'[25]

This example is clearly dealt with in *House of Representatives Practice* which states

> Remarks made during a division are not regarded as part of the proceedings of the House and are not recorded by Hansard. The Speaker has pointed out to Members that such remarks might not be covered by privilege and that this also has implications for media reports.[26]

A distinct lack of certainty is inherent in the phrases 'might not be' and 'implications for'. Who is at risk in these cases? Not the Clerk or his employees if their parliaments have enacted legislation similar to the *Legislative Assembly (Broadcasting) Act 2001* but members and re-broadcasters should be alerted to the risk.

Not everyone agrees with *House of Representatives Practice.*[27] Neil Laurie, Clerk of the Queensland Parliament, has a different view about interjections including those made during a division.[28] He believes they are 'incidental to the transacting of the business of a House'.[29]

A more hypothetical possibility to consider is the status of a question or answer which is ruled out of order by a Speaker. Again, according to *House of Representatives Practice*[30] 'The Chair has ruled that questions ruled out of order should not be included in Hansard, however in more recent years they have been published.' If they are not published and there is no record of them it would be difficult to include them in proceedings of parliament, however, the very fact of an audio-visual record of parliamentary proceedings makes it less likely that chairs will rule on the non-publication in Hansard of words spoken in a debating chamber.

Even if the practice of not publishing questions ruled out of order has ceased, there may still be some uncertainty as to whether it could be argued, for example, that an answer which is terminated on the grounds that it is not relevant[31] remains part of the proceedings. To suggest that an answer ruled out of order as irrelevant is no longer a proceeding in parliament might be extreme but it may not be the most bizarre suggestion on which a clerk has been called to provide advice.

Right of Reply

What of the interests of an individual whose reputation is maligned by a statement made in parliament under the cover of absolute parliamentary privilege? Speaker Snedden in 1979 did not advocate inventing rules which might prevent privileged attacks on individuals, stating that it was a matter of judgment for individual members and that curtailment of the right might prevent the legitimate airing of matters of public interest.[32] The matter was raised again in 1994 by the House of Representatives Joint select Committee on Parliamentary Privilege which recommended a policy of restraint such as operates in the House of Commons; however the recommendation has not been adopted.[33]

The Legislative Assembly for the ACT has adopted a resolution of continuing effect which 'provides a guide to Members in exercising their freedom of speech in the Assembly'.[34]

Jurisdictions which provide citizens with a right of reply (and most do, with the exception of the UK Parliament[35]) may determine that a citizen's response should be incorporated in Hansard. But Hansard is not the only medium in which the damage has been done — what capacity for redress is there in the audio visual record? There is none provided and the offending remarks remain on the audiovisual record without any further explanation or qualification. The prospect of serious damage being caused by inadvertent or malicious disclosure of a court suppression order (similar issues would apply to matters of national security) is dealt with in the following section.

Breach of Court Orders

A matter of privilege arose in the New Zealand House of Representatives when on 26 June 2008 Heather Roy MP made statements in the House that may have been in breach of a suppression order. In a paper prepared to assist members in determining how the Committee might proceed, Debra Angus, Deputy Clerk of the House of Representatives advised that:

> Various Speakers' rulings are clear that members should treat their privilege of freedom of speech with the utmost respect and use it only in the public interest. If a court has made a name suppression order, this must be presumed to have been made for a good reason and should be observed by members unless the public interest impels them to act otherwise. Such an order should only be disregarded in the most exceptional cases or extraordinary circumstances.
>
> While members are not bound in the House by a court suppression order, freedom of speech in Parliament is not a licence for anyone to break the laws of the country outside the House. No protection exists in relation to any kind of liability, other than defamation that may arise from repeating outside the House something that was said inside the House. A press report of proceedings in the House that breaches a court suppression order may be in contempt of court.[36]

The paper included a number of similar examples of identities of persons whose names were the subject of suppression orders being revealed in the New Zealand House of Representatives and in the House of Commons. Four examples from the New Zealand Parliament were provided, and one from the House of Commons.

The number of occurrences is interesting in that it might be seen as a reason for action or lack of action depending on the perceived level of risk. A report of the House of Commons Procedure Committee concluded that it was not necessary to take action as a result of one specific case, given the importance the House attaches to protecting the right of parliament to freedom of speech. The committee urged members to exercise the greatest care in avoiding breaches of court orders and suggested that should there be a number of instances of such breaches, then the House would be well advised to adopt a resolution limiting any reference to publication of material subject to a court suppression order.[37]

The level of risk was also pointed to in submissions to the New Zealand inquiry, among them one from Philip Joseph, Professor of Law at the University of Canterbury.[38] He drew attention to the Report of the House of Lords and House of Commons Joint Committee on Parliamentary Privilege[39] which 'noted that breach of court orders in parliamentary proceedings in Britain was 'extremely rare'' and questioned whether the mischief is more prevalent in New Zealand than in the United Kingdom. Professor Joseph's suggested remedies were 'contingent on whether the House believes there is a sufficient problem involving court orders, as to require action. That assessment should be made against the appreciation of the fundamental nature of the privilege of freedom of speech …which should not be restricted in the absence of a compelling need.'

A number of parliaments around the world responded to a similarly timed request for information on broadcasting policy from the Clerk-Assistant (Reporting Services) in the New Zealand House of Representatives.[40] Two specific questions related to whether protections were limited to defamation and asked for precedents testing the legal framework for broadcasting. The responses in the main indicated that these issues are untested. And this gives rise to a dilemma. Do Clerks recommend to their respective Houses that protections should be strengthened; and, if so, who for, or do they let sleeping dogs lie and await evidence from within their own jurisdictions that the breaching of court orders by members is a risk that needs to be mitigated?

The New Zealand Parliament having had the latest of such incidents referred to its Privileges Committee does consider that there is a risk both in relation to the likely occurrences of a breach and the lack of protection afforded to the publication and broadcast of Parliament's proceedings by the *Legislature Act 1908* (NZ) and the *Defamation Act 1992* (NZ). It has considered a number of suggestions for change and has recommended to the House that the Standing Orders be revised to limit statements made by members in Parliament in breach of court orders. They will need to apply to the Speaker to exercise his or her discretion in agreeing that a

matter is of sufficient importance to warrant such a breach and, in exercising that discretion, the Speaker will 'balance the privilege of freedom of speech against the public interest in maintaining confidence in the judicial resolution of disputes…'[41]

The Committee also recommended that knowingly breaching a court order, contrary to Standing Orders be included in the list of matters that might be considered a contempt 'because it could have a tendency to bring the House into disrepute.'[42]

Further it adopted a revised rule allowing a select committee to expunge from any *transcript* of proceedings any evidence or statement 'suppressed by an order of a New Zealand court.'[43] (But it made no reference to expunging the material from the *broadcast*, and did not accept recommendations to introduce delayed broadcasts to enable words to be beeped out or muted).[44]

The first actions of mitigation then are to reduce the risk of breaches occurring without prejudicing the privileges of the House; to seek to protect the House from disrepute by strengthening the contempt deterrent; and to expunge offensive material from the transcript.

The Committee made separate recommendations to the Government[45] including that it should amend the Legislature Act to provide protection by *absolute* privilege to the live broadcasts and delayed broadcasts or rebroadcasts that are made by order or under the authority of the House; and to protect by *qualified* privilege fair and accurate reports from extracts of proceedings, and the broadcast and other publication of extracts of proceedings that are not made by order or under the authority of the House of Representatives in a manner consistent with the provisions of the Defamation Act 1992.

It has also recommended addressing the concerns arising from the *Buchanan v Jennings* effective repetition case which were raised in 2005 (see paragraph 19).

Addressing the Copyright Issues

The ACT Legislative Assembly has a copyright statement on its website granting a general permission for personal or non-commercial use of parliamentary material but with the following restriction: 'Except as permitted above you must not copy, adapt, publish, distribute or commercialise any material contained on the site without the Legislative Assembly's permission.'[46]

The Commonwealth and Queensland Parliament websites have similar statements. These jurisdictions rely on the Commonwealth Copyright Act 1968. Queensland's Broadcast of Parliament Select Committee recommended that copyright of any vision of the proceedings of parliament captured by the television media is assigned to the parliament to seek to avoid a situation where the media owns copyright in the vision and may rebroadcast in a way that breaches the media guidelines without recourse by the Parliament.[47]The New Zealand Copyright Act 1994, however,

expressly excludes New Zealand parliamentary debates stating that 'No copyright exists in any of the following works, whenever those works were made…'[48]

The United Kingdom parliament reserves all parliamentary copyrights and invites people to apply on-line for a click-use parliamentary licence.[49]

. This licence does not include audio visual material and all live broadcasts of procedural coverage 'may not be directly linked to, reproduced, copied or downloaded without formal agreement from PARBUL (Parliamentary Broadcasting Unit Limited) or the Director of Parliamentary Broadcasting.

A recent study by the UK Parliament[50] highlighted the risks associated with allowing greater use of audio visual content, including disrespectful use of content, use out of context, use of inappropriate websites and manipulation of content. But it also recognised the potential benefits of wider access to parliamentary proceedings through social networking sites such as YouTube, including the opportunities for newer members of parliament to engage with a wider and younger portion of their electorates. It points out that 'The risk of not embracing these delivery methods are that it becomes ever harder to engage with the public as the perception grows that parliament is inaccessible and remote from the mainstream of public debate on the web.'

Allowing greater access to the audio-visual record of proceedings, while providing some sort of deterrent against misuse is not simple and, as can be seen in even a small number of jurisdictions, does not attract a consistent approach. The UK Parliament has a licensing arrangement (but not yet for broadcast material, perhaps this will come, along with a more permissive policy on reuse of audio visual material); the New Zealand Parliament excludes debates from its copyright law and the Australian jurisdictions noted above rely on a copyright statement on their websites, inviting people to seek permission if they wish to use parliamentary material for other than permissible reasons.

Even here, while parliamentary material is not to be used for political satire or ridicule how is this to be read against the fair dealing provision in section 41A of the Copyright Act[51] which states:

> A fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, does not constitute an infringement of the copyright in the work if it is for the purpose of parody or satire.

The questions of what is 'fair dealing' and whether a broadcast record of a proceeding in parliament is a 'literary, dramatic or musical work' would have to be settled but there does appear on the face of it to be some contradiction between the law and its potential application or at least some grounds for misinterpretation.

The UK study into parliamentary copyright also makes a salient point when it states 'It is important for Members in both Houses to be aware that whatever decisions on

copyright are taken, there is very little prospect of controlling the use of video clips of Parliamentary proceedings effectively. The relatively low incidence of abuses to date is probably more to do with a lack of interest than the current licensing rules providing an effective control and deterrent.'[52]

In risk management terms then it may be that as with potential breaches of suppression orders the likelihood of the risk of misuse is low.

Requests from Third-Party Publishers

The growing interest in parliamentary proceedings and the increasing use of newer technologies has also led to challenges to the Parliament's right to be the sole publisher of parliamentary material. Open Australia is a not-for-profit organisation which claims to be 'bringing transparency to Australia's democratic processes and public institutions.'[53] It has sought permission from Federal and State parliaments to republish their *Hansard* reports 'in a far more intuitive way. The website makes it possible for users to search and track their MPs, and also allows them to subscribe to RSS feeds and email alerts of their MPs votes and parliamentary speeches.'[54]

Some reservations about authorising the republication have been expressed by clerks, including Neil Laurie, Clerk of the Queensland Parliament who states:

> A key issue is whether OpenAustralia should be given the status and protection of an 'authorised publisher' as an engaged entity for the publication of an authorised parliamentary record as per section 51(4)(g) of the *Parliament of Queensland Act 2001*. I do not believe it would be appropriate for me to give this authority as this sort of arrangement was not contemplated by the *Act*;
>
> Therefore, if permission was granted, it would be on the basis that OpenAustralia is not an authorised publisher under the Act and that OpenAustralia accepts all risks of any legal liability arising from the further publication of the parliamentary record — which would not be absolutely protected by parliamentary privilege.
>
> Most significantly, I am concerned about an alternative 'non-official' site upon which lays the Queensland Parliament's official Record of Proceedings but [over] which no one in authority within the Parliamentary Service has control.[55]

The 'authorised publisher' concern may be valid when read against section 57 of the Parliament of Queensland Act[56] which states:

> Reports of the debates in the Assembly published in printed form under the authority of the Assembly may be received in evidence as an accurate record of what happened in the Assembly.
>
> Evidence must not be admitted contradicting, adding to or otherwise impugning the accuracy of the reports.

This would appear to confer protection on an authorised publisher notwithstanding whether or not the republished report was a correct copy and one can readily understand a clerk's reluctance to allow this possibility.

Under the general permissions contained within the copyright notice,[57] OpenAustralia would be entitled to fairly deal with the material for the purposes of criticism or review, but would not be permitted to reproduce the material for commercial purposes. If OpenAustralia is genuinely a not-for profit organisation, one wonders why they would need the Clerk's permission. It may be that another of the Clerk's concerns is more worrying, ie:

> I am concerned about the demands that may ultimately be placed upon the Queensland Parliamentary Service by OpenAustralia in terms of supply of information…it would become a 'special stakeholder' … to the extent that we would have to take into account OpenAustralia's needs when any adjustments have to be made to our own systems.[58]

The key issue may be more one of resourcing and control of methods of publication than privilege.

Where does this leave the audio-visual record when similar requests are made? Are the same concerns evident? According to Harry Evans recently retired longstanding Clerk of the Senate, 'there are no dangers or difficulties of providing near instant downloadable access to broadcastings that are not also involved in any other form of access to proceedings, going back to the printed Hansard'.[59]

Managing the Risks and Strengthening the Controls

Summary of risks

In the sections above some of the risks associated with dissemination of the record of proceedings have been described. No real differences have emerged in the risks attaching to different forms of dissemination, i.e. text, audio and video; what seems to be at issue is the opportunities that new technologies and networking sites provide to manipulate the record and to magnify any harm done by engaging a much wider audience than the traditional printed record ever reached, and the instantaneous nature of broadcasting. In summary the identified risks are:

An individual's right to sue for defamation: clerks and officials may still be relying on variations of the Parliamentary Papers Act[60] as amended over the years to take account of developments in technology. The current statutory protections may not be adequate to cover new and rapidly emerging methods of distribution; publication in one jurisdiction may still offend in another.

Effective repetition: following *Buchanan v Jennings*,[61] if a media organisation broadcasts an effective repetition of defamatory remarks made within parliament it may lose its parliamentary immunity; members and witnesses giving evidence at an inquiry may be constrained in talking about the issue outside the formal proceedings of parliament.

What constitutes proceedings: it may be possible for someone to broadcast defamatory remarks made by way of interjection which are not part of the *Hansard*

record, particularly during a division; if these were not found to be proceedings in parliament no protection would attach by way of parliamentary privilege. Other exchanges and asides during parliamentary proceedings but not incidental to transacting business can also put a member at risk.

Risk to reputation: an individual's reputation might be maligned when statements in parliament are broadcast. A right of reply is not incorporated in the audio visual record.

Breaches of court orders: unrestrained use of parliamentary privilege risks upsetting the comity between parliament and the judiciary and may put an individual at risk. It may not be possible to contain the damage once a breaching statement has been broadcast.

Breach of copyright: how is this risk manifested when the record is released in the public interest? The concerns appear to be the risk to the reputation of a member or the parliament as a whole or the risk of private profiteering.

Losing control of the publishing process: providing a parliament's authority to republish to a third party may confer absolute privilege, where only qualified privilege would normally apply,

Statutory controls

This paper does not attempt to analyse the effectiveness of all the statutory and parliamentary protections relied on in every parliament within the ANZACATT jurisdiction. It makes a broad sweep of some of the provisions available to the ACT Legislative Assembly, the House of Representatives in the Commonwealth Parliament, and the New Zealand and Queensland parliaments and looks in the following paragraphs at the adequacy of those protections to mitigate the identified risks.

Section 24 of the *Australian Capital Territory Self-Government) Act*[62] confers the powers, privileges and immunities enjoyed by the Commonwealth House of Representatives on the ACT Legislative Assembly and thus it enjoys the protections afforded by the *Parliamentary Privileges Act*,[63] in the absence of its own legislation. It relies on a resolution of the Assembly to authorise the preparation and publication of transcripts of debates and proceedings, including extracts but, according to a legal opinion obtained in 1995, it cannot rely on the *Parliamentary Papers Act 1908*:

> … the *Parliamentary Papers Act 1908* … provides for an absolute privilege in relation to the publication of Reports that are authorised by the House. However, it is arguable that this privilege is not a power conferred to the House of Representatives or to its members, but instead is a privilege given to a publisher. In R v Richardson; exparte Fitzpatrick and Browne (1955) 92 CLR 157 Justice Dixon characterised the *Parliamentary Papers Act 1908* as legislation passed in pursuance of Section 51 (39) of the constitution (the exercise of incidental power), and not legislation pursuant to

> Section 49 (defining and declaring parliamentary powers and privileges). It is not clear from Dixon's judgement which head of power the *Parliamentary Papers Act 1908* is incidental to. If the *Parliamentary Papers Act* 1908 is not a law with respect to the powers and privileges of Parliament, then it is probably not a power of the House of Representatives or its members for the purposes of Section 24 of the *Australian Capital Territory (Self-Government) Act 1988.* [64]

The Assembly has enacted the *Legislative Assembly (Broadcasting) Act 2001* authorising broadcasting of Assembly or committee proceedings by any person and continuing resolution 3[65] sets out guidelines which must be followed.

The House of Representatives is afforded the protection of the *Parliamentary Papers Act*,[66] *the Parliamentary Privileges* Act,[67] *the Parliamentary Proceedings Broadcasting Act*[68] and various resolutions authorising publication, broadcasting and televising of proceedings.[69] It produces, with the Senate, guidelines for televising proceedings.[70]

Queensland has the Parliamentary Papers Act[71] and the Parliament of Queensland Act 2001, which frees from civil or criminal liability any person publishing a parliamentary record (including an audio-visual record) under the authority of the Assembly. It also issues broadcasting guidelines under the authority of the speaker.[72]

All these jurisdictions appear to have enacted or introduced provisions offering protection from legal action to publishers and broadcasters of an expanded range of parliamentary records although, as the Clerk of the House of Representatives pointed out, the Parliamentary Proceedings Broadcasting Act was enacted for the purpose of indemnifying the official broadcaster, the Australian Broadcasting Corporation, and has not been updated to take account of the wider availability of proceedings.[73]

The New Zealand Parliament is taking steps following its recent Privileges Committee report[74] to strengthen the protections afforded by the *Legislature Act 1908*[75] to publishers and broadcasters and has also recommended:

> … that the Legislature Act 1908 be amended to provide that the criticism made of the decision in *Buchanan v Jennings* be addressed so that a Member of Parliament, or any other person participating directly in or reporting on parliamentary proceedings, who makes an oral or written statement that affirms or adopts what he or she or another person has said in the House or its committees will not be liable to criminal or civil proceedings.

The first two risks, relating to defamation action and effective repetition appear to be in hand.

The next risk — that of a member making a potentially defamatory remark that may not considered a part of the proceedings — can be addressed in two ways; the first is a behavioural control. The Clerk, through the Speaker, may be well advised to

draw the attention of members to the possibility of remarks which may not attract privilege, however slight the risk, and guidelines to broadcasters should prohibit the coverage of such remarks.

More serious is the behavioural control that needs to be applied to members who may cause grave harm to individuals or national security by using parliamentary privilege recklessly to make unsubstantiated allegations or to breach court orders. Standing orders may provide some guidance here; however, the recently strengthened rule in New Zealand requiring a member to apply to the Speaker for the exercise of his or her discretion before mentioning any matter awaiting or under adjudication has much to recommend it.

None of the clerks interviewed believed that a decision to expunge material from the record could be taken lightly, although the Clerk of the ACT Legislative Assembly did state that he would consider so advising the Speaker in the case of a threat to national security and would request media organisations not to rebroadcast the offending material.[76]

The risk to reputation, either of the parliament or an individual member is a concern shared by all clerks who consider themselves to be guardians of their respective institutions with an 'institutional obligation to preserve and promote the parliament to the public'.[77] However, they see this role played out by explaining and upholding the rules of their houses rather than by controlling republication or rebroadcasts of the record to protect members from potential embarrassment.[78] Broadcasting guidelines commonly prohibit use of the parliamentary record for the 'purposes of satire or ridicule' and copyright statements permit the 'download, display, print and copy of any material… in unaltered form only'.[79]

Financial penalties may apply to breach of copyright and parliaments (with the exception of the ACT Legislative Assembly) have an option to fine or even imprison those adjudged guilty of contempt of parliament. But a repeat of the punishment meted out to Messrs Fitzpatrick and Browne by a former Prime Minister[80] (three months imprisonment) is highly unlikely[81] and, in the case of reflections on members, the Commonwealth Parliament, with the enactment of the *Parliamentary Privileges Act* abolished the category of contempt constituted by reflections on Parliament, a House or a member.[82] And media organisations might think that a penalty of loss of access to proceedings for a short time is worth breaching guidelines for if unauthorised coverage of an incident in the chamber is politically newsworthy.

Finally, a fear of loss of control over the publishing process does not appear to be justified when republication or rebroadcast of parliamentary proceedings is generally permitted, albeit subject to guidelines, and those republishing or rebroadcasting are likely to be protected by at least qualified privilege, although in some cases, retaining the ability not to confer 'authorised publisher' status on third-party publishers may have some validity (see paragraph 58).

A New Role for Clerks

The most serious identified risk relating to the republication or rebroadcast of parliamentary proceedings is probably not that of an action in defamation, provided parliaments have taken steps to ensure that their own staff and authorised publishers are protected against action when enabling the publishing or broadcasting of parliamentary proceedings. Protection for republication or rebroadcast may not be so clear cut, with fairness, accuracy and the absence of malice needing to be established. Clerks should not have to assume responsibility, in representing their speakers or their institutions, for the actions of others, particularly those who might wilfully compromise the accuracy or fairness of a report.

While the risks facing clerks are largely the same, the number and complexity of protections is not, and there would be value in ANZACATT jurisdictions developing a uniform statutory model for addressing all issues relating to disseminating the record of parliamentary proceedings. If defamation laws can be made uniform, why not parliamentary privilege and other protections?

Clerks can also act to protect both members and private citizens by influencing the behaviour of members and strengthening their standing orders. New Zealand appears to have taken a lead in this regard with its amendments to restrict the ease with which members can disclose information suppressed by a court, and in addressing concerns that effective repetition may stymie debate but this may have been borne out of necessity in light of the number of instances when this has occurred. That, in itself is an important consideration, whether jurisdictions should wait until the risks have been realised before acting, or make a pre-emptive strike. Maintaining a current database on all privilege, publishing, broadcasting, technological or other issues relating to the parliamentary record would be an informative and efficient way of responding to the unexpected, or perhaps staying one step ahead.

Clerks could consider providing frank, fearless and sound advice to members about their own behaviour in the parliament; perhaps by publishing a new cross-jurisdictional guidebook 'The seven Habits of Highly Effective Members' with apologies to Steven Covey.[83]

Balancing the public's right to know against a risk to the reputation or safety of an individual, or the comity between the judiciary and the parliament, is also a pressing matter for the Clerk who may have to recommend expunging remarks or removing sound and vision from the record, noting the reservations expressed.

The adoption of new technologies and systems to make the record of proceedings more accessible provides a key opportunity to engage further with the public, and greater collaboration between parliaments will help to reduce costs.

This paper has only skimmed the variety of risks and protections that are evident. Further and more detailed research on a model which allows the widest and most convenient access to the parliamentary record, combined with the most effective and up-to-date protections *for those risks likely to be realised*, would be a useful start. Clerks are well placed to persuade the legislators of the benefits of a considered approach to protecting the institution while engaging with the public. A body of clerks recommending uniform best practice would be even better placed. ▲

End Notes

[1] 'record' is defined as the record of debates, in text or audio-visual media, not the minutes of proceedings.

[2] Letter from Russell Bayliss, Counsel, ACT Government Solicitor to Tom Duncan, Clerk of the Legislative Assembly, 19 April 2005.

[3] [2002] HCA 56.

[4] Anne Roberts, *The Story of Hansard*, http://www.commonwealth-hansard.org/chea.story.asp, 15 November 2009.

[5] Ibid.

[6] (1839) 9 Ad & E 1.

[7] Parliamentary Papers Act *1840*.

[8] Roberts, above, n 4.

[9] Ian Harris (ed.) *House of Representatives Practice* (5th edn, 2005) 712.

[10] *Parliamentary Papers Act 1840,* c 9, s 2.

[11] Harris, above n 9, 120.

[12] (1997) 189 CLR 520.

[13] (1997) 146 ALR 248, 274.

[14] Professor of Law, City University, London

[15] Ian Loveland, *Political Libels: A Comparative Study*, (1st edn, 2000) *ix*.

[16] [2005] 2 all ER 273.

[17] Privileges Committee, Parliament of NZ, *Question of privilege referred 21 July 1998 concerning Buchanan v Jennings* (2005) 4.

[18] Ibid.

[19] *Parliamentary Privileges Act 1987* (Cth) s 16(2).

[20] Harris, above n 9, *604*.

[21] House of Representatives Standing Committee of Privileges and Members' Interests, *Report on the issue of the exchange between the member for Robertson and the member for Indi on 28 May and the subsequent withdrawal and apology by the member for Robertson on 29 May 2008* (2008).

[22] Department of Parliamentary Services, *Main Committee Form Guide* (2008) *26*.

[23] Interview with David Elder, Deputy Clerk of the House of Representatives, Parliament House, Canberra, 11 December 2009.

[24] Legislative Assembly for the ACT, *Standing orders and continuing resolutions of the Assembly, continuing resolution 3 — broadcasting guidelines* (2008) 68.

[25] Letter from Lachlan Kennedy, WIN Television NSW Pty Ltd to Shane Rattenbury, Speaker of the Legislative Assembly, 23 October 2009.

[26] Harris, above n 9, 276.

[27] Harris, above n 9, 604.

[28] Interview with Neil Laurie, The Clerk of the Queensland Parliament, Canberra, 30 November 2009.

[29] *Parliamentary Privileges Act 1987* (Cth) s 16(2).

[30] Harris, above n 9, 604.

[31] Legislative Assembly for the ACT, *Standing orders and continuing resolutions of the Assembly, standing order no 118* (2008) 28.

[32] Harris, above n 9, 753.

[33] Ibid.

[34] Legislative Assembly for the ACT, *Standing orders and continuing resolutions of the Assembly, continuing resolution 7* (2008) 76.

[35] Interview with Bernard Wright, Clerk of the House of Representatives, Parliament House, Canberra, 11 December 2009

[36] Letter from Debra Angus, Deputy Clerk of the House, Parliament of NZ, to Members of the Privileges Committee, 24 July 2008, 2.

[37] Second Report, HC (1995–96) 252.

[38] Letter from Philip Joseph to Clerk of Privileges Committee, Parliament of New Zealand, 4 February 2009, 1

[39] HL Paper 43–1, HC 214–1, Session 1998–99, Report, Vol 1 56.

[40] Email from Wynne Price to Hansard Editors, 16 July 2009.

[41] Privileges Committee, Parliament of New Zealand, *Question of privilege relating to the exercise of the privilege of freedom of speech by members in the context of court orders, Report of the Privileges Committee* (2009) 5.

[42] Ibid, 20.

[43] Ibid, 6.

[44] Ibid, 26.

[45] Ibid, 26–7.

[46]Legislative Assembly for the ACT, *Copyright and Disclaimer Notice* (*2009*) http://www.parliament.act.gov.au.

[47] Broadcast of Parliament Select Committee, *Inquiry into the Queensland Parliament Video Broadcast System* (2008) 22.

[48] *Copyright Act 1994* (NZ).

[49] UK Parliament – Parliamentary Copyright, *Copyright Information page (2009), http://www.parliament.uk/site_information/parliamentary_copyright.cfm, 6 December 2009.*

[50] House of Commons, *Review of the Management of Parliamentary Copyright, House of Commons* (2009) 25.

[51] *Copyright Act 1968* (Cth).

[52] House of Commons, above n 49, 25.

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[54] Michelle Loh, *Qld Hansard a closed book to OpenAustralia*, Crikey, http://www.crikey 16 November, 2009, 1

[55] Email from Neil Laurie to Katherine Szuminska, 7August 2009.

[56] Parliament of Queensland Act 2001 (Qld).

[57] Parliament of Queensland, *Legal disclaimer 2009* http://www.parliament.qld.gov.au,

[58] Neil Laurie, above n 54.

[59] Email from Harry Evans to Val Barrett, 13 November 2009.

[60] *Parliamentary Papers Act 1840.*

[61] [2005] 2 all ER.

[62] *Australian Capital Territory (Self-Government) Act 1988* (Cth).

[63] *Parliamentary Privileges Act 1987* (Cth*).*

[64] Letter from Len Sorbello, Deputy Law Officer, Attorney-General's Department, to Mark McRae, Clerk of the ACT Legislative Assembly, 23 August 1995.

[65] Legislative Assembly for the ACT, above n 23.

[66] *Parliamentary Papers Act 1908* (Cth).

[67] *Parliamentary Privileges Act 1987* (Cth).

[68] *Parliamentary Proceedings Broadcasting Act1946* (Cth).

[69] House of Representatives, Parliament of Australia, *Standing and Sessional Orders* (*2008)*.

[70] House of Representatives, Parliament of Australis, *Guidelines for filming and photo-graphy and general media rules in Parliament House and its precincts, December 2008*.

[71] *Parliamentary Papers Act 1992* (Qld).

[72] Hon Mike Reynolds, Speaker, Parliament of Queensland, *Conditions for media access to the parliamentary precinct* (2008).

[73]I Bernard Wright, above n 34

[74] Privileges Committee, Parliament of New Zealand, above n 40.

[75] *Legislature Act 1908* (NZ).

[76] Interview with Tom Duncan, Clerk of the ACT Legislative Assembly, Canberra, 2 November 2009.

[77] Herr, Richard, *Historical development of constitutional government*, lecture, 16 July 2009.

[78] Interviews with Tom Duncan, Clerk of the ACT Legislative Assembly, Canberra, 2 November 2009, Neil Laurie, The Clerk of the Queensland Parliament, Canberra 30 November 2009, Bernard Wright, Clerk of the House of Representatives and David Elder, Deputy Clerk of the House of Representative, Parliament House, Canberra, 11 December 2009.

[79] Legislative Assembly for the ACT, above n 45.

[80] H.R. Deb. (10.6.55) 1625–65.

[81] Interview with Bernard Wright, above n 34.

[82]Harris, above n 9 *House* 735.

[83] Steven Covey, *7 Habits of Highly Effective People, Covey* (1st edn, *1989*).

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