Is Parliamentary Privilege Incompatible with a Modern View of the Public Interest?

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> Where then is the necessity for this power? Privilege, that is, immunities and safeguards, are necessary for the protection of the House of Commons, in the exercise of its high functions. All the subjects of this realm have derived, are deriving, and I trust and believe will continue to derive, the greatest benefits from the exercise of those functions.
>
> Patteson, J – *Stockdale v Hansard*, 1839

Introduction

Historically, parliamentary privilege has been viewed as synonymous with the public interest in that the powers and immunities secured by parliamentary privilege have empowered parliaments to legislate in the public interest, investigate and debate matters in the public interest, and hold the executive to account in the public interest. The public interest, however, is not static; rather 'It is a moving target in the sense that its content changes along with its time frame and focus'.[1] This dynamism is to be expected given that the public behind the public interest is not static. The reputedly 'deferential'[2] (because largely uneducated and unenfranchised) populace immortalised by Walter Bagehot in 1867 in *The English Constitution*, for example, is now the beneficiary of compulsory state-funded education, invested with a suite of rights which the Chartists could only have dreamt of, and supported by a legal system committed to defending and furthering such rights. These include, on occasion, rights that may be in conflict with parliamentary privilege. In a similar fashion, parliamentary privilege, which evolved 'to meet the needs of a very different age'[3] – one in which the Crown sought to control the Parliament; the courts were subservient to the Crown; and the populace, not overburdened with rights, was even more deferential than in Bagehot's time – has also not remained 'static or immutable'.[4] As well as some privileges lapsing due to changed circumstances over the centuries, parliaments have also modified, restricted the

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application of and, in some cases, relinquished a number of the powers and immunities bestowed by parliamentary privilege to ensure that privilege remains 'appropriate to contemporary parliamentary requirements [and] also more consistent with community expectations in terms of citizens' interests'.[5] In this quest the parliaments have been partnered by the courts, which have a long tradition of safeguarding the public against any impermissible exercise by parliaments of their privilege-sanctioned 'power of invading the rights of others'.[6] Indeed, over the past few decades – which have been characterised by a generally more rights-aware political environment and a concomitant increase in judicial activism and judicial review – higher courts have reduced the scope of some parliamentary powers and immunities in a bid to modernise the law and deliver more equitable outcomes.

In short, parliamentary privilege is not incompatible with a modern view of the public interest and is unlikely to become so as long as parliaments continue their pragmatic reformist approach and the courts hold true to their role as upholders of natural justice and the rule of law.

What is the Public Interest?

In 2003 the Organisation for Economic Co-operation and Development reported that 'Serving the public interest is the fundamental mission of governments and public institutions'.[7] Before discussing the role of parliaments in championing the public interest, and the degree to which the contemporary exercise of parliamentary privilege facilitates or compromises this role, it is useful to clarify what is meant by the public interest.

In a recent article entitled 'What is the Public Interest?', former Western Australian premier, Geoff Gallop, correctly alluded to the 'enormous amount of philosophical commentary about the public interest' and defined the concept with circumlocutions: 'It is what we pledge to serve whether our sphere of activity is local, state or national. It is both a value and a duty. It is about process and outcome'.[8] Other commentators have also highlighted the difficulty of defining the concept: 'Like the "common good" and the "general will," it is easier to talk about it than to determine what it is'.[9]

That the public interest involves 'a matter capable of affecting the people at large so that they might be legitimately interested in, or concerned about, what is going on, or what may happen to them or to others';[10] 'places a premium on the rights of citizens';[11] and seeks to secure 'public benefits'[12] are common themes and suggest why 'public good' and 'common good' are frequently used as interchangeable terms.

In addition, it is widely noted in the literature that public interests may be in competition or outright conflict with other public interests or with 'private rights',[13] and that in balancing competing interests, 'the assessment of the relative strength of the interests at stake is an uncertain, complex and speculative matter'.[14]

Interestingly, with respect to the balancing of competing interests, a number of writers suggest that judges are better at adjudicating this task than parliamentarians – while still conceding 'frequent disagreements among judges on these questions':[15]

> It can be argued that judges, by virtue of their independence and impartiality, are particularly -suited to decide matters in a principled way, and that a disposition to do so is a central characteristic of the judicial role. The decision-making of politicians, by contrast, is necessarily more responsive to transient pressures and pragmatic considerations…[16]

Others reject this stance as a 'left-leaning legal clique'[17] heterodoxy and argue that it is *because* parliamentarians are elected by the public and therefore represent – or are necessarily 'responsive' to – the prevailing public view they are best placed to canvass issues to do with the public interest. (As opposed to the 'comparatively narrow band of persons from whom the judiciary is typically drawn' as Kirby J has conceded.[18])

In surveying how parliamentary privilege assists legislatures in serving the public interest this paper will also assess how parliaments have attempted to resolve or ameliorate situations where parliamentary privilege is in conflict with – or seen to be 'incompatible' with – other aspects of the public interest or private rights.

Parliamentary Privilege – 'Tools of Trade'

There are numerous textbook definitions of parliamentary privilege – most paraphrasing the classic and much-cited one from the parliamentary law and practice bible *Erskine May*[19] – but as there is some variation in the provenance and scope of parliamentary privilege in Westminster-derived jurisdictions, possibly one of the most inclusive definitions is that provided by Gareth Griffiths:

> Parliamentary privilege concerns the powers, privileges and immunities from aspects of the general law conferred, as a matter of inherent right or under statute, on the Houses of Parliament, their Members, officers and committees. The justification for parliamentary privilege is that, if the Houses are to perform their constitutional functions – to inquire, debate and legislate – effectively, they must have the freedom to conduct their own proceedings without undue interference from outside bodies.[20]

So what are the 'powers, privileges and immunities' that constitute the 'tools of trade…the things that a parliamentarian needs to do his or her job effectively'?[21] Generally, discussions of privilege separate out 'individual immunities' versus 'collective powers'[22] for ease of classification.

In the first category are the 'rights and immunities enjoyed by Members and parliamentary officers *individually*'; in the second category are the 'rights and powers of the Houses of Parliament in their *collective* capacity'.[23] However, this dichotomy is useful only up to a point because individual immunities are 'not the prerogative of Members in their personal capacities'[24] – on the contrary, 'it is only as a means to the effective discharge of the collective functions of the House that

the individual privileges are enjoyed by Members'.[25] Furthermore, whether enjoyed on an individual or collective basis, parliamentary privilege exists, as Brennan CJ summed it up in *Arena v Nader*, 'not for the benefit of the members of parliament but for the protection of the public interest'.[26]

In the category of immunities granted to individual Members of Parliament, the principal one is freedom of speech. Indeed, it has been quite aptly stated that nowadays this is the only immunity of 'substance'.[27] The right to freedom of speech and debate had been claimed as early as 1512 by Members of the Parliament at Westminster who were frequently harassed with and arrested on charges of seditious libel for speaking out against the Crown on behalf of their constituents.[28] Given that the superior courts were under the control of the Crown until the *Act of Settlement 1701*[29] guaranteed the judiciary secure tenure *quamdiu se bene gesserit* (during good behaviour) it is understandable that this 'right' was insisted upon by parliamentarians and acceded to, in the main, by most monarchs. It was, however, only with the enactment of the Bill of Rights in 1689 that freedom of speech was given statutory force via Article 9, which directed, '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.'[30]

The major benefit conferred by Article 9 is immunity against all civil suits and criminal charges for Members of Parliament and others involved in 'proceedings in Parliament' (such as witnesses before parliamentary committees and petitioners) for anything said or done during such parliamentary 'proceedings'. The immunity is absolute. That is, it is not defeated by proof of malice as is the qualified immunity given to the media to report parliamentary proceedings, and it cannot be waived by a Member or House in the absence of legislation to that effect. Accordingly, and somewhat controversially, the provision 'protects the member who knows what he is saying is untrue as much as the member who acts honestly and responsibly'.[31] A similar absolute privilege protects the speech of judges, counsel and witnesses in proceedings in courts and for similar 'public interest' policy reasons, as the 1999 UK Joint Committee on Parliamentary Privilege outlined:

> The public interest in the freedom of speech in the proceedings, whether parliamentary or judicial, is of a high order. It is not to be imperilled by the prospect of a subsequent inquiry into the state of mind of those who participate in the proceedings even though the price is that a person may be defamed unjustly and left without a remedy.[32]

In addition, Article 9 erects a jurisdictional barrier against the 'reception and use of evidence of parliamentary proceedings by courts of law and by other extra-parliamentary bodies'.[33] This once blanket prohibition has been scaled back over recent decades by the judiciary in some landmark cases (and in some jurisdictions by parliaments through Interpretation Acts) so that parliamentary proceedings can be examined for 'benign'[34] purposes such as establishing uncontentious matters of historical fact[35] (for example, the occasions a Member was present in a Chamber or

the 'intention' behind a statute as disclosed by the relevant Minister's second reading speech.[36])

Nonetheless, the prohibition is still largely intact and a number of commentators[37] and justices[38] have outlined how the prohibition can deny courts information which could be pivotal to a case – and that the capacity for courts to order a stay of proceedings to obviate an injustice may not always be a satisfactory outcome. (Again, it should be noted that for public interest policy reasons courts are similarly denied information on the grounds of client legal privilege and public interest immunity).

Freedom of speech, as outlined above, was originally claimed as a defence against 'executive-motivated suits'.[39] It is now almost exclusively a defence against actions brought by private individuals and, as such, it is the most litigated privilege. Notwithstanding that the original rationale for the immunity has changed, parliamentarians are still tenacious of retaining the right in the name of the public interest. Former Speaker of the Australian House of Representatives, Sir Billy Snedden, for example, who strongly deprecated any abuse of freedom of speech in the House of Representatives during his speakership, nonetheless opposed any formal diminution of the privilege because he held that freedom of speech enabled Members to champion the rights of the public:

> All of us can think of not one, but many examples where, if it had not been for the freedom of speech and the attack on an individual in Parliament crime would have gone undetected and unpunished. Some people who were being seriously disadvantaged by rapacious people would not have been protected had it not been for the freedom and absolute privilege that this Chamber has to raise matters and to ventilate them...[40]

Indeed, the degree to which the immunity is still perceived by governments and the judiciary as being crucial to modern society was well demonstrated in the recent case of *A v The United Kingdom*, which was heard before the European Court of Human Rights in 2002. A roll-call of European governments made third-party interventions underlining that an 'unfettered exchange of information and ideas in Parliament' was an 'indispensable' requirement for the functioning of modern democracies[41] – a stance which was endorsed by the Court:

> while freedom of expression is important for everybody, it is especially so for an elected representative of the people. He or she represents the electorate, draws attention to their preoccupations and defends their interests. In a democracy, Parliament or such comparable bodies are the essential fora for political debate.[42]

Although Members may defend their retention of the freedom of speech immunity, there is a strong awareness among parliamentarians that if the right is abused as an 'abominable instrument of oppression',[43] the status of Parliament as the defender of the public interest is undermined and the Parliament is brought into disrepute.

Later in this paper the raft of measures and protocols implemented by parliaments to address the competing public interest issues surrounding freedom of speech will

be surveyed – as will be the efforts of the courts to rein in the privilege in defence of the traduced.

In addition to freedom of speech, Members of Parliament – and in some cases, those who have been elected but not yet sworn in as Members[44] – are also granted another small group of minor immunities with respect to legal processes. These include: immunity from arrest in civil – but not criminal – cases for stipulated, but varying, periods of time depending on the jurisdiction (which is of minimal benefit today given the likelihood of being arrested on a civil charge is 'extremely small'[45]); exemption or disqualification from jury duty (in most jurisdictions); and exemption from attendance at a court or tribunal when subpoenaed to give evidence during parliamentary sessions or on days when Parliament is sitting or a parliamentary committee is meeting – and for a prescribed number of days before and after such sessions or sitting or meeting dates. The justification for these exemptions has been stated simply as the 'paramount right of Parliament to the attendance and service of its Members'[46] – an issue of some importance in small parliaments or ones which have slim majorities. For a similar reason these minor immunities also cover in some cases parliamentary officers and parliamentary witnesses.

The category of powers exercised by parliaments in a collective or corporate capacity fall into three broad categories.

The first includes the power to conduct inquiries (usually delegated to parliamentary committees) which enables committees to compel the attendance of witnesses, mandate the giving of evidence under oath, and order the production of documents. As Gerard Carney has observed, 'Armed with these coercive powers and protected by Article 9 freedom of speech, parliamentary inquiries become potent investigative tools' as they probe 'matters of public interest'.[47] This investigatory role of parliaments has, of course, always been considered to be imperative for the public interest – as the somewhat magniloquent centuries-old epithets 'grand inquest of the nation'[48] and 'general inquisitors of the realm'[49] suggest.

The second category of powers is generally referred to as 'exclusive cognisance' which has been summarised by Enid Campbell as 'the right of the houses of a parliament to adjudge whether members are qualified to sit and vote [of 'limited significance' in jurisdictions where membership qualifications and disqualifications are enumerated by statute[50]]; the right of houses to make and interpret their own rules of procedure; and the right of each house to administer its internal affairs within its precincts'.[51] The justification for this power is the public interest one of parliaments being autonomous and free from 'the control of Her Majesty's Courts in its administration of that part of the statute-law which had relation to its own internal proceedings' – as Stephen J stated in the leading case on the subject, *Bradlaugh v Gossett*.[52]

The third category is the power held by most parliaments to discipline and punish Members and non-Members for breaches of parliamentary privilege and 'contempts' of Parliament. (In Australia some jurisdictions do not hold punitive powers – although they can expel a Member for 'defensive' reasons.[53]) Contempts have been defined broadly as including any action which has the capacity to interfere with or impede the Parliament carrying out its functions – or, by extension, a Member from carrying out his or her parliamentary role. Examples of contempts by non-Members include offering a bribe to a Member with respect to parliamentary duties, intimidating Members or witnesses, and abusing the petition process. Examples of contempts by Members include deliberately misleading the House, accepting a bribe related to parliamentary duties, and breaching the rules of the House. The range of penal and disciplinary powers available to most parliaments include reprimand and admonishment and being called to the Bar of the House 'to apologise or take the consequences'.[54] And, as for consequences, these can encompass for Members suspension and expulsion from Parliament; and for both Members and non-Members fines and imprisonment – somewhat contentiously, without trial, without legal representation, and without appeal.

The power held by parliaments to punish contempts is part of the ordinary law of the land and numerous cases in Westminster jurisdictions have established the principle that, while courts will judge on the existence of a privilege, or that its ambit has not been exceeded, they will not 'judge of the occasion and of the manner of its exercise'.[55] Notwithstanding this, the penal jurisdiction of parliaments – 'the whole star-chamber hog'[56] – has long been criticised by lawyers, academics, journalists and even parliamentary committees (discussed again later). However, the requirement for parliaments to hold some penal powers has been justified in no-nonsense fashion by the 1999 UK Joint Committee on Parliamentary Privilege thus:

> If the work of Parliament is to proceed without improper interference, there must ultimately be some sanction available against those who offend… unless a residual power to punish exists, the obligation not to obstruct will be little more than a pious aspiration. The absence of a sanction will be cynically exploited by some persons from time to time.[57]

The power of parliaments to punish contempts has been called the 'exact equivalent'[58] of contempt of court – although Enid Campbell has argued there is a difference in that a court's use of its contempt powers is usually appealable to a higher court[59] – and has been defended by *Erskine May* on the convenience grounds that it enables parliaments to 'safeguard and enforce their necessary authority without the compromise or delay to which recourse to the ordinary courts would give rise'.[60]

No new privilege may be created by a Parliament except by statute. Parliaments are also able to surrender privileges if they think it is appropriate to do so. The next section of this paper will examine how parliaments have reformed privilege to ensure it remains consonant with modern views of the public interest.

A Work in Progress: The Reform of Parliamentary Privilege

In 1831 when the First Reform Bill was in the House of Commons, the eminent Whig historian, and Member for the rotten borough of Calne, Thomas Macaulay, warned his fellow parliamentarians that it was imperative to 'Reform, that you may preserve'.[61] The advice was excellent; it was (eventually) heeded; and the British parliamentary and electoral systems *did* survive the reform measures imposed upon them. In a similar fashion parliaments have long evinced a 'proper anxiety' that if parliamentary privilege was not exercised responsibly and confined to the 'minimum infringement of the liberties of others' it would become untenable.[62] As a current Member of the House of Representatives, Alexander Somlyay, has put it:

> The effect that parliamentary privilege has on perceptions of Parliament cannot be disregarded. The use of parliamentary privilege creates the potential either for Parliament and parliamentarians to be seen as exclusive, arrogant or out of touch, or to be seen as inclusive of the community and responsive to community concerns.[63]

Over the years parliaments have voluntarily surrendered a number of immunities and powers. A major one was transferring the arbitration of controverted elections from in-house parliamentary committees, where 'partisan instincts'[64] were difficult to subdue and often attracted censure, to the courts. This hand-over occurred in England in 1868 with the passing of the *Parliamentary Elections Act 1868*. Interestingly, the take-up of this significant reform in Australia varied markedly. Western Australia promptly followed the mother country's lead in 1870 in its new Constitution for representative government,[65] but the sister colonies/states, by contrast, only gradually relinquished the privilege – with South Australia surrendering exclusive jurisdiction to a Court of Disputed Returns as late as 1969.[66]

A number of parliaments have pared back the entitlements relating to immunity from legal processes. As early as 1770 the UK Parliamentary Privilege Act, for example, removed the exemption from civil arrest from Members' servants (and, as a result, this privilege was not inherited by the Australian colonial legislatures).[67] More recently, the Australian Commonwealth Parliament in s. 14(1) of the *Parliamentary Privileges Act 1987* slashed the exemption granted to Members to refuse to attend a court or tribunal when subpoenaed to give evidence from forty days before or after sessions of Parliament (the current exemption in a number of jurisdictions) to five days before and after a sitting of Parliament or a meeting of a parliamentary committee. As a number of commentators have noted, the forty-day exemption operates almost 'permanently'[68] providing Members with a 'virtual immunity from appearance in the witness box',[69] whereas the five-day fore and aft immunity:

> may be regarded as having achieved a reasonable compromise between a parliament's paramount claim to the services of its members and the claims of courts and litigants to have members of parliament available to give evidence in curial proceedings.[70]

In a similar fashion, section 14(1) reduced the immunity granted from civil arrest from forty days before and after sessions to five days before and after sittings of Parliament or meetings of parliamentary committees.

The 1999 UK Joint Committee on Parliamentary Privilege commented favourably on the codification and abridgement of immunities in the *Parliamentary Privileges Act 1987* and has, in turn, recommended the abolition of both the exemption from civil arrest and attending at court as a witness immunities – although recommending that subpoenas not be issued to Members without leave of a master or district judge to prevent the issuing of vexatious subpoenas.[71] So far Westminster has not acted on either recommendation, but *Erskine May* notes that the House of Commons routinely gives 'tacit permission'[72] for Members to attend court on sitting days if they wish to do so. Westminster has, however, in the *Criminal Justice Act 2003* removed from Members the exemption to serve on juries – and rigorously tightened up the excusal process.[73] Currently all Australian jurisdictions give Members an exemption from jury service, but as up to 65% of the general populace manages to evade jury service for a range of 'flimsy excuses',[74] this exemption does not attract a great deal of public opprobrium. Indeed, in the smaller Australian legislatures (the Tasmanian Parliament's Legislative Council, for example, only has fifteen Members, as opposed to the House of Commons' 650 Members) the absence of a Member on jury duty – particularly on a protracted trial – could have a detrimental impact on votes taken in the House, so there are sound public interest grounds for this exemption to stand.

Another area of parliamentary privilege which has seen significant reform is that relating to parliaments' penal and disciplinary powers. This is not surprising given the degree of unease which has long been expressed about parliaments exercising judicial functions – and without the usual curial safeguards. Only seven years after the inauguration of the Commonwealth Parliament, for example, one of its Joint Select Committees disapprovingly reported that:

> The ancient procedure for punishment of contempts of Parliament is generally admitted to be cumbersome, ineffective, and not consonant with modern ideas and requirements in the administration of justice. It is hardly consistent with the dignity and functions of a legislative body which has been assailed by newspapers or individuals to engage within the Chamber in conflict with the alleged offenders, and to perform the duties of prosecutor, judge, and gaoler.[75]

In 1999 the UK Joint Committee on Parliamentary Privilege recommended that the High Court *concurrently* exercise with Parliament the power to punish non-Members for contempts,[76] and a number of academic commentators have also recommended that parliaments' contempt jurisdiction be handed to the courts – either exclusively or concurrently. As Enid Campbell has outlined, this course of action is not barred by any 'constitutional impediment'[77] and would have a number of advantages:

> Nowadays the judges could be trusted to try cases of alleged contempt of parliament fairly and impartially and in accordance with all of the protections afforded by the criminal process. Most judges are also more experienced in the trial

> of disputed questions of fact than most parliamentarians. There is the further consideration that when houses of parliament adjudicate complaints of contempt they are acting as judges in their own cause. And sometimes their decisions may be seen to have been affected by party political considerations.[78]

Arguing against this line is *Odgers' Australian Senate Practice* which outlines that British and Australian parliaments, although judges in their own cause, have generally been extremely 'lenient' ones who have exercised 'great circumspection' and have tended to dismiss contempts with reprimands and warnings, whereas a court dealing with statutory offences and penalties would be more likely to deal out a conviction and punishment.[79]

With a few rare exceptions, such as the week-long imprisonment of Brian Easton by the Western Australian Legislative Council in 1995, *Odgers'* is an apt summary of the contemporary situation. Most parliaments now only exercise penal jurisdiction in extreme cases, deciding that they would 'best consult [their] own dignity by taking no action'[80] with minor breaches. Indeed, a number of parliaments have passed resolutions to this effect, such as the House of Commons which formally resolved in 1978 to exercise its penal jurisdiction 'as sparingly as possible' and 'only when the House is satisfied that to exercise it is essential' for the functioning of Parliament.[81] *Erskine May* provides an instance of this new approach – that disturbances in the public galleries of the House of Commons are now generally dealt with by the Sergeant-at-Arms 'by virtue of the directions given…by Standing Order No 161(1) or otherwise, without any formal question of contempt arising'.[82]

The Australian Commonwealth Parliament in enacting the *Parliamentary Privileges Act 1987* abrogated in s. 8 the power to expel Members from Parliament – a power which had only been invoked once in the Parliament's history, in 1920, when Hugh Mahon was expelled for 'seditious and disloyal utterances'.[83] Even without the formal abrogation of this power, it is interesting to note that today, expulsions such as Mahon's could be challenged in Australia for violating the implied freedom of political communication in the federal Constitution.[84] (The abrogation of the expulsion power now applies, under the terms of the *Australian Capital Territory (Self-Government) Act 1988*, to the ACT Legislative Assembly, and the penalty has since been surrendered by the Northern Territory Legislative Assembly.)

Section 7(5) of the *Parliamentary Privileges Act 1987* also gave the Commonwealth Parliament the power to impose fines on Members, which now means that the Parliament is unlikely to invoke the more draconian power in its armoury – imprisonment. Certainly, the only time that the Commonwealth Parliament exercised its committal powers (in the Fitzpatrick and Browne contempt case in 1955) Prime Minister Menzies specifically rebutted the proposition that a fine would have been a more 'appropriate punishment'[85] arguing that as the House of Commons had not imposed a fine since 1666 the Commonwealth Parliament could not be said to have inherited that power – in accordance with s. 49 of the Commonwealth Constitution – from the House of Commons 'at the establishment of the Commonwealth'.[86]

The *Parliamentary Privileges Act 1987* also defined contempt in s. 4, which put an end to the Commonwealth Parliament being able to 'treat any act as a contempt'[87] – thereby providing greater certainty for the public. In addition, as outlined by *Odgers'*, s. 4 is subject to judicial interpretation in that an action could be brought to establish that conduct being punished did not 'fall within the statutory definition'.[88] In a similar way, the stipulation in s. 9 of the *Parliamentary Privileges Act 1987* that warrants for committal 'shall set out particulars of the matters determined by the House to constitute that offence' opens up any use of this penalty to judicial review.

Parliaments and courts have made the greatest number of adjustments to parliamentary privilege with respect to the freedom of speech immunity – which is not unexpected given this immunity has the greatest capacity to impact adversely on others.

Parliaments have imposed a range of protocols on the exercise of this immunity to discourage its abuse. A number of Chambers have issued formal 'guidelines' such as those adopted by the Australian Senate in 1988 which enjoin Senators to exercise the immunity in a 'responsible manner'; 'to have regard to the rights of others'; and to ensure that any adverse comments are 'soundly based'.[89] Presiding Officers routinely caution Members during proceedings to exercise the 'most stringent responsibility'[90] with respect to what they say in debates, and parliamentary law and practice manuals issued under the aegis of parliaments contain cautions on the responsible exercise of the immunity.[91] Furthermore, if a Chamber believes a Member has deliberately misled the House, or flagrantly abused the immunity by unfairly defaming someone, it can treat the action as a contempt and punish the Member by admonition and censure; by demanding retractions, apologies or statements of regret; and even by suspensions. Parliaments also allow individuals who believe they have been referred to adversely in parliamentary proceedings to have another Member ask questions, make corrective statements, or submit a petition on their behalf.

Over the past couple of decades a number of parliaments around the world have also followed the lead of the Australian Senate which in 1988 instituted a citizens' 'right of reply' procedure whereby an individual (and, extended by some jurisdictions to *corporations*) can seek to have their response to adverse references made against them in Parliament incorporated into *Hansard* if the response is approved by the relevant Privileges Committee and, subsequently, by the House. The wording of the Senate resolution, which has largely been copied by other parliaments, offers a right of reply if the aggrieved person believes he or she has been, 'adversely affected in reputation or in respect of dealings or associations with others, or injured in occupation, trade, office or financial credit, or that the person's privacy has been unreasonably invaded…'[92]

The right of reply process can be exercised speedily – with responses having been submitted, referred to and considered by the Privileges Committee, adopted by the Senate, and published in *Hansard* on the same day.[93]

Courts have also attempted to ameliorate the often quite catastrophic impact on individuals of defamatory statements made in parliaments by developing the doctrine of *effective repetition*. This doctrine holds that a Member has 'effectively' repeated, or adopted by reference, privileged comments made within parliamentary proceedings outside the Parliament – where they are not protected – by merely saying that they 'did not resile from' the comments or that they 'stood by them' – even though such bald statements need to be read in conjunction with *Hansard* to carry any defamatory charge.[94] (And as outlined earlier, courts have ratified the use of *Hansard* to establish what has been said as a matter of historical fact.[95]) After the Privy Council gave its unanimous *imprimatur* to effective repetition in the *Buchanan v Jennings* case (endorsing some earlier Australian and New Zealand cases which had accepted the principle) some legislatures' privileges committees advocated legislative override.[96] No Parliament has yet taken this course, perhaps accepting that it would not go down well in the public domain, notwithstanding there is some evidence that the doctrine is having a 'chilling effect' on parliamentary and extra-parliamentary debate which, it could be argued, is *not* in the public interest.[97] Instead, Members are routinely cautioned by their Presiding Officers and Clerks to exercise great circumspection in what they say.

Finally, parliaments also curb the freedom of speech of Members with respect to the *sub judice* rule whereby, usually at the discretion of the Presiding Officer, a Parliament will not permit debate, motions or questions relating to cases which are currently within the court system, so as not to risk prejudicing a trial.

Conclusion

That parliamentary privilege, notwithstanding its occasional friction with competing public interests and private rights, is still widely perceived to be compatible with a modern view of the public interest was demonstrated in 2008 when the British press and blogosphere vigorously defended Tory Shadow Immigration Minister Damian Green after his arrest at Parliament and the raiding, without warrant, of his office at the House of Commons on the grounds of 'aiding and abetting misconduct in a public office'[98] (aka receiving leaked information from a whistle blower in the Home Office). Curiously, none of the commentators was entirely sure if a contempt of Parliament *had* been committed, but most expressed the view that Green's serial Home Office disclosures were 'manifestly in the public interest'[99] and part of 'doing his job as an MP' – and '[a]s such, Green's rights protect us all'.[100] Or as *The Economist* put it, 'Of course MPs must not be above the law. At times, though, they must sail close to it in seeking to challenge the executive, whether king or Home Office. So they are granted certain privileges, hallowed by long observance...'[101]

Undoubtedly, the next time a Franca Arena or Bill Heffernan makes outrageous allegations in a legislature, the press and blogosphere will denounce parliamentary privilege. It is a difficult balancing act, but parliaments and the courts have, over the centuries, done a commendable job in ensuring that parliamentary privilege remains compatible with an evolving public interest. ▲

End Notes

[1] Carol W. Lewis, 'In Pursuit of the Public Interest', *Public Administration Review*, September/October 2006, p. 696.
[2] Walter Bagehot, *The English Constitution*, Oxford University Press, 2001 (1867), pp. 33–37.
[3] G.F. Lock, 'Parliamentary Privilege and the Courts: The Avoidance of Conflict', *Public Law*, 1985, p. 73.
[4] Joint Committee on Parliamentary Privilege, *Report: Volume 1 – Report and Proceedings of the Committee*, UK Parliament, Session 2998–99, HL 43–1/HC 214–1, Chapter 1, para 17.
[5] Bernard Wright, *Patterns of Change – Parliamentary Privilege*, House of Representatives, [Canberra, ACT], 2007, p. 27.
[6] Patteson J from *Stockdale v Hansard* (1839) 9 AD & E 1112 at 1192.
[7] Cited in Lewis, 'In Pursuit of the Public Interest', p. 694.
[8] Geoff Gallop, 'What is the Public Interest?', *Public Administration Today*, July–September 2007, p. 44.
[9] Frank Bealey quoted in Lewis, 'In Pursuit of the Public Interest', p. 694.
[10] H.P. Lee, 'The "Public Interest" Test', *Australian Press Council News*, 19(3): 1, 2007.
[11] Centre for Policy Development, 'The ABCs of Protecting the Public Interest', 3 November 2006, http://cpd.org.au/article/abcs-protecting-public-interest (viewed 22 January 2009).
[12] Daniel H. Henning, 'Natural Resources Administration and the Public Interest', *Public Administration Review*, March/April 1970, p. 134.
[13] An excellent discussion of the public interest versus private rights can be found in the recent case *A v The United Kingdom* 2002 (35373/97).
[14] Denise Meyerson, 'Why Courts Should Not Balance Rights Against the Public Interest', *Melbourne University Law Review*, 31: 889, 2007.
[15] Meyerson, 'Why Courts Should Not Balance Rights Against the Public Interest', p. 889.
[16] Meyerson, 'Why Courts Should Not Balance Rights Against the Public Interest', p. 891. On the superiority of judges in assessing competing public interests also see McHugh J: 'Changing social conditions are central to the development of the law by the judiciary. Unlike political parties, judges have no agenda to be implemented'. From 'The Judicial Method', paper delivered at the Australian Bar Association Conference, London, 5 July 1998, p. 10. See also the assessment of Kirby J: 'As if one can trust implicitly and unquestioningly officials who submit every three years to a single visit to the ballot box, but reject the longstanding and legitimate law-making functions of the judges, whose duty it is to interpret and apply the law as text and context permit, with justice and discretion', 'Judicial Activism: Power Without Responsibility? No, Appropriate Activism Conforming to Duty', *Melbourne University Law Review*, 30: 591, 2006.
[17] Alan Anderson, 'The Rule of Lawyers', *Policy*, 21(4): 35, 2005–2006.
[18] Michael Kirby, 'Judicial Activism', *Western Australian Law Review*, Vol. 27, No. 1, 1997, p. 18.
[19] *Erskine May* definition: 'Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Thus privilege, though part of the law of the land, is to a certain extent an exemption from the general law'. See Sir William McKay (ed.), *Erskine May's Treatise on the Law,*

Privileges, Proceedings and Usage of Parliament, 23rd edn, LexisNexis Butterworths, London, 2004, p. 75.

[20] Gareth Griffith, *Parliamentary Privilege: Major Developments and Current Issues*, NSW Parliamentary Library Research Service, Background Paper No. 1/07, 2007, p. 1.

[21] Described thus by A.J.H. Morris QC and quoted in Harry Phillips and David Black, 'Parliamentary Privilege in Western Australia: The House of Commons Conundrum', *Australasian Parliamentary Review*, 17(2): 180, 2002.

[22] Griffith, *Parliamentary Privilege: Major Developments and Current Issue*, p. 3.

[23] Griffith, *Parliamentary Privilege: Major Developments and Current Issue*, p. 3.

[24] I. C. Harris (ed), *House of Representatives Practice*, 5th edn, Department of the House of Representatives, Canberra, 2005, p. 707.

[25] McKay, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, p. 75.

[26] *Arena v Nader* [1997] HCA S111 (unreported); quoted in Gerard Carney, 'Lifting the Veil of Mystery: Freedom of Speech Under Parliamentary Privilege', in Judith S. Jones and John McMillan (eds), *Public Law Intersections: Papers Presented at the Public Law Weekend – 2000 & 2001*, ANU Centre for International and Public Law, Canberra, 2003, p. 146.

[27] Harry Evans (ed.), *Odgers' Australian Senate Practice*, 12th edn, Department of the Senate, Canberra, 2008, p. 29.

[28] For background information on the development of freedom of speech see McKay, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, pp. 78–82, and David Clark, *Principles of Australian Public Law*, 2nd edn, LexisNexis Butterworths, Sydney, 2007, pp. 150–151.

[29] *Act of Settlement 1701*, 1700 12 & 13 Will. 3 c. 2.

[30] *Bill of Rights 1689*, 1 Will. & Mar. Sess. 2 c. 2.

[31] Joint Committee on Parliamentary Privilege, *Report: Volume 1*, Chapter 2, para 38.

[32] Joint Committee on Parliamentary Privilege, *Report: Volume 1*, Chapter 2, para 39.

[33] Enid Campbell, *Parliamentary Privilege*, Federation Press, Annandale, NSW, 2003, p. 124.

[34] Joint Committee on Parliamentary Privilege, *Report: Volume 1*, Chapter 2, para 45.

[35] *Prebble v Television New Zealand Ltd* [1995] 1 AC 321.

[36] *Pepper v Hart* [1993] AC 593.

[37] See, for example, Wright, 'Patterns of Change – Parliamentary Privilege', p. 26; and Campbell, *Parliamentary Privilege, passim.*

[38] See Lord Browne-Wilkinson's comments regarding 'the interests of justice in ensuring that all relevant evidence is available to the courts' in *Prebble v Television New Zealand Ltd* [1995] 1 AC 321 at 336.

[39] Quoted in Sylvia Song, 'The Reform of Parliamentary Privilege: Advantages and Dangers', *Legislative Studies*, 12(1): 36, 1997.

[40] Harris, *House of Representatives Practice*, p. 753.

[41] Quotations from the submission of the Norwegian Government, *A v The United Kingdom* 2002 (35373/97), para 57.

[42] *A v The United Kingdom* 2002 (35373/97), para 79.

[43] Lord Dunedin from *Adam v Ward* [1917] AC 309 at 324 (HL(E)), cited in Clark, *Principles of Australian Public Law*, p. 154.

[44] *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, p. 126, outlines that: 'A Member of the Commons is entitled to this privilege [freedom from arrest] even if he has not yet taken the oath'.

[45] Evans, *Odgers' Australian Senate Practice*, p. 57.
[46] McKay, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, p. 125.
[47] Gerard Carney, 'The Power of Privilege', *About the House*, June 2004, p. 29.
[48] Patteson J from *Stockdale v Hansard* (1839) 9 AD & E 1112 at 1185.
[49] Coleridge J from *Howard v Gossett* (1845) 1 QB 359 at 379–380.
[50] Evans, *Odgers' Australian Senate Practice*, p. 58.
[51] Campbell, *Parliamentary Privilege*, pp. 177–178.
[52] Stephen J cited in Sir Clarrie Harders, 'Parliamentary Privilege – Parliament Versus the Courts: Cross-examination of Committee Witnesses', *The Australian Law Journal*, 67(2): 117, 1993.
[53] See *Armstrong v Budd* (1969) 71 SR (NSW) 386.
[54] Joint Committee on Parliamentary Privilege, *Report: Volume 1*, Chapter 6, para 300.
[55] Quotation from unanimous decision delivered by Dixon CJ in *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 162.
[56] Claude Forell, 'Abuse of Privilege: A Perspective from the Press Gallery', *Australasian Parliamentary Review*, 17(2): 248, 2002.
[57] Joint Committee on Parliamentary Privilege, *Report: Volume 1*, Chapter 6, para 302.
[58] Harry Evans, 'Parliamentary Privilege', *Government Lawyers Update*, 4: 1, April 2006.
[59] Campbell, *Parliamentary Privilege*, p. 193.
[60] McKay, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, p. 155.
[61] Quotation from Thomas Babington Macaulay, 'A Speech Delivered in the House of Commons on the 2nd of March, 1831', in *The Life and Works of Lord Macaulay, Complete*, Edinburgh edn, 10 vols, Longmans, London, 1904–1912, Vol. VIII, p. 24.
[62] Quotations from Viscount Radcliffe in *Attorney General of Ceylon v De Livera and Another* [1962] 3 All ER 1066 at 1069.
[63] Alex Somlyay, 'The Use and Abuse of Parliamentary Privilege', *Australasian Parliamentary Review*, 17(2): 241, 2002.
[64] Joint Committee on Parliamentary Privilege, *Report: Volume 1*, Chapter 1, para 19.
[65] *Legislative Council Ordinance*, 33 Vict., No. 13, ss. 31–37.
[66] See Kristen Walker, 'Disputed Returns and Parliamentary Qualifications: Is the High Court's Jurisdiction Constitutional?', *UNSW Law Journal*, Vol. 20, No. 2, 1997, pp. 263–264. Some of the colonies/states had hybrid tribunals before handing over jurisdiction to the courts. South Australia, for example, in its 1856 Electoral Act (s. 35) directed that the South Australian election petition 'Court' comprise eight members of the Parliament and that the 'junior or the sole acting Judge of the Supreme Court shall be the President of such Court'.
[67] McKay, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, p. 93.
[68] Evans, *Odgers' Australian Senate Practice*, p. 57.
[69] Quotation from the Australian Commonwealth's Joint Select Committee on Parliamentary Privilege from its 1984 Report, cited in Campbell, *Parliamentary Privilege*, p. 150.
[70] Campbell, *Parliamentary Privilege*, p. 151.
[71] Joint Committee on Parliamentary Privilege, *Report: Volume 1*, Chapter 7, para 333.
[72] McKay, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, p. 76.
[73] See Schedule 33 of the UK *Criminal Justice Act 2003* (c. 44).

[74] Statistic quoted by Western Australia's Attorney General, Hon. Christian Porter – see Amanda Banks, 'Porter Says He'll Tighten Laws', *The West Australian*, 14 March 2009, p. 4.
[75] Hugh Guthrie, 'Some Aspects of Parliamentary Privilege in the Legislative Assembly of Western Australia', *University of Western Australia Law Review*, 10(4): 397–398, 1972.
[76] Joint Committee on Parliamentary Privilege, *Report: Volume 1*, Chapter 6, para 309.
[77] Campbell, *Parliamentary Privilege*, p. 26.
[78] Campbell, *Parliamentary Privilege*, p. 192.
[79] Evans, *Odgers' Australian Senate Practice*, pp. 67–70.
[80] Quotation from House of Representatives Committee of Privileges Report, *Commitment to Prison of Mr T. Uren, M.P.*, pp. 40 (1971), p. 6, cited in Harris, *House of Representatives Practice*, p. 725.
[81] Joint Committee on Parliamentary Privilege, *Report: Volume*, Chapter 1, para 20. In 1984 the Joint Select Committee on Parliamentary Privilege of the Australian Parliament recommended the 'adoption of a policy of restraint in the exercise of the penal jurisdiction' based on the House of Commons one, and while this recommendation was not formally implemented, as the then Clerk of the House of Representatives, Ian Harris has outlined, successive Speakers have 'indicated support for it' – Harris, *House of Representatives Practice*, p. 727.
[82] McKay, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, p. 129.
[83] Quotation from the expulsion motion, cited in Campbell, *Parliamentary Privilege*, p. 214.
[84] See Campbell, *Parliamentary Privilege*, pp. 214–20, for discussion of this point.
[85] Sir Robert Gordon Menzies, *Afternoon Light: Some Memories of Men and Events*, Cassell, London, 1967, p. 302.
[86] Section 49, Commonwealth Constitution.
[87] Evans, *Odgers' Australian Senate Practice*, p. 64.
[88] Evans, *Odgers' Australian Senate Practice*, p. 64.
[89] Quotations from guidelines cited in Campbell, *Parliamentary Privilege*, p. 55.
[90] Speaker Sir Billy Snedden quoted in Harris, *House of Representatives Practice*, p. 753.
[91] See, for example, the 'Limitations and Safeguards in the Use of Privilege', pp. 753–4, in Harris, *House of Representatives Practice.*
[92] Quoted in Campbell, *Parliamentary Privilege*, p. 70.
[93] Evans, *Odgers' Australian Senate Practice*, p. 76.
[94] *Buchanan v Jennings* [2005] 2 All ER 273 at 276.
[95] See *Prebble v Television New Zealand Ltd* [1995] 1 AC 321.
[96] The Privileges Committee of the New Zealand House of Representatives recommended that: 'the Legislature Act be amended to provide that no person may incur criminal or civil liability for making any oral or written statement that affirms, adopts or endorses words written or spoken in proceedings in Parliament where the oral or written statement would not, but for the proceedings in Parliament, give rise to criminal or civil liability'. See Privileges Committee, *Question of Privilege Referred 21 July 1998 Concerning Buchanan v Jennings*, May 2005, p. 9. The Western Australian Legislative Assembly's Procedure and Privileges Committee made a similar recommendation: 'That the *Parliamentary Privileges 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'. See Procedure and Privileges Committee, *Effective Repetition: Decision in Buchanan v Jennings*, Report No. 3, 2006, p. 6.

[97] See Andrew Geddis, 'Defining the Ambit of the Free Speech Privilege in New Zealand's Parliament', *Public Law Review*, 16(1): 16, March 2005; and David McGee, 'Members of Parliament and Defamation', Paper prepared for the 32nd Conference of Australian and Pacific Presiding Officers and Clerks, Wellington, New Zealand, July 2001, p. 7.

[98] 'Damian Green Arrest: The Expert View', Times Online, http://www.timesonline.co.uk/tol/news/uk/article5251363.ece (viewed 6 January 2009).

[99] 'Tory Shadow Minister Damian Green Arrested After Obtaining Leaked Documents', Telegraph.co.uk, http://www.telegraph.co.uk/news/newstopics/politics/lawandorder/3532133/Tory-minis (viewed 6 January 2009).

[100] 'Damian Green: Arrested for Doing his Job', Guardian.co.uk Politics Blog, http://www.guardian.co.uk/politics/blog/2008/nov/28/damian-green-conservatives/print (viewed 6 January 2009).

[101] 'The Tragedy of the Commons', *The Economist*, 389(8609): 16, 6 December 2008.