Perceptions of Parliamentary Privilege in today's Legislative System

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This article addresses the question of privilege in terms of its essential purposes, and of public perceptions. Relying on the judgment of the High Court in Browne v Fitzpatrick, it concludes that 'whether privilege exists or not must always remain a justiciable question'.

There are major differences between parliamentary privilege as an element of the *Lex Parliamenti* and the perception of some parliamentarians and the community that privilege, as it attaches to members of Parliament acting within their jurisdiction, is some kind of special right or concession that should be bound by the rules of morality but which is used and sometimes abused by members in a way not enjoyed by other sections of the community.

The colonial legislatures, when established before Federation, were entitled by law to such privileges as were reasonably necessary for the proper exercise of their legislative functions. Some of these legislatures later enacted legislation adopting for themselves the whole of the privileges enjoyed by the House of Commons in the United Kingdom or adding defined privileges to those already invested in them under the general law relating to colonial legislatures.

Victoria, South Australia, Western Australia, Tasmania and Queensland legislated to extend claimed privileges and powers to punishment for contempt.

In 1987 the Commonwealth Parliament enacted the *Parliamentary Privileges Act* to provide that, except to the extent the Act expressly provides otherwise, the powers, privileges, and immunities of each House and the members of the committees of each House in force under the Constitution continued in force.

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The Act was also enacted to avoid the perceived consequences of the interpretation of Article 9 of the Bill of Rights in the judgments of Mr Justice Cantor and Mr Justice Hunt in the Supreme Court of New South Wales.

To date the New South Wales State Parliament has not passed such an Act, relying generally on the privileges that attach to it from the adoption of Article 9 of the Bill of Rights of 1688.

In 1995 the Legislative Council established by resolution of the House a Standing Committee on Privilege and Ethics. It replaced an earlier Committee established to consider matters of privilege only and acquired additional functions as a result of amendments to the *Independent Commission Against Corruption Act 1988*. The main purpose of the amendments was to expand the jurisdiction of the ICAC over members of Parliament. This was achieved by inserting an additional ground relating specifically to members into the definition of 'corrupt conduct' — 'substantial breach' of a code of conduct adopted by the House for the purposes of the Act.

In addition to expanding the definition of 'corrupt conduct', the amendments also required that a committee be established in each House of Parliament to perform certain specified functions relating to members' ethics. These functions included development of a code of conduct for members.

The equivalent Assembly committee was established directly by a provision of the Act itself. Unlike the Council committee, the Assembly committee includes three 'community members'. The Council rejected a proposed amendment to the Act that would have included community members on its committee.

The Legislative Council Committee has met on a number of occasions both in its earlier and current forms. In my estimation, however, it has met to discuss a matter of privilege in only two cases. These were, unauthorised disclosure of *in camera* evidence given before a parliamentary committee (1993) and an alleged attempt to interfere with a witness before a committee of the House (1998). I will discuss my reasons for this assertion later in this article. Each of the other matters referred to the Committee have been matters of procedure or order. It is even doubtful whether any of the matters have arisen pursuant to the *Independent Commission Against Corruption Act 1988*.

This highlights the importance of correctly understanding what parliamentary privilege really means. This is not to say that matters of disorder or corruption should not be addressed but that they should be put into their proper context. Neither breaches of ethics nor matters of corruption have any relationship to privilege.

In considering that context it is relevant to consider briefly the history of parliamentary privilege. It has long been claimed that Parliaments are the exclusive judges of their own privileges. Equally, it has long been held that parliaments cannot by simple action create a new privilege. The courts, while mindful of the *Lex*

Parliamenti, regard it not as a particular law but a part of the law of the land. When the rights of third parties have therefore become enmeshed in matters in which a parliament may claim privilege, the courts have reserved the right to form their own view of the law of parliament and its application.

It is the possible abuse of the rights of parties outside the parliament that gives rise to my concern about the misconceptions that exist in relation to parliamentary privilege and the call of some parliamentarians to seek a wider application.

Appropriate privileges exist that allow parliaments to regulate their own constitutions and as such those privileges attach themselves to a House,

> As a collective body for the protection of its members and the vindication of its own authority and dignity. Fundamentally, however, it is only as a means to the effective discharge of the collective function of the House that the individual privileges are enjoyed by members. (see *Erskine May*, 21 edn, 69)

It should be noted that these privileges, stemming as they do from those asserted by resolution of the House of Commons in 1675, were established for the purpose of allowing members to 'Freely attend the public affairs of the House, without disturbance or interruption' C.J. (1667–87, 342).

It is clear, therefore, that these privileges were, and are, attached to service in the House rather than to activities external to it although those activities may have some connection to a member's wider duties.

While undoubtedly the role and function of members of Parliament have changed extensively since 1675, all authorities have continued to structure this aspect of privilege around 'proceedings in parliament.'

'Proceedings in parliament' are defined in *May*, 21 edn, at 92, as:

> Some formal action, usually a decision, taken by the House in its collective capacity. This is naturally extended to the forms of business in which the House takes action, and the whole process, the principal part of which is debate, by which it reaches a decision.

The principal privilege, that is, the right of free and unfettered speech, is absolutely protected by current law. Action cannot be taken against members for exercising their right of free speech.

As has been already mentioned, parliamentary privilege attaches to *'the collective function of the House'* and as such can only be waived by resolution of the House itself. No individual member may waive the privilege they enjoy. While there are few instances in which the NSW Parliament has waived privilege, it did so on two reasonably recent occasions.

The first occasion arose from a request from the Royal Commission into the New South Wales Police Force, which sought access to certain *in camera* evidence taken before the Select Committee upon Prostitution. The Parliament agreed to allow the Royal Commission access to relevant transcripts provided the contents of the evidence not be made public or revealed to any person other than the Royal Commissioner and officers of the Royal Commission. The resolution also required that should the Commission seek to adduce any of the material into evidence it should first seek the leave of the Legislative Assembly. The Royal Commission made such a request; however, the request was denied on the basis that the action proposed by the Commission had real potential to breach Article 9 of the Bill of Rights. This is a course of action with which I agree, as it is imperative to the successful function of committees that witnesses giving evidence, *in camera* or openly, must not fear their evidence will be used against them in any other way.

The second occasion occurred when the *Special Commissions of Inquiry Act* was amended in 1997 to waive certain elements of privilege to allow an inquiry into allegations made in Parliament against certain persons including members of Parliament. It was believed the serious nature of the allegations was such as to impugn the integrity of Parliament itself and both Houses were of the view that an extraordinary measure was necessary to address an extraordinary circumstance.

The amendments were so structured as to ensure the privileges of the Houses were still totally within their control and were not in any way diminished by legislation. The amendments provided that the waiver of privilege by a House would not prevent a member of Parliament from claiming parliamentary privilege before a special commission, but allow a member to appear and answer questions or produce documents voluntarily before a special commission without being obliged to claim privilege. Where a member appeared before a commission the protection of the Act, section 23, still applied, so that the information gained by reason of the fact that privilege was not claimed could not be used — except in limited circumstances — in civil or criminal proceedings against the person. Any resolution to waiver privilege required a two-thirds majority of the relevant House or, if investigating proceedings of a joint committee, by a two-thirds majority of both Houses.

While the Parliament made every endeavour to retain control over its privilege there is still a question as to whether the action of the Parliament was necessary in the circumstances or whether in doing so it weakened the privilege previously existing?

Although the allegations were of a serious nature there was no evidence brought before the Parliament to substantiate them. Indeed, at the conclusion of the investigative process the member raising the allegations denied making allegations of criminal conspiracy or even an implication of any criminal conspiracy. While members have the right to raise matters of concern in the Parliament they are also under an obligation, where evidence of criminality exists, to bring that evidence to the attention of the appropriate authorities. Under New South Wales law persons having knowledge of information that suggests corrupt conduct have an obligation

to place such information before the Independent Commission Against Corruption. This I believe was the procedure that should have been followed.

The allegations were made against individuals, some of them members of Parliament, but in no way touched the functions of Parliament as an institution. While the Parliament took extraordinary action to protect some of its members by an action perceived as protection of the institution, this was not the case. It demonstrates the blurred perception of what constitutes the privilege of parliament.

It is my opinion that the privileges of the Parliament in New South Wales do not need further definition to protect these rights. New South Wales has survived 150 years without a specific Privileges Act and without a damaging effect on either the legislature or the people it represents.

In considering whether the scope of parliamentary privilege should be widened, I simply ask the question: 'What mischief has been done to the democratic process in our State by not enshrining privileges in statute?' I would suggest none.

Why, therefore, do we need to make more rules? Just for the sake of making rules, or because we have an inflated perception of our own preciousness? Was not the Oakes incident in Federal Parliament not so long ago just that sort of reaction? Was the case of Brown and Fitzpatrick other than a monstrously unjust action by the Parliament?

We often hear references to the 'coward's castle' from those who think the right of free and unfettered speech in the Parliament already gives too great a licence for irresponsible abuse of those outside. What further criticism might we attract if we extended that privilege to a wider spectrum of parliamentary activity and to the positive power of punitive sanctions against those seen to be a threat to parliamentarians.

There is little true analogy between contempt of court and contempt of Parliament. The purpose of a court hearing is to ascertain truth in the adjudication of a particular matter upon which it must determine a just solution. To impede or corrupt that process is an immediate threat to one of the essential ingredients of civilised society, the right of those before the court to a fair hearing. It has been rightly said that the courts should have the power to act summarily in order to ensure that they can continue to function in the event of conduct which, either in the face of the court threatens the proceedings immediately or, outside the court, threatens to pollute the streams of justice.

Parliaments deal with matters in a more general manner and are, by their very nature, less susceptible to impediment or corruption in the carriage of their legislative duties. Their power to enact legislation is in itself a powerful weapon against any serious threat to their representational and constitutional responsibilities. Any serious attempt to obstruct or intimidate an individual member in the

execution of that member's wider duty is surely capable of prosecution by legal process outside parliament and, as such, should properly be dealt with by the courts.

I pose again the question: *'Where are the travesties of democracy and justice that cry out for change?'*

In attempting to codify a defined need for which there is no demonstrated need, do we not run the risk of creating something more of a monster than exists at the moment? Once again, what are the great travesties of democracy that cry out for our immediate attention? If we embrace an imagined need, are we not merely pandering to a political rather than a democratic element of our system? Are we in fact placing a weapon in the hands of the parliament, dominated as it generally is by the government, which can be used for political purposes rather than democratic ends? Even in a House in which the government does not have the numbers, there is no guarantee that such a power would be used only to good and noble end.

There are two aspects of privilege that have been raised of late and should be addressed. One is the illicit use by the media of *in camera* evidence given to committees. The second is whether a member's source of information can be subpoenaed by the courts on the basis that they are not protected as a 'proceeding of parliament'.

In relation to the first, we must have some regard for the media's source of *in camera* evidence. Obviously it can only be the witness, highly unlikely if it reflects badly on the witness, committee staff, highly doubtful, or a member of the committee, most probably. While it may be seen as reprehensible for the media to take advantage of illicitly obtained evidence, it cannot be as reprehensible as a committee member breaching the rules of that member's own committee. The parliament has within its power the capacity to discipline the real culprit. The fact that it cannot or will not take the steps to find and punish the real culprit is surely not a reason to 'shoot the messenger'. If members think so little of their committees that they will endanger their efficacy, why should anyone else be concerned. If members want to avail themselves of the very great privileges they have, they must also accept the responsibility of proper conduct on their part to preserve that benefit. The reason it may be considered as a breach of privilege is that it may well impede members of Parliament in the carriage of their duties.

In regard to the second, it has been argued that any impediment to the free flow of information, including confidential information, to members could inhibit their capacity to exercise constructively their responsibility as a representative of the people. If the public feel that confidential information given to a member could be drawn out by proceedings in court it may well cut off information vital to the welfare of the people and the probity of public administration.

This possibility was raised in the NSW Legislative Assembly in 1987 when a member sought the House's reassertion of its privilege of representation of

constituents by members, including the right of confidentiality of communication between member and constituent.

After reference to the Solicitor General the following advice was given,

> Article 9 does not support the claim of privilege asserted by [the member]. The mere fact that a constituent communicates confidentially with his or her local member does not make that communication a 'proceeding of parliament'. Even if the information was tendered for use in parliament (which in this case it apparently was not) that would not be sufficient.
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> The communication is privileged for the law of defamation, thereby protecting the parties in the absence of malice (R v Rule (1937) 2KB 375) but it is not subject to parliamentary privilege (see Erskine May, Parliamentary Practice, 20th edn, 167–8; S.A. de Smith 'Parliamentary Privilege and the Bill of Rights' (1958) 21 Mod L Rev 465 AT 479–80).

This means that notes of a communication between a constituent and a member can generally be subpoenaed. It *might* be otherwise if that communication related to a specific matter under consideration in parliament.

The question of a professional interest immunity for communications between member and constituent is an interesting one and one for which I had some initial sympathy. The danger, however, lies in the distinct possibility that those outside parliament could attract to themselves the privilege of parliamentary immunity simply by linking their cause to a member of Parliament under the guise of representation. This would be unconscionable and a totally unwarranted extension of the concept of parliamentary privilege. Against this proposition is the fact that in most cases material produced to members of Parliament exists in other forms available under subpoena. The competing elements of public interest must be carefully balanced and perhaps is an issue with which parliaments might rightfully be concerned, even if it means taking on the courts. The right of immunity from defamation enjoyed by members should always be used responsibly and there are many ways in which sources can be protected while at the same time bringing forward matters of genuine public concern.

This matter was examined by the House of Representatives in its 2000 *Inquiry into the status of the records and correspondence of Members*, conducted by the Standing Committee of Privileges, and by the United Kingdom Joint Committee on Parliamentary Privilege, First Report 1999. Both inquiries recommended that no additional protection, beyond that provided by current law, be given. The United Kingdom Committee noted:

> Article 9 provides an exceptional degree of protection . . . In principle this exceptional protection should remain confined to the core activities of Parliament, unless a pressing need is shown for an extension. There is insufficient evidence of difficulty, at least at present, to justify so substantial an increase in the amount of parliamentary material protected by absolute privilege.

I mentioned earlier a reference to the Legislative Council Committee in relation to alleged interference with a witness before a committee of the House. I believe this does come within the ambit of privilege in that it may be seen as an abuse of the effective discharge of the collective function of the House. Committee proceedings are certainly 'proceedings of parliament'. Intimidation of a witness that prevents a committee from gathering necessary evidence or receiving false evidence prevents the parliament from discharging its function in a proper manner.

With regard to public misconceptions of what constitutes parliamentary privilege we recently witnessed a much-publicised occasion in the Commonwealth Parliament that many considered an abuse of parliamentary privilege. There are those who consider such an unfounded attack on a person of high standing in the community to be an abuse of the special office and functions with which a member of Parliament is endowed. Though an abuse of a 'privileged' position in the broad sense of the word, however, this was not an abuse of privilege in the narrower parliamentary sense because the right of free and unfettered speech protected the speech delivered to the Senate by one of its members. That right is the essential ingredient of parliamentary representation. We would hope the Senator, when he addressed the Senate, believed what he said was correct. The fact that his assertions were ultimately shown to be baseless is the process of reacting and interacting.

When members of Parliament make false, malicious or foolish statements they are generally exposed and, as a consequence, that member's credibility is severely damaged. Unfortunately, it also often inflicts some damage on the credibility of the Parliament and the parliamentary process. Parliaments are, however, robust institutions and are well able to survive such temporary setbacks. It is difficult for the public to understand that occasional abuse of the right to free and unfettered speech, the corner stone of our democracy, is really an expression of the fundamental strength of our system rather than a weakness.

Finally, I will briefly comment on the question of punitive powers. Most decisions in parliament are made on political grounds and the public understands and accepts this as a natural phenomenon of our system. Accepting that such decisions are generally made in the party room, it is therefore difficult to reconcile that process with a decision that could result in the imprisonment of a member of the public for alleged contempt of the House. The public perception of such decision-making would certainly be one of subjective political purpose rather than disinterested justice.

The unanimous judgment of the High Court in *Browne and Fitzpatrick* said this:

> It is unnecessary to discuss at length the situation in England. It has been made clear by judicial authority. Stated shortly it is this: It is for the courts to judge on the existence in either House of Parliament of a privilege, but given an undoubted privilege, it is for the House to judge the occasion and the manner of its exercise.

That is the nub of the issue. No matter what the House decides the courts can and will override a decision of the parliament if they feel the parliament has wrongly exercised its power in respect of privilege. In other words, whether privilege exists or not must always remain a justiciable question.

Such a position would, I am sure, find favour with the public at large, and rightly so, for it is surely the role of parliaments to aid and not deny the proper process of justice. ▲