

The Use and Abuse of Parliamentary Privilege

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Parliamentary privilege is important in enabling parliamentarians to carry out their duties. But its coverage does not need to be wider than necessary to underpin key democratic processes. Nor can the impact on public opinion of perceived abuse of privilege be disregarded.

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.

The dark side of the impact of parliamentary privilege arises from concerns about the supposed abuse by members of parliament of the privilege of freedom of speech to defame people unjustifiably in speeches made in parliament.

Most recently, the comments made in the Senate about High Court Justice Michael Kirby aroused considerable debate about the use which could be made of parliamentary privilege. The campaign by Franca Arena in the New South Wales Legislative Council a few years ago against alleged paedophilia also raised similar concerns. Other instances of supposed misuse of parliamentary privilege arise in all jurisdictions with reasonably regular frequency and all attract a great deal of media attention and outrage.

Incidents such as these, lead to calls in the media and letters to the editor for parliamentary privilege to be wound back or restricted. These calls tend to reflect a perception that parliamentary privilege is a special 'privilege' (like access to a gold pass) that is only available to members of parliament. There seems to be little understanding in these views of the broader role of parliamentary privilege. The

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term 'privilege' is an unfortunate one as it creates the impression of a special right belonging to a small group of members of parliament only.

In addition to the concern within the media, the scope of the freedom of speech privilege has been questioned in academic and legal circles.¹ The basis of this questioning has been that the circumstances in which the freedom of speech privilege developed have changed significantly and the current interpretation of the law in this area is not consistent with the origins of the privilege nor with current community interests and needs.

Much of the criticism of parliamentary privilege focuses on views about community expectations of how privilege will be used. However, as I will indicate in these remarks, the breadth and importance of the protection provided by privilege is probably not well understood in the community and, if it was, community perceptions could be very different.

The simplistic view of parliamentary privilege is that it exists just to allow members of parliament to slander people in parliament without fear of defamation action. In fact I have even heard it said that some people believe members of parliament are immune from prosecution of any sort and are, somehow, above the law. However, the freedom of speech privilege itself is about a much broader protection than just allowing members of parliament to defame other people wilfully. Moreover, parliamentary privilege is about much broader protection than the freedom of speech privilege.

Also, I recognise that privilege provides a very powerful protection and thus needs to be handled with restraint. I will indicate some of the constraints which operate effectively to keep a rein on the operation of parliamentary privilege.

Turning to the freedom of speech immunity, it enables parliaments and their committees to debate and inquire into matters uninhibited by the threat of retaliation or retribution.

For the individual member, he or she can pursue matters on behalf of constituents or the public without fear of legal action being taken by powerful interests in an effort to silence the member. These powerful interests could be the executive government, business interests or others. We can too easily take this protection for individual members for granted and forget that, while the protection is for the member of parliament, it is the power it gives the member to raise matters on behalf of constituents, public interest groups and others that is significant. It is not uncommon for members to raise issues such as possible illegal activities of local businesses or unfair treatment of individuals by businesses. Without this protection, I think we

¹ See particularly G.M. Kelly, "'Questioning' a privilege: article 9 of the Bill of Rights 1688" in *Australasian Parliamentary Review* 16(1), Autumn 2001, 61–99.

would soon see the impact that this would have on the freedom with which members could express themselves in raising matters in Parliament.

It is perhaps not widely appreciated in the community that the freedom of speech privilege also extends to the proceedings of parliamentary committees including to the witnesses appearing before parliamentary committees as well as the members serving on the committees. This protection is very powerful in giving witnesses the assurance that no legal action will be taken against them for their evidence given to committees. A good example of the power of this protection is the range of witnesses who appeared before an inquiry into the Australian banking industry conducted by a House of Representatives committee, of which I was a member, in the early 1990s. Those witnesses who wished to raise complaints about banks were able to raise their cases without fear of legal action being taken by the banks. For example, a number of borrowers who had been caught up in the foreign currency loans debacle had signed confidentiality agreements with banks as part of the settlement of their cases. With the protection of parliamentary privilege, they were able to disclose the details of those confidential agreements without fear of legal action being taken against them. The evidence they gave was of great assistance to the committee, but it also assisted other borrowers in pursuing their claims with the banks. Without the protection available to witnesses, the committee could not have obtained the same quality of evidence that it did. And there is little doubt that, without the protection, the banks would have used their considerable legal muscle to restrict the evidence given to the committee.

Parliamentary privilege also confers powers on houses of parliament to protect the integrity of their processes. The principal of these powers is the power to punish contempts.

The power to punish contempts is particularly important in ensuring that parliamentary committees are supported in conducting their inquiries including being able to require the production of documents and the attendance of witnesses, and to protect witnesses from possible interference or intimidation.

The importance of the protection of witnesses was brought home very graphically to the committee recently when it had a reference in relation to a witness before the Defence Subcommittee of the Joint Committee on Foreign, Affairs, Defence and Trade. This witness, a serving member of the Australian Defence Force, gave evidence in relation to the Defence Subcommittee's inquiry into military justice, and specifically in relation to events in the 3rd Battalion Royal Australian Regiment. Subsequent to his giving of evidence, he received telephone threats and had threats painted on the door to his room in the Australian Defence Force Academy. The committee concluded that the threats to the witness were related to his evidence, but unfortunately the committee was not able to identify the perpetrators. However, the

committee was able to obtain assurances from the Australian Defence Force and the Australian Federal Police that the witness would receive protection.²

In relation to the protection of witnesses, the committee has commented on the importance of witnesses being able to give evidence to parliamentary committees freely. Interference with witnesses or potential witnesses has the potential to diminish the quality and range of evidence that is provided to committees. The committee also noted that:

if the Parliament fails to provide the protection to which . . . witnesses and prospective witnesses are entitled, the effectiveness of the Committees, and through them, the Parliament and the nation, will suffer.³

The protection of witnesses appearing before parliamentary committees provides a very good example of why the broader community should appreciate the important role that parliamentary privilege plays in supporting the community in being involved in parliamentary processes and underpinning our democratic system of government.

The power to punish for contempt also is used to prevent any interference with the capacity of members to perform their duties as members. As with the protection of the freedom of speech privilege, this protection is central to enabling members of parliament freely to undertake their parliamentary and constituency duties. The House Committee of Privileges has examined a number of cases where there have been allegations of interference with members freely performing their duties as members. While these cases have not resulted in any specific action, they have been a warning to those who may seek to interfere with members performing their duties that such action will not be tolerated by the Parliament.

I have pointed to the importance of parliamentary privilege and have advocated a better appreciation in the wider community of the role of privilege in underpinning our democratic system.

However, those who have the protection of parliamentary privilege need to understand it is very powerful, and they should exercise the protection with constraint. It is the abuse of privilege that brings it into disrepute and undermines the wider perception of the central role that privilege plays.

There are a number of mechanisms to ensure that privilege is exercised with constraint. Members of parliament are reminded periodically by their presiding officers that privilege should be used carefully. It should also be recognised that members that misuse privilege in a reckless way will be likely to face severe

² House of Representatives Committee of Privileges, Report concerning the alleged threats or intimidation against a witness before the Defence Sub-committee of the Joint Committee of Foreign Affairs, Defence and Trade, May 2001.

³ Quoted in *ibid.*

criticism from the media and the public. The damage to their credibility for misusing privilege will be greater than any punishment that might be imposed on them by their houses. I think those examples where misuse has occurred demonstrate this point very well.

Many houses of parliament, including the House of Representatives, have also introduced procedures for a citizen's right of reply. These procedures provide the opportunity for citizens to seek to reply to speeches in the houses where they consider their reputation has been adversely affected.

The process for raising and dealing with matters of privilege also ensures that only matters of significance and merit are pursued. In the House of Representatives, a member can raise a matter of privilege at any time, and should do so at the first opportunity. When a matter has been raised, the Speaker carefully assesses the matter on the basis of any evidence that is provided and on precedents and determines whether there is a *prima facie* case of a breach of privilege. If there is a *prima facie* case, it is then referred to the Committee of Privileges for investigation and report back to the House. The Committee of Privileges has no power to take action itself. It makes recommendations to the House and it is only by resolution of the House that action could be taken. You will appreciate that this exhaustive process of review ensures that only the most serious matters reach the concluding point of possible action being taken by the House.

This process can be illustrated by the most famous of cases considered by the House of Representatives — the Browne/Fitzpatrick case. In May 1955, the then Member for Reid, Mr Morgan, successfully moved that an article in the *Bankstown Observer* concerning allegations that he had been involved in an immigration racket be referred to the Committee of Privileges. Subsequently other articles from the same newspaper were also referred to the committee. The committee reported in June 1955, finding that the owner of the *Bankstown Observer*, Mr Fitzpatrick, and a journalist working for the paper, Mr Browne, were guilty of a serious breach of privilege by publishing articles intended to influence and intimidate Mr Morgan in his conduct in the House by seeking to discredit and silence him with an imputation of corrupt conduct. The committee recommended that the House should take appropriate action.⁴

The report was debated on the following day and the House agreed with the Committee's findings that Messrs Fitzpatrick and Browne were guilty of serious breaches of privilege. They were requested to attend at the Bar of the House the next day to be advised of the House's findings and be given the opportunity to explain their actions.

⁴ House of Representatives Committee of Privileges, Report relating to articles published in the *Bankstown Observer* on 28th April, and 5th, 12th and 19th May, 1955, June 1955.

The House subsequently agreed to a motion to imprison Messrs Fitzpatrick and Browne for a period of three months. This was the first occasion in the history of the Australian Parliament that a contempt of a House had been punished by imprisonment. It was probably news to many people that a House of Parliament could impose imprisonment for a breach of privilege.

Since 1955 the Browne/Fitzpatrick case has attracted great interest from historians and archivists. The complete evidence given to the Committee of Privileges by Messrs Morgan, Fitzpatrick and Browne was never published by the Committee or the House. Brief extracts only from the evidence were published in the Committee's report to the House. In 1999, the Committee of Privileges reviewed the *in camera* evidence and recommended to the House that the evidence be made available to the public through the National Archives.⁵ Following consideration of the Committee's recommendation, the House agreed in December 2000 to a resolution that publishes all *in camera* evidence of the Committee of Privileges that is more than 30 years old. Under this historic resolution, the *in camera* evidence of the Browne/Fitzpatrick case (and other cases dating back more than 30 years) has been released to the public. This process is very valuable in opening up for the scrutiny of historians and journalists, the proceedings of the Committee of Privileges.

Finally, I think it is important that the coverage of parliamentary privilege is not made wider than it needs to be to underpin our key democratic processes in the way I have described earlier.

One of the issues that are of current concern in a number of jurisdictions is the protection given to the records and correspondence of members, particularly that relating to members' dealings with constituents. The House Committee of Privileges examined this issue recently. While recognising the genuine concern that members have about their dealings with constituents and their desire to protect those dealings, the committee concluded that there should *not* be an expansion of parliamentary privilege to cover members' records generally. In reaching this conclusion, the committee was very conscious of the need to balance the significant additional protection that such an extension would provide with the other interests that would be affected by an extension. In the committee's view the balance was best preserved by not providing any additional protection in this area for members. I am aware that other jurisdictions are also looking at this issue and I would caution them to think very carefully before considering an extension to the already considerable protection afforded by parliamentary privilege.

In conclusion, I think it is unfortunate that there is not a more positive perception of parliamentary privilege in the community. As I have indicated in my presentation, there are good reasons for the community to recognise the vital role that parliamentary privilege plays in supporting our democratic system and the impact

⁵ House of Representatives Committee of Privileges, Proposed release of *in camera* evidence to the *Bankstown Observer* inquiry, November 1999.

that any diminution of privilege could have, in the longer term. On the other hand, I think there is an important onus on those who enjoy the protection of parliamentary privilege, members of parliament in particular, to ensure that privilege is exercised with restraint. ▲