

## Rating the effectiveness of committee reports: some examples

Malcolm Aldons\*

### *Introduction*

In the first article on this subject I described my methodology for rating the effectiveness of committee reports.<sup>1</sup> Based mainly on government responses to reports, committee reports can be rated according to whether in respect of influencing government decision-making: 1 — the report is effective; 2 — the report is prima facie effective; 3 — there are doubts about effectiveness; and 4 — the report is ineffective.

It is necessary to reiterate the basis for the first two ratings. To receive a rating of 1, at least 50 per cent of the recommendations have to be accepted in one form or another. These are the recommendations with likely positive outcomes. In addition, at least 50 per cent of these should have positive outcomes. In other words, these recommendations should have been implemented or there should be a commitment for implementation. There are two exceptions. If key or important recommendations have been accepted and implemented then the report should receive a rating of 1, irrespective of the rest of the ratings data. Further, if a report has been referred to in the Governor-General's speech at the opening of a parliament, this should also attract the top rating. All three indicate that the report(s) have influenced government decision-making.

To receive a rating of 2, prima facie effective, a report would have to receive the 50 per cent of likely positive outcomes, but because the positive outcomes [implementation] would be below 50 per cent, that report would get the second rating.

This article, through the use of five case studies, applies this methodology to eight reports. One case study is on a House of Representatives report, two studies are on two joint committee reports and the remaining two case studies cover five Senate committee reports. After these case studies I will discuss in the Conclusions section possible ways of measuring overall effectiveness by comparing different types of reports.

---

\* Former Committee Secretary, House of Representatives, Canberra.

<sup>1</sup> M. Aldons, 'Rating the Effectiveness of Parliamentary Committee Reports: The Methodology', *Legislative Studies*, Vol. 15, No. 1, Spring 2000

### *The case studies*

The case studies were not selected at random. They cover the first two ratings and discuss some of the issues connected to the ratings process.

#### **Case study 1: The Insider Trading Report [Rating: 1 — Effective]**

The report, *Fair shares for all: Insider trading in Australia*, from the House of Representatives Standing Committee on Legal and Constitutional Affairs, was presented on 28 November 1989. The government responded to the report on 11 October 1990.

The report had 21 recommendations and 17 were directed to government. Four of the 21 were omitted from the calculations because they were not related to government decision-making. These recommendations were directed to other bodies – the Australian Stock Exchange, the National Companies and Securities Commission, the Australian Securities Commission and representative groups in the securities industry. The government supported these recommendations and urged these bodies ‘to examine and implement these recommendations at an early stage.’

The recommendations dealt with amending the legislation and other ways of curbing insider trading, described in the response as ‘an especially insidious and damaging form of market manipulation.’ I have classified the report as policy.

The response had several complimentary comments. The committee was thanked ‘for the thoroughness of its report and its constructive suggestions for legislative amendment.’ The response also made this important comment:

The Government accepts and is acting on the vast bulk of the Committee’s recommendations. The Government has approved the preparation of amendments to the Corporations Act 1989 to give effect, to a substantial degree, to most of the recommendations in the report that require legislative action. It is planned that these provisions will be released as an exposure draft later this year.

The response also said that the government had reservations about certain recommendations. As it turned out, this meant that one recommendation was accepted in part, the government accepted the possibility of another in the longer term and approached the third in a different way.

The attitude of the government was explicit for 14 of the 17 recommendations. In other words, for these 14 the response said ‘accepts’, ‘accepted in principle’ and so forth. All 17 recommendations were accepted in whole or part so the number of recommendations with likely positive outcomes was 100 per cent. Of these, fourteen or 82 per cent had a commitment of implementation. These figures are well above the 50 per cent acceptance of recommendations and the 50 per cent implementation rate required for the top rating. Therefore, the report receives a rating of 1: effective. The House Legal and Constitutional Committee report on Insider Trading was effective in influencing government decision-making.

**Case study 2: The Agricultural and Veterinary Chemicals Report**  
**[Rating: 1 — Effective]**

The report, *Agricultural and Veterinary Chemicals in Australia*, from the Senate Select Committee on Agricultural and Veterinary Chemicals in Australia was presented on 23 August 1990. The government responded on 28 May 1992.

The report had 45 recommendations but 3 were excluded from the calculations because they asked for the provision or distribution of information and were, therefore, not related to influencing government decision-making. The majority of the remaining 42 recommendations were directed to government [62 per cent] but many were directed to other bodies, for example, the Australian Agricultural and Veterinary Chemicals Council.

According to the response the report 'identified major deficiencies in the current clearance and registration arrangements', including the absence of a substantial program to systematically review existing chemicals. Because the majority of the recommendations addressed these matters, I have classified the report as policy.

The government response was very complimentary:

Overall the Committee's Report provides a blueprint for the management of farm chemicals in agricultural production for the next decade.

Many of the Senate Committee's recommendations have been incorporated in the Government's strategy for farm chemicals for the next decade.

Unfortunately, however, these kind words did not translate into explicit government attitudes to committee recommendations. There is no response where the government says 'accept' or 'agree' and so forth. Nevertheless, I have classified 55 per cent of the responses as explicit because I considered the attitude to these recommendations to be very clear. This leaves a significant 45 per cent where the government attitude was implicit and therefore had to be inferred.

Several recommendations called on the government or organisations to 'review' or 'examine' specified matters. There are problems with such recommendations because even if they are accepted and implemented, we do not know the results of such reviews, and whether the review influenced government decision-making. For example, recommendation 43 asked the National Health and Medical Research Council to 'conduct a full review of the persistent organochlorine compounds used in Australia in order to reassess whether their continued use is justified on public health grounds'. The response said a review had been conducted, a draft report had been released and that the council would consider the final report later in 1992. Here is an instance where a review recommendation has been accepted and implemented but the outcome is not known.

The response said the report identified major deficiencies and then added that the government 'has moved swiftly to overcome these areas of concern'. The government decided 'to establish a national registration scheme for agricultural and veterinary chemicals' and to take related action. The committee recommended all this, which appears to be key or important recommendations. I have said previously that if key recommendations are accepted and implemented then that is sufficient reason for the report to be classified as effective. The response does not admit to acceptance but from the text of the response this is what has happened.

Of the 42 recommendations, 31 [or 74 per cent] had likely positive outcomes and, of these, 17 [or 55 per cent] had positive outcomes; in other words, at minimum, there was a commitment on implementation. These figures are above the minimum for the top rating and I have rated the report 1: effective. The Senate Select Committee report on Agricultural and Veterinary Chemicals in Australia was effective in influencing government decision-making. The report has made a significant contribution to the development of policy in this area.

### **Case study 3: The World Bank and the IMF Report [Rating: 1 — Effective]**

This report, *Australia, the World Bank and the International Monetary Fund* from the Joint Standing Committee on Foreign Affairs, Defence and Trade, was presented on 30 September 1993. The government responded on 30 November 1995.

The report had 32 recommendations. Of these, two were omitted from the calculations for rating effectiveness in influencing government decision-making because they dealt with the provision of information to parliament. The report required decisions from government to ensure that the two organisations more effectively met Australia's objectives. It also covered the monitoring of the activities of the Bank and the Fund. Because of this the report has been classified as policy.

The response said 'the Government welcomes the Report of the Committee and endorses many of its recommendations'. However, only one recommendation was 'endorsed'. The government attitude was explicit for only 9 of the 30 recommendations [30 per cent]. I have classified 8 of these as explicit because although words such as 'agree' or 'accept' or 'do not accept' were not used I considered the response to be sufficiently clear. This leaves a significant 70 per cent where the attitude was implicit and had to be inferred.

Governments are being evasive when they do not make explicit their attitudes to recommendations. There could be several reasons for this evasiveness. One is that governments, to avoid public criticism from their backbench, do not want to tell committees that most of their recommendations have been rejected. Such criticism can be therefore confined to the party room so that lack of explicitness is a trade-off for avoiding public criticism.

I have classified 12 recommendations [40 per cent] as being unnecessary because the committee was asking the government to do what the government had been doing before the recommendation was made. The words 'will continue to' in the response is a clear indication of an unnecessary recommendation. Recommendation 20 was that the 'Australian Executive Director exercise a more stringent oversight of Bank loans to ensure that the Bank takes a more active role in evaluating the impact of its programs upon the environment and the population'. The response said that reflecting the concerns of the government on these issues, Australia's Executive Director 'will continue to maintain a stringent oversight', that Treasury 'will continue to' seek comments on environmental aspects and that these comments 'will continue to' be passed on to our Executive Director.

A general problem with recommendations and responses, a problem that has bedevilled analysts for a long time, is causality: the relation between the recommendation and the

action taken. In some cases, such as the *Fisheries Revisited* report, and others, there is no problem because government acknowledges the connection. But these are few and far between. In other cases the government accepts a recommendation and then describes what it is doing or going to do. Here, I assume causality. In still other cases, particularly when the government attitude may be implicit, judgment is necessary. My judgment is based on the commentary provided by the response but I tend to give any benefit of the doubt to the committee.

There is another category and here the response says ‘accept’ and so forth and then indicates that implementation is not required because what the committee wants is what the government has been doing before the recommendation was made or even before the inquiry commenced. Sometimes the words ‘will continue to’ are used. These recommendations have to be discounted in the ratings process.

For most of the recommendations with positive outcomes the government attitude was implicit so that both agreement and implementation had to be inferred. But only 40 per cent of the recommendations had likely positive outcomes and on this basis the report should have received a rating of 4: ineffective.

However, a key recommendation was accepted and implemented and this changed the rating. Recommendation 32 was that the Presiding Officers write to their counterparts in countries that supply Executive Directors of the IMF and the World Bank to seek a meeting in Washington to establish an inter-parliamentary assembly to monitor the IMF and the World Bank. The upshot of all this was that the two organisations agreed to cooperate, the first meeting of the group was held in Washington in November 1994 and was attended by 22 parliamentarians from 17 countries, including Australia. The intention was that the meeting continue as an annual event under the title, the ‘International Group of Parliamentarians Involved in the Oversight of the IMF and the World Bank’.

This is an important development, the result of the committee initiative. Because this key recommendation was accepted and implemented the report receives a rating of 1: effective. This underlines the value of this special provision in the methodology. It should be noted that key recommendations that are not accepted should result in that report receiving a rating of 4: ineffective.

#### **Case study 4: The Midford Paramount Report** **[Rating: 1— Effective]**

This was a well-publicised inquiry and report. Although good administration is rarely newsworthy poor administration certainly is. The report, *The Midford Paramount case and related matters — Customs and Midford shirts — The paramount case of a failure of Customs*, from the Joint Committee of Public Accounts [the PAC], was presented on 18 December 1992. Responses to PAC reports are by a Finance Minute, so-called because the Department of Finance coordinates these minutes. This minute from Finance was dated June 1993 and the committee report on the minute was presented on 28 November 1993.

There are benefits and weaknesses in the Finance Minute system. Its great value, not available to other committees, is that it allows the PAC to respond to the minute [the response to a committee report] in a report that incorporates the minute. A notable

feature of this process in this case was the strong criticism of the committee by the Director of Public Prosecutions (the DPP) and the equally strong rebuttal of these criticisms by the PAC in the committee report on the Finance Minute.

The major weakness of the Finance Minute system is uncertainty over which response to accept when more than one organisation responds to a recommendation and when different or even conflicting views are presented. Recommendation 63 covered arrangements between Customs and the DPP. Customs accepted the 'intent' of the recommendation but the DPP said it was not viable and therefore could not be supported.

Because of this confusion I have omitted this and another recommendation. The report had 134 recommendations. The response said five dealt with policy and that the government would respond separately to them. These have been omitted. A further nine recommendations have been omitted because they do not deal with decision-making. They called for investigations by the Ombudsman and the Auditor-General, for information to be provided to the Parliament or in annual reports and for Customs to report back to the committee.

The last mentioned is used by some committees. It reflects a view that was popular in the early 1980s, namely that public servants are directly accountable to the parliament. This is a view that flies in the face of the reality of executive-legislature relationships.

The Finance Minute system is sufficient reason for classifying PAC reports as administration. The recommendations in the Midford Paramount report were process oriented and covered matters such as procedures that should be applied to investigations and legal proceedings, the seizure of documents and goods, and training of staff. I have classified the report as administration.

The attitude of the departments and others was explicit for 92 per cent of the recommendations. In other words these recommendations were 'accepted' or the 'intent' of the recommendation was accepted. This high rate is a feature of reports that result from high profile inquiries that deal with politically sensitive subjects. The vast majority of the recommendations that were accepted were implemented. The Finance Minute says that instructions, changes and amendments have been made in manuals or that instructions have been 'amplified' or 'reinforced' in manuals.

However, as noted earlier, acceptance does not necessarily mean that the organisation is going to do something new. Acceptance also means the organisation has been doing what the committee asked it to do before the committee made the recommendation. For example, recommendation 118 called for strategies for improving the performance of the investigation workforce and 119 called for performance measures. These were 'accepted' [because] such things are reviewed continuously.

Even after these recommendations are discounted more than 70 per cent of the 118 had likely positive outcomes and of this percentage 90 per cent had positive outcomes. This is a very good result so the report receives a rating of 1: effective. The PAC Midford Paramount report was effective in influencing government decision-making in administration.

It should be noted that these days process is given less weight than outcomes. An earlier view of public administration was that if adequate procedures were in place, if qualified

and trained staffs were employed and if they were adequately remunerated, then all good things would follow. Be that as it may, I believe there is a relationship between process and efficiency and effectiveness.

A result of the PAC report was the Conroy inquiry that produced another report that reviewed the Australian Customs Service.<sup>2</sup> If the committee report were the catalyst for a revamp of Customs administration this would be an even bigger plus for the committee report.

Hynd asks whether committees are concerned with outcomes or obsessed with process.<sup>3</sup> He quotes from Godfrey who says committees produce recommendations that do not discriminate between strategic matters and those of administrative detail. Godfrey also says the PAC report on the Customs Service 'would have been enormously improved by the excision of two-thirds of (its) ...recommendations'.<sup>4</sup> My proposal for an 'impact analysis' of each recommendation should go some way to resolve any perceived problem in this regard.<sup>5</sup>

### **Case study 5: The Animal Welfare Reports** **[Rating: 2 — Prima Facie Effective]**

The Senate Select Committee on Animal Welfare presented 11 reports, between 1985 and 1991. This case study covers 4 of these reports — *Kangaroos* [presented 1 June 1988, responded to on 6 May 1993], *Animal Experimentation* [presented 5 September 1989, responded to on 9 October 1990], *Intensive Livestock Production* [presented 23 August 1990, responded to on 30 May 1991] and *Culling of Large Feral Animals in the Northern Territory* [presented 21 June 1991, responded to on 30 April 1992].

Because each report received the same rating of 2 [prima facie effective] the case study treats all 4 together.

The reports made 99 recommendations but 33 were excluded from the calculations because they were essentially for the States and Territories to consider or implement. As such they had no bearing on Commonwealth government decision-making. The remaining recommendations were directed at government or specific ministers and covered matters such as funding, research and others requiring government attention. I classified all four reports as policy.

The government responses had several complimentary comments. They included the following:

The Committees' recommendations form the basis for improvement in welfare aspects of the relevant industries [Intensive Livestock Production].

(The recommendations) form the basis for improvement in welfare aspects of controlling feral animals [Culling of Large Feral Animals in the Northern Territory].

---

<sup>2</sup> F. Conroy, *Review of the Australian Customs Service — The Turning Point*, December 1993

<sup>3</sup> D. Hynd, 'Concerned with outcomes, or obsessed with process?: Senate committee reports', *Legislative Studies*, Vol. 11, No. 1, Spring 1996

<sup>4</sup> B. Godfrey, 'The Learning Organisation and Accountability in the Public Sector', *Canberra Bulletin of Public Administration*, No. 73, September 1993

<sup>5</sup> M. Aldons, *op. cit.* p. 30

The attitude of the government was explicit for all 66 recommendations. Thirty-four were supported in principle [or accepted in principle], 24 were supported, four were accepted with modification and 4 were not accepted. Therefore, the vast majority of recommendations were accepted in one form or another, so that 94 per cent had likely positive outcomes. However, a few of these had to be discounted because all that support meant was that the government was agreeing to a recommendation because government had been doing what the recommendation asked for before the recommendation was made.

Nevertheless, the four reports combined still had a healthy 77 per cent acceptance rate of recommendations [likely positive outcomes]. For the reports to receive the top rating half of these recommendations require implementation or a commitment to implementation. But only 22 per cent achieved this goal so the four reports received a rating of 2: *prima facie* effective. In other words, it appears on the surface that the reports were effective in influencing government decision-making on policy related to animal welfare.

A rating of 2 is an indeterminate or temporary rating. If there was sufficient information on implementation this could show that more than 50 per cent of the recommendations were implemented so that the rating would be changed to 1: effective. If the information showed little or no implementation, then this could reduce the percentage of recommendations with likely positive responses to below 50 per cent. The result would be a downgrading of the report to a rating of 4: ineffective.

## ***Conclusions***

Absence of follow-up procedures is a feature of committee operations. But if there is to be change committees must be interested to know of the final outcomes of their reports. If they are not interested no one else will be. If they are not interested they might continue to attract the cynical description of being 'a collection of the unfit appointed by the unwilling to do the unnecessary'.<sup>6</sup>

A solution, assuming committee interest, is for the House of Representatives and the Senate, through the Presiding Officers, to ask the government to table an 'Action Report' at regular intervals. These reports would include information on implementation of recommendations the government has accepted and the final view on recommendations the government said needed further consideration or those that have referred to others.

However, the major purpose of my research project is to test the proposition that as we move along the committee influence spectrum, from low administration to policy, administrative policy and finally to high or strategic policy, committee influence on government decision-making weakens. The ratings of reports will be used to test the proposition.

I can record the number of reports according to category and rating and write this up. Alternately, as I am inclined at the moment, I can use only two types of ratings, effective and ineffective and express effectiveness as a percentage of the total or as a

---

<sup>6</sup> A.M. Young, 'Parliamentary Committees: A collection of the unfit appointed by the unwilling to perform the unnecessary?', *Legislative Studies*, Vol. 12, No. 1, Spring 1997



ratio. This method can also be used to compare the success of Senate committees versus committees of the House of Representatives or to rank Senate, House and joint standing committees.

I have chosen the period 1988 — 1995 for my study and will be rating all reports presented in this period that require government responses.<sup>7</sup> The case studies in this article are an application of my methodology. There is a long way to go before the project is completed. ▲

---

<sup>7</sup> Reports on bills are excluded. The reports include reports presented early during the 38th Parliament that were from committees appointed during the thirty-seventh parliament

## **'Questioning' a privilege: article 9 of the Bill of Rights 1688**

**G M Kelly\***

It will not be denied, that power is of an encroaching nature, and that it ought to be effectively restrained from passing the limits assigned to it.

James Madison, *Federalist* No. 48.

Constitutional laws fix the operational foundation for the common life of a society and for accommodating divergent interests within it. Such laws may be crystallised into a formal constitution or enacted in some other statutory form. In systems of British lineage, they also inhere in the common law. They may well have their origin in immediate objectives, but readily acquire an aura of permanence. That tendency may be induced and advanced by entrenchment.

Some scope for adjustment to changing circumstances is available by way of judicial interpretation; through its processes, a constitutional provision may preserve the character of a living instrument. But the judicial role is limited. Constitutional leaps are possible only by way of political action.

Typically, therefore, the legislative process establishes structures of resistance and the legal climate imposes a mood of reluctance in respect of fundamental change. That fosters the persistence of outmoded norms, but also mitigates the danger that transient enthusiasms may eclipse venerable and still valuable law. There is no sure prescription for reconciling the apparent legislative logic of the present with the constitutional wisdom of the past.

These broad considerations are directly pertinent to the law of parliamentary privilege — a basic element in the constitutional structure. In respect of the Australian Commonwealth, the privilege regime is governed by s 49 of the Constitution,<sup>1</sup> as embroidered by legislation, by parliamentary rulings and conventions and by decisions

---

\* Barrister and solicitor, High Courts of Australia and New Zealand. The author wishes to record his appreciation for assistance in the preparation of this article to: Harry Evans, Clerk of the Australian Senate; Geoffrey Lindell, Professor of Law, University of Melbourne; Librarian and staff, Lionel Murphy Library, Commonwealth Attorney-General's Department. None of these has any responsibility in respect of the opinions expressed.

of the courts. The focus for present purposes is the privilege relating to freedom of speech and debate in Parliament, established under Article 9 of the Bill of Rights 1688.<sup>2</sup> The Article confers on Parliament and its members what is essentially an immunity rather than a privilege in respect of the conduct of parliamentary business. The practical implication is that participation in that business should not give rise to exposure to criminal or civil process.

There is nowadays some discomfort with the traditional Article 9 regime as elucidated by centuries of common law decisions. The Article, notwithstanding, is still in force in many jurisdictions (including that of the Commonwealth of Australia) in the original form. When the *Parliamentary Privileges Act 1987* (Cth) — the only relevant Commonwealth legislation of any significance — was enacted in relation to Article 9, it was expressed to be declaratory only.

From time to time, reservations are quite insistently advanced. Has judicial indulgence toward parliamentary claims caused the regime to stray excessively from its origins — and from reasonable purposes? Is constitutional rebalancing called for to meet contemporary expectations of openness and accountability in respect of public institutions, and of unobstructed access to justice by the citizen? Has the latter-day dominance of the electronic media eroded the rationale of the Article 9 privilege? The analysis that follows takes up such questions.

The ultimate concern is the current regime of the Australian Commonwealth. Because that regime is still heavily dependent on the common law background, the corpus of English law decisions is first outlined and analysed. Reference is made to interpretations and approaches in kindred jurisdictions. Although the law relating to the speech and debate privilege is not now identical throughout the common law world, consensus persists as to the foundation of principle on which it rests.

### ***The English law background***

Members of a parliamentary assembly, and the assembly as an entity, need those privileges — legal protections and immunities — that are required for the effective performance of functions under the constitution. More fundamental, and much more divisive, is the question as to how far the privileges are to extend. In English law, the long struggle over that question illustrates the theme that shifts in the actual power balance among the branches of government are bound to be reflected in constitutional change.

#### *The genesis of Article 9*

With the collapse of the feudal order in Europe, absolute monarchy was established progressively. In England, however, that kind of royal authority was soon challenged by traditional gentry and a middle class deeply influenced by protestant beliefs and ambitious in political pretensions. The Parliament became the focus of a struggle that went on intermittently for most of the 17th century.

Freedom in respect of ‘liberal but not licentious speech’ was already substantially acknowledged, but that did not extend to controlling the parliamentary agenda. ‘No King fit for his state’, declared Sir Edward Coke, ‘will suffer such absurdities’.<sup>3</sup> Foreign

policy, religion, the royal succession and the role of Parliament in the constitutional structure were crucial subjects which the Stuart kings strenuously withheld from parliamentary discussion and influence as pertaining exclusively to the royal prerogative. It was a further handicap to parliamentary assertion that the Crown claimed the right, also under prerogative power, to call and dismiss parliaments at will.

Members of the House of Commons defied restraints on the liberties of their assembly. Soon after the accession of Charles I, *Eliot's case*<sup>4</sup> illuminated the claim of the Commons to control subject-matter and procedure as elements of the speech and debate privilege. Debate had proceeded without introduction or endorsement by the Executive and the Speaker had been forcibly detained to delay adjournment. The Crown perception was that an established rule of control had been flouted and that the matter in issue (the King's action in starting a war with France) was peculiarly within the prerogative. In the contemporary setting, the legal differences were fairly justiciable. Because judges, typically, were creatures of the Crown (and did not obtain security of tenure until 1701), it was a foregone conclusion that such a matter would be unfairly judged. Eliot was charged with seditious libel and for violence against the Speaker. He perished in the Tower.

It was a serious obstacle to the realisation of the aspirations of the Commons that the judges were appointed and dismissed at the royal pleasure and were subservient to Crown wishes accordingly. The Crown even interfered procedurally. In the notorious case of Sir William Williams,<sup>5</sup> the King dismissed a court that was already empanelled and substituted a fresh bench of judges that would more certainly reach the decision required.

As is well known, the conflict ended with revolutionary change in the constitutional balance. The monarchy was permanently sidelined and the political supremacy of the Parliament was entrenched. That outcome was crystallised in the Bill of Rights 1688, which targeted grievances to which the victors in the 'Glorious Revolution' were particularly sensitive. Article 9 proclaimed parliamentary aspirations that had been denied or suppressed during the long struggle for supremacy:

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.

Within the Bill, Article 9 is distinct and in its own right fundamental, but it responded also to broader historical imperatives and has a close relationship with the overall scheme. Whatever the effects of semantic movement and the shifts of generations of judges over three centuries, that starting point is always important. The Article has enjoyed unusual constitutional sanctity. To this day, it is an important foundation of the privileges of Parliament in the United Kingdom and those other countries whose systems derive from English law.

### *The issue of construction*

Time and change have imposed unusual difficulties for fixing the initial meaning of Article 9. One accretion should first be dealt with. More often than not, commas are inserted after 'speech' and 'Parliament'. They were not there in the original and are misleading. By present-day rules of punctuation, the result would be curious: 'freedom of speech' would not be limited by 'in Parliament' and 'debates and proceedings' would

not depend on 'freedom'. On that point, however, the text is in any case ambiguous. Are 'freedom of speech' and the following words to be taken as separate or is 'freedom of speech and *freedom* of debates and proceedings' intended? The latter is narrower. The historical record rather suggests that freedom from Crown interference was to such an extent uppermost in the minds of the parliamentarians that the broad construction may be discarded. But *Lord Peterborough's* case<sup>6</sup> indicates, it should be added, that members of the Stuart parliaments could not always rely on privilege as a defence even against private actions arising directly from their parliamentary duties.

The foundation meaning of 'debates or proceedings' emerges from the history. The Bill of Rights was concerned to enable Parliament to conduct its affairs without direct royal interference or intimidation. The immunity would be wide enough to achieve that safely and to cover matters vulnerable to harassment. That suggests a field of operation wider than just formal sessions, but it is necessary to be cautious. At the time of enactment of the Bill, as Erskine May recalls,<sup>7</sup> 'proceedings' was a technical parliamentary term denoting formal action such as a decision. The wider modern meaning developed later. That interpretation does in fact fit the text of the Article. Although the Bill should not be analysed by the exacting standards applied to present-day legislation, it is reasonable to assume that 'debates' and 'proceedings' were seen as distinct. A narrow reading of 'proceedings' would satisfy that assumption. The extended modern meaning would include 'debates' and make that word unnecessary. It is unlikely, therefore, that Article 9 initially comprehended a wide range of 'parliamentary' activities.

Could 'debates or proceedings' ever be taken to extend beyond the members? In *Jay v Topham*,<sup>8</sup> the parliamentarians thought privilege should cover parliamentary officers carrying out the orders of the House in the House. But that is a very logical extension, and a small one, scarcely affecting the conclusion suggested. It does not indicate that strangers to the House could be parties to 'proceedings'.

'Ought not' has attracted judicial attention<sup>9</sup> on the ground that it is not the expected formulation for a prohibition. Is Article 9 to be read just as recommendatory, as a guiding principle only? It is true that, in the Bill of Rights generally, the favoured formula is 'x . . . is illegal'. But five clauses do not fit the formula and 'ought' appears instead. It is not arguable that all those provisions are directory only. The apparent discrepancy is best explained as a stylistic variation.

Semantic shift is clearly an issue in respect of 'impeached or questioned'. From the 16th century, 'impeach' has had a range of meanings including 'challenge', 'call in question', 'attack', 'discredit' and 'disparage'. A respected British authority has offered another possibility:

According to the New English Dictionary, to impeach originally meant 'to impede, hinder, prevent' and it retained this signification at the time the Bill of Rights was passed. It would seem to follow that the privilege of freedom of speech would be infringed, not only by direct proceedings against members for words spoken in Parliament, but by any acts which impede or hinder members in the exercise of, or prevent them from exercising, this privilege.<sup>10</sup>

The case is not quite compelling, not least because the semantic conclusion does not fit well with 'impeached in any court'. Seventeenth century usage in similar contexts may be a better guide. The Protestation of 1621 claimed 'freedom from all Impeachment,

Imprisonment or Molestation (other than by censure of the House itself)' in relation to the speech privilege. The Long Parliament repeated this form of words. What would be expected to precede 'imprisonment'? The natural answer is indictment or prosecution. Since the central theme of the struggle with the Crown was to remove parliamentary proceedings from the scope of the courts, the use of 'impeach' in a technical connection with court action is probable.<sup>11</sup> Of course, that narrower meaning survives to this day.

'Question' is difficult because it suggests such a vague and extensive field of operation. To adopt the researches of David Hunt J in the Supreme Court of New South Wales,<sup>12</sup> its meanings have included 'interrogate' (Shorter Oxford Dictionary, since 1490), 'doubt' (Shorter Oxford, since 1533), 'call in question, dispute, oppose' (Shorter Oxford, since 1632) and 'examine judicially — call to account, challenge' (Shorter Oxford, since 1637). It is unlikely that all of these were intended for the purposes of Article 9, and the last meaning commends itself because it corresponds accurately to the mischief the Article aimed at. The essential link, once again, is with court process.

If, as suggested, the focus is on Crown interference by way of the courts, it is not at once evident why 'or place' is tacked on to the Article after 'any court'. The addition has been something of an embarrassment, since it could not realistically apply at large. It is read down to refer only to bodies that are court-like in their objectives and operation. As a guide to the initial intention, that is actually close to the mark. Apart from statutes and matters deliberately placed on the public record, 17th century (and later) Parliaments treated their business as highly confidential.<sup>13</sup> There was no 'place' except a court or similar inquiry where parliamentary privilege would be under threat. Even if apparently at large, therefore, 'place' had a very limited scope.

'Freedom' is the overarching concept of Article 9. Must its ambit be taken as unrestricted? In 1593, Sir Edward Coke found no difficulty in describing as freedom of speech a privilege limited to subject-matter endorsed by the Crown. Nearly a century later, James II advanced, not implausibly, that freedom of written communication was not implied. Indeed, the law commonly speaks of freedom within parameters, though it is likely to be confusing when the parameters are not clearly stated. The authors of Article 9 had strict principles and would have intended the meaning 'freedom under the law'. But their pretensions for the Parliament were not modest; it is another question, in the context, what they might have meant by 'the law'.

Historical retrospect can thus identify fairly confidently the legislative objectives to which the Bill of Rights — and Article 9 — gave effect. Textual interpretation is more speculative. But one conclusion emerges clearly: on a number of key points, a pragmatically narrow reading is impelled. Does that suggest that broader constructions have been coloured, anachronistically, by doctrines of parliamentary supremacy which 1688 realised? No subsequent monarch challenged the new constitutional regime. That outcome, notwithstanding, did not create a Parliament whose reach was unrestrained. The demise of one constitutional problem gave more vigorous life to another: to reconcile parliamentary privilege with the authority of the courts.

### *Privilege and the courts*

In its origins, Article 9 responded to the historical menace that judges who lacked independence did the bidding of the Crown. Stuart prosecutions were arbitrary and so

were the consequent legal penalties. In the post-1688 climate, when the judiciary secured permanent tenure, constitutional protection against collusion became, in principle, unnecessary. Had Article 9 become a dead letter? Since 1688 had fostered excessive claims to privilege on the part of the parliamentarians, it was fortunate that that did not occur. Paradoxically, Article 9 was absorbed into the role of the courts in imposing moderation in matters of privilege on the Commons. That development gave it a new life — and reach — but also shifted the foundations on which it rested.

It was a large question whether the law of Parliament was subject to the general law of the land. Sir Edward Coke had declared it to be distinct from the common law and not amenable to judicial intervention.<sup>14</sup> Later, the judges resisted any such doctrine. Once they had security of tenure and a measure of independence, they felt their way cautiously into this minefield. In *Jay v Topham*,<sup>15</sup> the right to examine a privilege was asserted, but with mixed results. *Ashby v White*<sup>16</sup> clearly exposed judicial misgivings as to the inroads made by privilege. The case involved a disputed return and was thus cognisable in Parliament. Holt CJ held, notwithstanding, that his jurisdiction was not excluded. A vote was a property right and as such justiciable at common law. In *R v Paty (the Five Ailesbury Men)*,<sup>17</sup> five electors challenged the returning officer for fraudulently and maliciously refusing their vote. The reaction of the Commons was again based on the claim that Parliament was the sole arbiter in its affairs (then acknowledged to include election processes). The complainants were committed to Newgate prison for contempt. They applied to the Court of Queen's Bench for habeas corpus. Although other judges in the case persisted unevenly with the doctrine that privilege matters were not to be determined by the courts, Holt CJ now asserted in forthright terms that the constitution opened the way to court intervention — 'if they [the Commons] declare themselves to have privileges which they have no legal claim to, the people of England will not be estopped by that declaration'.<sup>18</sup>

The Lords finally concluded that the episode involved claims to parliamentary privilege that were not supported by the constitution, passed a resolution prohibiting the arrest of the persons pursued by the Commons and initiated a resolution to the effect that no new privilege could be created.<sup>19</sup> That did not remove the power to commit for contempt but reinforced the judges in asserting the paramountcy of the general law. Acts of 1700, 1703, 1737 and 1770 progressively whittled down excessive claims to privilege.<sup>20</sup>

In the post-Jacobean order, nevertheless, there was not much judicial disquiet that 1688 might have delivered too much of a good thing. Disquiet was more active among the Americans, who embodied it in their written constitution. Apart from *Wilkes*,<sup>21</sup> courts of English law were not assertive to contain privilege in the interests of constitutional balance. Blackstone, a faithful fan of the Settlement, epitomised the prevailing mood:

The whole of the law and custom of Parliament has its original from this one maxim, 'that whatever matter arises concerning either House of Parliament ought to be examined, discussed and adjudged in that House to which it relates, and not elsewhere'.<sup>22</sup>

By this time, the Parliament had captured the Executive by way of the convention of the Cabinet system and its apotheosis seemed complete. Blackstone's maxim was parroted on complacently even into this century. His towering reputation obscured the inconvenient truth that it was too loosely expressed.

In 1837, the Commons followed Blackstone in a resolution that reasserted 'sole and exclusive jurisdiction to determine upon the existence and extent of its privileges'.<sup>23</sup> The courts persisted with a much narrower approach and had even extended their grasp to criminal matters. In *Burdett v Abbot*,<sup>24</sup> it was held that criminal offences connected with parliamentary proceedings were cognisable in the courts. In *R v Merceron*,<sup>25</sup> evidence before a Commons committee was held to be admissible on a criminal charge. Except when dealing with statutory exceptions, later cases (including *R v Wainscot*<sup>26</sup> in Australia) did not maintain this boldly intrusive approach.

Keen parliamentary sensitivities were aroused and the basic tension was exposed in the very public case of *Stockdale v Hansard*.<sup>27</sup> The case arose when the Commons ordered a report made to the Parliament by a statutory body to be printed. Stockdale commenced an action for libel. Lord Denman (with the concurrence of other judges) endorsed the Blackstone approach — 'whatever is done within the walls of either assembly must pass without question in any other place'<sup>28</sup> — but held that the defamatory words were not within the scope of the privilege. His Lordship distinguished a paper published for the use of members and a document that might be 'published and sold indiscriminately'. The judgment thus asserted court control over the ambit of the privilege.

There was a strange sequel. Stockdale was committed for contempt by the Commons in respect of his successful action and the Sheriff of Middlesex was similarly committed for executing the lawful judgment.<sup>29</sup> The episode ended in a reluctant review of their position by the Commons and that was crystallised in statutory form. The Parliamentary Papers Act 1840 provided that any civil or criminal proceedings initiated against a person in relation to publishing papers by order of Parliament must be stayed.<sup>30</sup>

Other relevant 19th century developments may be noted briefly. Against earlier trends, *Ex parte Wason*<sup>31</sup> decided that statements by members in the Lords could not be made the foundation of civil or criminal proceedings, though the ruling related to an alleged conspiracy initiated outside the House. The case was said to be founded on a principle of necessity in respect of the conduct of Parliament rather than Article 9. Also, a line of cases took the point that the courts cannot go behind an enactment to demonstrate that it was obtained by fraud, error or misunderstanding, even if related proceedings against a member are not in question.<sup>32</sup>

In *Bradlaugh v Gossett*,<sup>33</sup> the plaintiff was elected to the Commons and sought to make an affirmation instead of taking the oath under the Parliamentary Oaths Act 1866. The House ordered his exclusion until he had a change of heart. When Bradlaugh sought an injunction and a declaration that the order was *ultra vires*, the court declined jurisdiction on the ground that what was in issue was the internal management of the House. That looked to be merely echoing Blackstone, but the approach was in fact much narrower, for the court reaffirmed the right to ascertain in case of need the extent of the privileges.

Defamation, a familiar issue in relation to privilege, was taken up in *Dillon v Balfour*.<sup>34</sup> *Stockdale v Hansard* was distinguished and an action stemming from words spoken in the Commons was stayed in express reliance on Article 9. '[W]e have but to open the Statute Book', declared Palles CB, 'for the Bill of Rights . . . declares its existence as one of the 'ancient rights and liberties of the realm'.<sup>35</sup> It is worth noting also that *Duke of Newcastle v Morris*<sup>36</sup> decided that a parliamentary privilege might be abrogated only by express words in an enactment. The condition retained its force in the common law but was not always observed in subsequent statutes.



By the end of the 19th century, great progress had been made in establishing a rational approach to privilege and to fixing the ambit of Article 9. The evolution may be summarised as follows:

- (1) The Article 9 privilege was the outcome of a long constitutional struggle and epitomised a fundamental redistribution of power. Its purpose was simply to declare the right of Parliament to pursue its own agenda free from interference or legal harassment by the Crown.
- (2) There is doubt as to the original meaning of key expressions in the Article. The evidence suggests:
  - ‘freedom’ is limited by the historical context and should be read as applying both to speech and to proceedings;
  - ‘proceedings’ was restricted to formal parliamentary actions and decisions;
  - ‘impeached or questioned’ reflected the need to protect parliamentary activity against retribution by the Crown through court process.
- (3) The Act of Settlement 1701 established the foundation for an independent judiciary, thus eliminating in principle the threat of collusion with the Executive which had been a basic rationale of the Article. But it survived as a safeguard and was imported into new contexts.
- (4) Seventeenth century political euphoria in respect of parliamentary supremacy and excessive judicial deference combined to give Article 9 an expanded ambit.
- (5) Parliaments have shown some capacity to curtail privileges in the public interest.
- (6) The role of the courts as the final arbiter on the existence and scope of privileges was ultimately secured.

### ***Modern approaches and dilemmas***

The regime of privilege inherited by present-day Parliaments was created in an age very different from our own. It responded to constitutional difficulties which, by and large, have been overcome. Parliamentary victory over the Crown ensured that, for the purposes of the English constitution, a system of ascendancy of the legislature was firmly entrenched, generally applauded and not much questioned.

### ***Some general implications of change***

Once the English legal system crossed the Atlantic and other oceans, the rationale of the regime was less apparent. The Americans were alert to the dangers of parliamentary supremacy and provided ‘practical security for each (of the several classes of power) against the invasion of the others’.<sup>37</sup> The concept of balance, not supremacy, is in any case implicit in the arrangements of a federal state. Powers have to be distributed, and in such a way that legal safeguards and scrutiny are called for. Parliaments must be more open and their reach is diminished. Legislative absolutism is modified by requirements of power sharing and the realities of judicial review. In the fullness of time, Canada and

Australia were bound to impose that kind of emphasis. The result is a far cry from the Blackstone paradigm.

A system of balance became more attractive when, even in its own Houses, Parliament was no longer supreme. From the 18th century (in the British tradition), the Cabinet was drawn from the members, but this capture of the Executive by the Parliament came to a bad end. Factions congealed into parties and the governing party came to be controlled by the Executive. Privilege, which had begun by protecting parliamentarians against an arbitrary Executive and a corrupt judiciary, thus became available to the Executive, through its control of parliamentary business, as a political weapon and a shield.

Other parliamentary changes impinged upon the position of Article 9. Invasion by the Executive, to repeat Madison's term, was paralleled by the invasion of vernacular democracy. Until this century, the British Parliament was recruited by a kind of confidence trick which ensured that most members were most unlike most of their electors. But the Mother of Parliaments lost much of that patrician flavour and the assemblies of Commonwealth countries were largely spared it. Such an evolution placed great strains on a scheme of privilege that ultimately implied a tacit code of conduct, even if reinforced by the internal disciplines of a House. If members were ignorant or scornful of the standards on which the system rested, privilege could very easily be misused and abused.

The derelictions of members were now much more likely to have adverse consequences for public confidence in the political system because parliamentary affairs ran the gauntlet of media exposure. Much earlier, proceedings had been conducted in strict confidence. Progressively, the record (now in the form of *Hansard*) was published<sup>38</sup> and unauthorised reports and comment were permitted.<sup>39</sup> Assemblies of the common law world ultimately became fairly relaxed about media intrusion and criticism, even if intemperate or wrong-headed.<sup>40</sup> On that basis, the explosive development of the media in recent times ensured that all sorts of lapses from parliamentary propriety and responsibility, as well as the serious business of the state, would figure prominently in the schedules of the networks.

That came about because it was never considered that the media of the common law world were so closely bound to the Executive, or exercised such coercive or punitive powers, as to fall within the rubric 'other place out of Parliament'.<sup>41</sup> Article 9 did not apply to the media, which thus enjoyed much greater access to parliamentary material than the courts and much more freedom in its use. That caused considerable concern in communities of the initiated but was too abstruse a matter to excite the general public. It was a positive aspect of popular democracy, nevertheless, that the citizen ceased to regard the apparatus of government as taboo terrain and came to expect accountability from all organs of government. Moreover, committees, hearings and inquiries made up an increasingly significant share of parliamentary functions and were directed not only toward the world outside but also inward upon the policies and decisions of parliamentarians themselves. Because the voluminous traffic of committees was taken to be reasonably related to proceedings in Parliament, it too was covered, in most of the common law jurisdictions, by privilege and Article 9. Most hearings ran the gauntlet of public scrutiny, notwithstanding, because media coverage was accepted.

Two communities of the initiated regarded the privilege regime with particular disquiet. Although certain parliamentary material could now be tendered in proof of fact, the

China Wall of Article 9 still excluded examination — the drawing of conclusions and inferences — in any court-like process. That frustrated the aspiration of the courts to elicit the truth and do justice. For civil rights activists, even broader issues were at stake. To close off parliamentary transactions from investigation in the most rigorous forums of accountability could prejudice the recognition of human values. The situation of common law jurisdictions appeared especially vulnerable in an era when international opinion had given human rights issues a universal colouration. The China Wall of privilege, it was alleged, did not permit that obligation to be honoured.

These strictures could not be disregarded in a situation where the Article 9 privilege had strayed dramatically from its origins. The monarchy had become a paper tiger and the Executive had been absorbed into the Parliament. Judiciaries were independent in principle and fairly generally regarded as impartial in practice. The initial purposes of protection against the Crown were exhausted. Perversely, as it might seem, Article 9 had not become obsolete but flourished in a different setting and by way of different applications. Although still invoked from time to time in relation to collisions of constitutional interest, its most common role in modern times is to shield members against private suits in defamation. That role is symptomatic in a community where litigation has been democratised and defamation is part of the theatre of citizens with celebrity status. Parliamentarians, it is reasonably said, must be free to expose wrongdoing without fear or favour or risk of legal jeopardy. The doubt is whether that freedom should extend to allegations made with motives that are not altruistic. Such excesses are supposed to be controlled by the internal disciplines of Parliament, but the task is impracticable.

Even where the citizen initiates a defamation action in relation to a member's comment outside Parliament, there is no guarantee of a fair trial. Parliamentary proceedings may be material as corroboration of the member's imputations or conduct but are most unlikely to be available to the court. Worse again, a member may commence a defamation action against the citizen, who may need access to the parliamentary record to justify his allegations. Insofar as the record is to be analysed, Article 9 bars the way. Media coverage, of course, knows no such obstacles. The virtual reality of that most recent and dubious form of 'People's Court', trial by television, may well appeal to the public as affording better exposure of the issues.

It is a widespread assumption, moreover, that uncontroversial application of Article 9 is fostered because fundamental conflicts between Parliament and the Executive have been resolved. Even after the important accommodations of the 19th century, distinguished judges were not so sure. As Lord Coleridge CJ warned in one of the last great privilege cases of that era, the prospect could not be excluded of further 'unseemly conflicts between the courts and the House'.<sup>42</sup> Is latter-day quiescence on the matter the result of unduly indulgent attitudes to privilege on the part of modern courts? In de Smith's suggestion, the 20th century has taken 'a remarkably generous view of the scope of the internal affairs of the [Parliament]'.<sup>43</sup>

In recent jurisprudence, also, privilege has been linked with a principle of necessity in respect of legislative operations and a principle of mutual respect between the branches of government.<sup>44</sup> That ensures a strong predisposition to judicial deference. In the Article 9 context, however, the current paradigm is not beyond question. The robust

approach of David Hunt J in *R v Murphy*, for example, may provide a glimpse of a braver new world:

Freedom of speech in Parliament is not now so sensitive a flower that, although the accuracy and honesty of what is said by members can be severely challenged in the media or in public, it cannot be challenged in the same way in courts of law.<sup>45</sup>

### *Relaxation of the 'exclusionary rule'*

In relation to court processes at common law, in fact, there has been some lifting of the veil. In *Prebble v Television New Zealand Ltd*,<sup>46</sup> the Attorney-General of New Zealand set out what might be accepted as the common law position. Evidence of debates or proceedings would be admissible when used:

1. to prove material facts, such as the fact that a statement was made in Parliament at a particular time, or that it refers to a particular person.
2. for the purpose of proving that a government decision was announced in Parliament on a particular day.
3. in order to establish that a member of Parliament was present in the House and voted on a particular day.
4. to establish that a report of parliamentary debates corresponds with the debate itself and is fair and accurate and therefore attracts the defence of qualified privilege in the law of defamation.

The submission noted further that the courts had resorted to reports of debates in Parliament for the purpose of interpreting statutes. That use (which did not depend on the leave of the House) was also assumed not to be contrary to Article 9.

At common law, relaxation of the rule ('the exclusionary rule') that the courts may not refer to parliamentary material as an aid to statutory construction now rests particularly on the authority of the House of Lords case of *Pepper v Hart*.<sup>47</sup> The rule was entirely judge made, was not a recognised rule until the 19th century and has been irregularly enforced. Its boundaries were never clearly settled. In English law, inroads had previously been made upon it, notably in *Pickstone v Freemans Plc*,<sup>48</sup> where the House of Lords looked at what was said by the relevant minister in initiating debate on a statutory instrument not subject to amendment in Parliament. *Pepper v Hart* concerned an ambiguous provision in a tax Act. On a purely textual approach, the court would be likely to find a legislative intention to impose the tax. Ministerial statements and the parliamentary history made clear that the tax was not intended.

Their Lordships found some difficulty in giving up the useful convention that a statute should be 'a formal and complete intimation to the citizen of a particular rule of law'. Concern was also expressed that use of parliamentary material would make the preparation of cases more onerous and expensive.<sup>49</sup> It was obvious, notwithstanding, that a more purposive approach would throw light on the intentions of Parliament, and worthy of note that other Commonwealth countries had modified the exclusionary rule without adverse consequences. The question remained, however, whether the use of what was said in Parliament in order to construe legislation would be an impeachment or questioning in breach of Article 9 — 'a provision of the highest constitutional importance'. Lord Browne-Wilkinson concluded that discussion as follows:

In my judgment, the plain meaning of Article 9, viewed against the historical background in which it was enacted, was to ensure that Members of Parliament were not subjected to any penalty, civil or criminal for what they said and were able, contrary to the previous assertions of the Stuart monarchy, to discuss what they, as opposed to the monarch, chose to have discussed. Relaxation of the rule will not involve the courts in criticising what is said in Parliament . . . Far from questioning the independence of Parliament and its debates, the courts would be giving effect to what is said and done there.<sup>50</sup>

*Pepper v Hart* thus allowed reference to parliamentary materials for the purpose of identifying the legislative intention — but only where words of a statute are ambiguous or obscure and only where the reference provides a clear solution. A result very similar to that common law relaxation had already been achieved in Australia under s.15AB of the *Acts Interpretation Act 1901* (Cth), enacted in 1984 on a similar view as to consistency with Article 9. The section authorises reference to a wide range of material (specified in subsection (2)) to confirm the meaning of a provision by purposive tests or to determine the meaning of a provision that is ambiguous or obscure or that leads to a result that is manifestly absurd or unreasonable. Subsection (3) qualifies that rule by providing that due weight must be given to the desirability of reliance on the ordinary meaning of the text and on the need to avoid prolonging proceedings without compensating advantage.

#### *Narrowing Article 9 — the Murphy controversy*

In the course of a Commonwealth Commission, material emerged which might be taken to suggest that an active judge of the High Court, Justice Lionel Murphy, had been involved at an earlier stage of his career in perversion of the course of justice. Senate Select Committees held hearings on the matter and criminal proceedings were subsequently launched against the judge.

It was common ground at the trial that the Committee hearings came within ‘proceedings in Parliament’ under Article 9. But the Crown and the accused both wished to cross-examine and to test credibility by reference to statements at the hearings. Neither the Crown nor the accused was likely to invoke privilege. Did the trial judge have an obligation to do so? In that case, were the statements admissible for the purpose of critical scrutiny and inference? The Senate was represented as *amicus curiae* and put forward the orthodox view that cross-examination would be in breach of privilege because it would be used to draw inferences or conclusions about statements at the Senate Select Committee hearings.

As David Hunt J recalled, judicial glosses and restatements had created confusion and provided scope for fresh examination. Thus in *Stockdale v Hansard*, ‘whatever is done within the walls of either assembly must pass without question in any other place’<sup>51</sup> and ‘whatever is done or said should not be liable to examination elsewhere’.<sup>52</sup> That approach suggested to one judge ‘all the privileges that can be required for the energetic discharge [of parliamentary functions]’,<sup>53</sup> but that rubric is not helpful because it depends so obviously on value judgments for its content. And so to the *Church of Scientology* case — ‘a member must have a complete right of free speech in the House without any fear that his motives or intentions will be questioned or held against him thereafter’.<sup>54</sup> As was implied in *Pepper v Hart*, moreover, permitted media activity had

long since compromised the apparent exclusionary force of Article 9 — 'members must speak and act taking into account what political commentators and others will say'.<sup>55</sup>

*R v Murphy* purported to narrow the broad or Blackstone interpretation by drawing on the legislative history. The mischief aimed at, David Hunt J suggested, was that legal consequences had been visited upon members for what they had said or done in Parliament. No authority could be found either in the text of the Article or in the circumstances of its enactment for the proposition that it was intended to encompass wider objectives than to cure a practice deeply damaging to the role of Parliament and 'utterly and directly contrary to the known laws and statutes and freedom of this realm'.<sup>56</sup> Its scope should not be artificially broadened, moreover, because that could deny to the courts a role they shared with Parliament — to ascertain the truth. In the result, 'impeached or questioned' should be interpreted in the sense that the exercise of freedom of speech should not be challenged by way of court (or similar) process having legal consequences for the member (or committee witness) because he or she exercised the freedom.

The immediate significance of *Murphy* was to make parliamentary speech and conduct available to the courts to throw light on a matter outside Parliament to which privilege could not attach and from which proceedings of some sort had arisen. In that situation, a procedure such as cross-examination as to consistency could not result in proceedings against the person on account of what was said in Parliament, because the proceedings were already instituted independently. The contention was that parliamentary statements could be proved in court, analysed and compared. The jury might be asked to reach conclusions on them. That would not prevent the exercise of freedom of speech in Parliament or legally punish its exercise.

*R v Murphy* confronted earlier orthodoxies but did not stand alone on the Australian scene. Cantor J had decided to the same effect in previous interrogatory proceedings. Earlier, in *Uren v John Fairfax*,<sup>57</sup> Begg J permitted interrogatories to be addressed to a member of Parliament concerning the correctness of *Hansard*. In *R v Foord*,<sup>58</sup> cross-examination of prosecution witnesses was permitted on evidence given to a Senate Committee. The transcript of proceedings of a New South Wales Select Committee was admitted in evidence in *R v Saffron*.<sup>59</sup> It was ruled at first instance in *Australian Broadcasting Corporation v Chatterton*<sup>60</sup> that words spoken in Parliament were capable of examination to explain statements outside Parliament — even though more equivocal views were expressed on appeal. *Wright v Lewis*<sup>61</sup> gave effect to the same concern for competing social values and the same concern to narrow the privilege.

Authority to the contrary included *Sankey v Whitlam*,<sup>62</sup> *Munday v Askin*<sup>63</sup> and *Comalco v Australian Broadcasting Corporation*.<sup>64</sup> The common thread of these cases was that facts as to parliamentary speech and debates might be proved in court but could not be made the subject of submission or inference. That approach was followed in *R v Jackson*,<sup>65</sup> where Carruthers J expressly disagreed with the reasoning of David Hunt J in *R v Murphy*. The English case of *Church of Scientology of California v Johnson-Smith*,<sup>66</sup> in which Browne J held that *Hansard* extracts could not be admitted to support an allegation of malice in defamation, appears to have been a significant influence on Australian decisions. The *Scientology* case was followed in England, though with some reluctance, in *Rost v Edwards*.<sup>67</sup> Before that time, however, the Australian Commonwealth position had been settled by statutory intervention.

The effect of *R v Murphy* was that prosecution and defence counsel made free use of evidence given at Senate Committee hearings (including some evidence given in camera). ‘Severe attacks’ were launched as to the truthfulness and motives of witnesses. The conclusion drawn by the Senate was that, if the judgment stood, members of Parliament or witnesses could be called to account, attacked and damaged for participation in parliamentary proceedings, provided only that those proceedings were not the formal cause of the action. Papers prepared for the Senate<sup>68</sup> condemned any such result and upheld the conventional approach that committee evidence should be available only to prove a material fact. That restriction was necessary to ensure that proceedings in Parliament were genuinely free. The Senate papers confidently asserted that these conclusions had solid support in the history of Article 9 and a long line of court decisions.

### *Executive capture*

Possibilities inherent in Executive ascendancy in the Parliament are illustrated by *Roman Corporation Ltd v Hudson’s Bay Oil and Gas Co. Ltd.*<sup>69</sup> Following a ministerial announcement of proposed legislation in the Canadian House of Commons, the minister issued a press release and Prime Minister Trudeau sent a telegram to the appellant company warning that, in view of the proposed legislation, an intended transaction by the company would be unacceptable. In the Ontario Court of Appeal, a claim for wrongful procurement of breach of contract was held to be barred by absolute privilege on the ground that the press release and telegram were ‘mere extensions’ of statements in the House and therefore ‘in essence’ proceedings in Parliament under Article 9. The case went on to the Supreme Court of Canada but the privilege aspect was not followed up at that stage.

In discussing the scope of ‘proceedings’, the Ontario court expressly followed a pronouncement of Lord Radcliffe in the Privy Council: while the House would be anxious to confine privileges to the minimum infringement of the liberties of others, it must have the privileges needed for ‘all essential Parliamentary functions’.<sup>70</sup> Two difficulties suggest themselves. Were the transactions in question too remote from those functions to be fairly characterised as covered by Article 9? And could they be described as proceedings in Parliament at all? In making the announcement, the minister spoke just as a minister of the Crown. There was no Bill before the House and no formal debate occurred. The House was informed but not seized of the matter. It reached no conclusion and gave no direction. Subsequent actions by the two ministers were taken, therefore, in their executive capacity only. If this decision is the law, the implication is disturbing. If Cabinet ministers expect legal reaction to a contentious course of action, the solution may be simple: drop a word in the Parliament. The Executive may then proceed under cover of privilege.<sup>71</sup>

### *Public accountability*

In such cases, the cloak of privilege necessarily diminishes possibilities of public scrutiny and criticism. The notion of accountability to the public at large is an important aspect of the democratic psychology of latter-day communities. Parliament is no longer on a pedestal. The perception of its role as a protector of the public weal survives: the change is that Parliament itself is seen as accountable. That exposure of the workings of Parliament may be frustrated by Article 9 is suggested by the experience of the Western

Australian Royal Commission into Commercial Activities of Government (1990–1992). In response to a considerable public outcry, the 'WA Inc Commission' was set up by statute to investigate allegations of corruption in government dealings. As the Commissioners observed, that would entail scrutiny of statements and conduct of members of Parliament and of parliamentary committee proceedings on matters within the terms of reference. Following vigorous representations by the Commission, the Western Australian Parliament advised that the inquiry would have to proceed without access to proceedings in either House or in any committee.

As their report emphasised, the Commissioners regarded these restrictions as contrary to the public interest. While acknowledging that members must be free to speak their minds in Parliament and should not be liable for otherwise actionable comment, the Commissioners urged that privilege need not, and should not, impose a barrier of silence. The immunity from examination of parliamentary speech was 'fundamentally inconsistent with the right of all citizens to be governed in an open and accountable manner' and was likely to encourage or facilitate a disregard for the truth. The right to 'questioning' that fell short of imposing legal jeopardy was imperative for a sound relationship between Parliament and the people and for the due operation of the parliamentary system.<sup>72</sup>

### *Obstruction of the legal process*

In *R v Murphy*, David Hunt J was similarly concerned with respect to the muzzling effect of privilege on public access to parliamentary business. The greater emphasis in that case, however, was with the related but more specific issue of obstruction of justice. In an era concerned to define fundamental human rights and to empower the citizen to obtain them, interference and denial relating to legal process are serious issues. In the conventional view, the effect of Article 9 in frustrating court proceedings must escape stricture on the ground that the principle enshrined in the Article has to be given priority. That reasoning came under powerful attack in the *Murphy* judgment.

The Senate submission advanced the broad construction of Article 9 consistently endorsed by the courts. Cross-examination in relation to any parliamentary speech would be in breach of privilege because it would be used to draw inferences or conclusions. As a practical matter, witnesses would be unlikely to speak out freely if their credit could be challenged in subsequent proceedings. In the Supreme Court of New South Wales, David Hunt J asserted that the current interpretation of Article 9 was contrary to basic principles of law because its application could seriously restrict the courts and cause a denial of justice. The ascertainment of truth, a primary function of the courts, was frustrated. Seventeenth century politicians who enacted the Article to ensure justice vis-à-vis the Crown would not have meant to confine individual rights and stultify principles of justice in circumstances where 'questioning' of statements by a member or witness would not place that person in any legal jeopardy (in the instant case, the jeopardy had already arisen separately). Article 9 was intended to ensure only that members and witnesses might exercise freedom of speech in Parliament without fear of legal consequences.

The standard response is epitomised by the opinion of the Privy Council in *Prebble*. Essentially, hard choices are imposed between competing priorities. Their Lordships were 'acutely conscious' that privilege could have a serious impact. There were three



issues in play: 'first, the need to ensure that the legislature can exercise its powers freely . . . second, the need to protect freedom of speech generally; third, the interests of justice in ensuring that all relevant evidence is available to the courts'.<sup>73</sup> It was long settled that the first must prevail even if the other two interests could not be ignored. In short, the Privy Council fell back on traditional orthodoxies which entailed generous indulgence of historical parliamentary claims. That approach, in the view of the New South Wales Court, meant declining the fundamental re-examination of the role and scope of the privilege which the compellingly changed conditions of the contemporary world would appear to impose.

### *Media liberties and the contrast with the courts*

Both in *R v Murphy* and in the 'WA Inc' Commission, there was forthright criticism of the 'puzzling distinction' between the muzzling effect of Article 9 on court proceedings and the wide latitude for comment and 'questioning' enjoyed by the media. As has been outlined, media material has never been considered as coming within the scope of Article 9. The broad construction of the Article, the Commissioners observed, had the effect of excluding evidence and thus obstructing them in the role Parliament had itself designated. Yet much of the forbidden material was notoriously a matter of public knowledge and had been the subject of a media feeding frenzy. The issue was not simply frustration of public accountability. The contrast threatened to turn the Commission into a theatre of the absurd.

In *R v Murphy*, the contrast concerned David Hunt J in the circumstances of a criminal trial. In his opinion, the argument that committee witnesses would not speak freely if their statements could be examined in court deserved short shrift in view of the present-day liberties of the media:

The publication of such comments by powerful organs of the media attacking the conduct of a member of parliament is undoubtedly far more likely to prevent him speaking in parliament 'with impunity and without fear of the consequences' than mere allegations in a court of law that his statements in parliament were untrue.<sup>74</sup>

As David Hunt J emphasised, the circumstances of the case were already a matter of active and widespread controversy. In that situation, it would be incongruous if what was said by members (or witnesses) could be challenged severely in the media but not challenged in the courts of law. That conclusion made up one strand in a judgment which, as has been noted, took the unconventional course of permitting introduction and cross-examination of parliamentary material.

### *Imbalance in legal proceedings*

Another kind of curial imbalance has quite frequently attracted adverse commentary in the courts not only as inhibiting their capacity to do justice but as also imposing unfair prejudice against a particular class of litigants. If the citizen launches a defamation action against a member of Parliament on the only footing possible — a statement outside Parliament — it may be of great importance to give evidence of parliamentary speech or conduct as corroboration. On precedent, access is very likely to be refused. Much more prejudicial is the case where the member initiates proceedings and the citizen's defence depends on introducing parliamentary matter, for example to prove

justification. The South Australian case of *Wright v Lewis*<sup>75</sup> exposes the essential dilemma.

The plaintiff alleged in the House of Assembly that the defendant Wright had obtained favours as the result of his Labor Party affiliations. Wright replied through a local newspaper, accusing Lewis of abusing privilege and characterising the allegation as 'cheap political opportunism'. When the plaintiff sued in defamation, the defendant sought to challenge the truth of what had been said in the House. At the request of the Speaker, the State Attorney-General appeared in order to submit that the words spoken could be proved by tendering *Hansard* to found a claim of qualified privilege but could not be the subject of 'submission or inference'. There could be no examination of the plaintiff's motives or propriety in making the allegation. The trial judge ordered most of the particulars of defence to be struck out on the basis of privilege and the matter was referred to the Full Court.

Article 9, King CJ recalled, had been 'interpreted and applied in widely different ways' and its scope was open to consideration. Cases such as the present one particularly merited such consideration because the public interest was significantly involved. If defences in defamation were effectively stifled by privilege, the conduct of members of Parliament would be protected 'from the public scrutiny which is an essential feature of modern notions of public accountability'. If the defendant sought to defeat an action for defamation by proving truth, that would not inhibit a member in the exercise of free speech because he would be aware that his actions and motives could not be examined in a court unless he himself instituted proceedings. It was held that the 'questioning' in issue would not impugn the plaintiff in a way prohibited by Article 9, that the privilege was not intended to extend to cases where the member of Parliament was initiating the proceedings and that the privilege could not be relied on by the plaintiff.

*Prebble v Television New Zealand Ltd*<sup>76</sup> considered rather more elaborately the unfairness resulting if a member of Parliament plaintiff succeeded because privilege crippled the defendant's case in proceedings he had not sought. The matter arose from an investigative television programme that dealt with aspects of economic restructuring in New Zealand during a period in the 1980s when the plaintiff was the Minister of the Crown responsible for sales of state assets. TVNZ wished to put the plaintiff's reputation in issue, pleaded all the defamation defences and sought to use the speech and conduct of the plaintiff and others in Parliament to demonstrate irregularities in the sales processes. At first instance, Smellie J struck out particulars referring to parliamentary statements and proceedings but permitted the matter to proceed on the ground that there was adequate non-privileged material for a satisfactory defence.

In the Court of Appeal, the claim to privilege was upheld. There was concern, however, as to the resultant imbalance between the parties. Would TVNZ be placed at an unjust disadvantage if parliamentary material could not be used to examine motives? The House might be petitioned to waive privilege (the House subsequently advised that it had no power to waive a provision in a statute).<sup>77</sup> Further, the case raised an issue of 'great constitutional significance' — it would put on trial the record of a government and the integrity of its economic programme. A defamation action by one ex-Minister 'is hardly a suitable vehicle for such an inquiry'. By majority, the Court exercised its inherent jurisdiction to stay the action.

The case then went to the Privy Council. Their Lordships were by no means blind to the acute dilemma presented by such cases as between private rights, access to justice and the need to uphold parliamentary immunities. Unlike the New Zealand Court, however, they found themselves able to evade the dilemma. In the present case, it was concluded, the allegations struck out were comparatively marginal and the defendant would be handicapped to a limited extent only. The interests of justice did not demand a stay. That would appear to suggest a less generous assessment of the threshold at which a defence in such circumstances would be viable. Strangely, the issue ‘of great constitutional significance’ that had conclusively influenced the matter for the Court of Appeal — the extensive political scope of the case — was not referred to.

Politicians are not entirely insensitive to the implications of privilege in depriving the citizen of legal rejoinder and redress in face of parliamentary allegations. Even if a response skirts the pitfalls of defamation, however, there is a basic imbalance because parliamentarians have the assurance of media attention, especially if their allegations are colourful. The victim may struggle in vain to achieve equal prominence. The Australian and New Zealand parliaments have quite recently adopted a right of reply procedure under which a response to parliamentary allegations may be incorporated in *Hansard* and published.<sup>78</sup> From the all-important media standpoint, notwithstanding, yesterday’s news may be no news. It is a hard chase after an allegation that has a parliamentary start.

### *Impeached or questioned*

To speak generally of the common law jurisdictions, it is now beyond doubt that the courts will admit proof of fact as to parliamentary business. ‘Questioning’ — taken to involve examination and the drawing of conclusions and inferences — is another matter. The very wording of Article 9 appears to put that beyond the pale. The distinction seems clear, but has caused judges and others considerable difficulty.

The tediously familiar case of *Adam v Ward*<sup>79</sup> is a useful starting point. It arose from the report of an Army Council inquiry which made unfavourable references to the conduct of Adam (a member of Parliament) after he had unfairly vilified an officer in the House. In an action by Adam, the House of Lords noted that the report was in strong terms but considered it justified by the ferocity of the attack and because the attack had been published to the world at large. The defence of qualified privilege was allowed. Parliamentary privilege was at no stage raised. In *Prebble*, the Privy Council was pressed to explain. In their Lordships’ view, the only legal issue in relation to which parliamentary privilege could have arisen was whether the Army Council’s response was so wide as to go beyond qualified privilege. Because the answer was no, ‘there was no issue . . . which questioned the truth or propriety of what had been said in Parliament; the only material point was the fact that the allegation [against the officer] had been made in Parliament’.<sup>80</sup>

The explanation is a puzzle. The balance between statement and rejoinder was certainly considered closely. Conclusions were drawn as to the quality and character of the plaintiff’s words. In *Wright v Lewis*, the extent of this process is recalled — ‘it is clear from the report [of *Adam v Ward*] that the plaintiff was questioned about the statements and his motives in making them. That procedure attracted no comment from the Lords who decided the appeal’.<sup>81</sup> Did the judges conclude that particular features of the case

made the application of privilege inappropriate or that, if the parties ignored it, the Court was entitled to do the same? If so, somebody should have said so. The strange silence of *Adam v Ward* on parliamentary privilege makes it an unsatisfactory authority on that topic.

*Finlay v News Media Ownership*,<sup>82</sup> which went to the New Zealand Court of Appeal, is even less instructive. A newspaper initiated a sustained campaign against the policies and motives of the plaintiff (a minister of the Crown). Finlay retorted in Parliament. The newspaper then published a further sharp attack. When the minister sued, the defendant sought to justify the allegations, and the tenor of statements made, by detailed analysis and comment in respect of the plaintiff's comments in the House. It is helpful to turn to Cooke P in *Prebble*'s case: 'The Court accepted that it was open to the defendant to invite the jury, when considering damages, to take an adverse view of the plaintiff's speech. It is hard to see that this would not be a "questioning"'.<sup>83</sup> Parliamentary privilege was not raised and is not mentioned in the judgment. It is also hard to see that the circumstances and their legal implications were appreciably different from those in *Adam v Ward*. In *Prebble*, notwithstanding, the Privy Council dismissed the privilege aspect of *Finlay v News Media* as follows: 'In their Lordships' view, the defendant newspapers should not have been allowed to 'question' the plaintiff's conduct in the House'.<sup>84</sup>

The New Zealand case of *Cushing v Peters*<sup>85</sup> is helpful in linking 'questioning' to the related concept of 'impeached'. Outside the Parliament, allegations of corrupt practice were made against 'a prominent businessman' by Mr. Winston Peters MP. He did not indicate the person aimed at, but later named Mr. Cushing in Parliament. Cushing launched a defamation action on the non-parliamentary statements and sought to produce *Hansard* for identification. In the District Court, Dahlmer J allowed access on the ground that 'questioning' of the parliamentary statement or disclosure was not involved.

The difficulty is that, in relation to the relevant limb of the case, the non-parliamentary material was a kind of shadow-boxing because it was insufficient for identification. And identification is a *sine qua non*. Could it fairly be said that the source of the action and jeopardy was outside the Parliament? Could the *Hansard* fact be taken as the effective source of the jeopardy? The judgment examines seriously only the 'questioned' limb of the Article 9 formula. Much more fundamental is the issue deriving from 'impeached' — whether examined or challenged or not, does legal jeopardy arise because of the use of the statement? That view was taken on appeal. For Ellis and Greig JJ, the parliamentary material provided the only source of identification and was thus the proximate source of the jeopardy. The case was finally decided against the defendant, notwithstanding, on the basis of identification by way of a separate non-parliamentary statement. The moral is that parliamentary facts, even if not 'questioned', may be inadmissible as 'impeaching' a party. Thus access to *Hansard* may have to be conditioned by circumstances and an alert intuition as to the possible implications of these two fundamental terms of the Article 9 scheme.

### *The problem of 'proceedings in Parliament'*

As earlier analysis has indicated, it is crucial to the operation of Article 9 to have reasonable certainty in the interpretation of 'proceedings'. At common law, it can

scarcely be said that objective was ever met. The preliminary point is that, whatever construction was placed on the term originally, the courts have undoubtedly allowed more latitude in modern times. Some cases show great indulgence. *R v Graham Campbell, Ex parte Herbert*<sup>86</sup> raised the question as to how far beyond the direct business of the Chamber the privilege should be taken to extend. The result has been said to have established a 'low watermark of judicial deference' when the sale of liquor in the House of Commons without a licence was held to be in proceedings and thus beyond the reach of the law. In the view of Lord Hewart CJ, 'any tribunal might well feel, on the authorities, an invincible reluctance to interfere'. Much later, an Australian court was less generous. In *Bear v South Australia*,<sup>87</sup> it was held that privilege did not govern injury to the knee of a parliamentary waitress.

The commonest issue is in relation to documentation, as illustrated by the 1957 Strauss affair,<sup>88</sup> which concerned actions and correspondence of a member outside parliamentary debate. Strauss, a member of the Commons, forwarded a letter to a minister, who sent it on to the chairman of the Electricity Board. The letter contained allegations about members of the Board and the Board's solicitors threatened Strauss with proceedings in defamation. He referred the matter to the House Committee of Privileges, which decided the letter was within 'proceedings' in the sense of Article 9 and that the action would be a breach of privilege. Subsequently, the Commons resolved that the letter was not in proceedings, despite the committee's finding.

It is worth adding that the matter did not end there. A referral was then made to the Privy Council as to whether (in effect) the issue of a writ against a member for parliamentary speech could be treated as a breach of privilege.<sup>89</sup> The proviso is necessary that the reference did not relate directly to the scope of 'proceedings' but focused on the question whether the Parliamentary Privilege Act 1770 (UK) removed the barrier of privilege in relation to a suit against a member. Their Lordships recalled 'the inalienable rights of Her Majesty's subjects to have recourse to the courts of law for the remedy of their wrongs' but held that the rights were not inalienable at all. The answer was no. The Act applied only to members in their private capacity and did not affect privilege under Article 9. Lord Denning dissented strongly, suggesting also that the Commons had misconceived their competence in the Strauss affair.<sup>90</sup> Article 9 is contained in an enactment and the interpretation of enactments is a fundamental responsibility of the courts.

As *R v Murphy* illustrates, 'proceedings' certainly extends beyond parliamentary debates, and related conduct of members, to hearings in committees. The authorities envisage a somewhat wider application, but common law decisions have been taken on a case by case basis. Rules of remoteness have not been developed, though de Smith has hinted at some such test.<sup>91</sup> Successive United Kingdom inquiries embraced the idea of defining 'proceedings' for the purposes of Article 9 and a 1967 Select Committee on Parliamentary Privileges suggested 'everything said or done by a member in the exercise of his or her functions or in either House in the transaction of parliamentary business.' These inclinations have not been followed up in that jurisdiction by legislation, apparently on the ground that a precise statutory definition would deprive the Parliament of freedom of interpretation and might lead to disputes with the courts.<sup>92</sup> Erskine May purports to reflect the original technical meaning of the term and also the later development:

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.<sup>93</sup>

As will appear, it was left to the Parliament of the Commonwealth to grasp the nettle. The approach taken implies a generous reading of the Select Committee dictum and would appear to range beyond the implied Erskine May boundaries.

*The 'wider principle' — reading up the privilege?*

Does the Article 9 privilege cover the field in conferring immunities relating to 'proceedings'? In *Prebble*, Cooke P and Richardson J both put that in doubt.<sup>94</sup> The former traced the relevant privilege to three sources, with the implication that their operation is indistinguishable. This finds support in *Chenard and Co v Arissol*,<sup>95</sup> where Lord Reid stated a principle of necessity as a paramount ground of decision — that the setting up of a legislative assembly implies the necessary powers, which would have to include the immunities included in absolute privilege. The leading case of *Ex parte Wason*,<sup>96</sup> also, was not founded on Article 9 but allowed immunity on analogy with the 'necessary' protection given to court proceedings in the administration of justice. In Cooke P's opinion, the principle of mutual restraint between the courts and Parliament was also at the heart of time-honoured authorities.

Richardson J raised the rather different suggestion that parliamentary immunities are not confined to Article 9 but fall into two categories, 'those concerned with the speech and conduct of individual members and those concerned with the collective or corporate functions of Parliament'. In his Honour's view, *Prebble* raised both, but what was determinative was a separate privilege ('associated with' Article 9) under which speech or conduct reflecting on the proceedings of the House is a violation of privilege.<sup>97</sup>

The concept of a penumbra of privilege beyond Article 9 is endorsed again in *Prebble* by the Privy Council:

In addition to Article 9 itself, there is a long line of authority which supports a wider principle, of which art 9 is merely one manifestation, viz, that the Courts and Parliament are both astute to recognise their respective constitutional roles.<sup>98</sup>

The Blackstone doctrine is prominent among the authorities cited for that proposition. The Privy Council went on to suggest that 'according to conventional wisdom, the combined operation of Article 9 and the wider principle' would prohibit any suggestion in court that statements were untrue or deceptive or that parliamentary action had been influenced by a conspiracy.

All this is formidable authority, but it is confronted by quite formidable objections. Lord Denning, in his commentary resulting from the Strauss affair, has provided a starting point:

Whatever may have been the privilege of Parliament before the ninth article, it is quite plain that thenceforth the extent of the privilege was to be found by reference to the statute and nothing else; as when the royal prerogative is embodied in a statute, thence-forward the statute alone governs the exercise

of it. And being found in a statute, the courts of law are by our constitution the only body authorised to give a binding interpretation of it.<sup>99</sup>

In short, a statute takes precedence over any other instrument or rule (except possibly another statute) purporting to cover the same subject-matter. Does that permit concurrence? As Lord Denning has stated, there is no question of concurrence where a prerogative is overtaken by statute — the prerogative is extinguished to the extent of the statutory intrusion. It would be confusing and inconvenient if that did not hold for privilege.

There is no reason, of course, why other principles relating to parliamentary privilege should not apply beyond the field of operation of Article 9. In a particular instance, however, the ambit of the Article must be determined in order to establish what scope remains, because no other principle can trespass on the territory of the Article. In *Prebble*, that issue really escapes consideration. Both in the New Zealand Court of Appeal and in the Privy Council, the ‘wider principle’ is taken to absorb Article 9 (which is ‘merely one manifestation’). That would entail the consequence that a principle of common law may extend or even override the operation of an Act. But statutory eclipse is not a normal process of the law. The notion stands customary precedence on its head.

In a case such as *Prebble*, moreover, it is difficult to see that the ‘wider principle’ could have a role. What parliamentary material was sought? Which aspects of it would be comprised under the principle but not under Article 9? The defence sought to examine statements made in the House and the processes by which ‘proceedings in the House were initiated or carried through into legislation’. Enacted legislation, probably, could not rank as ‘proceedings’; that may explain the decision in *Chenard v Arissol*.<sup>100</sup> But the conduct of parliamentary business, manipulation of procedures, management of the progress of legislation — these matters are squarely within the ambit of Article 9. If, in accordance with the argument as to statutory paramountcy, the ‘wider principle’ must not encroach on that territory, no scope remains for its operation.

### ***The Parliamentary Privileges Act 1987***

The *Parliamentary Privileges Act 1987* (Cth) was enacted in reliance on s 49 of the Constitution for the express purpose of overturning the decision in *R v Murphy*. It fixes the interpretation of Article 9 but purports to be declaratory only. The Act speaks as if the Article is the sole source of privilege in relation to freedom of speech and proceedings and asserts such broad claims for its scope that coexistence with the ‘wider principle’ would seem to be excluded.

Subsection 16(1) declares that Article 9 applies in relation to the Parliament of the Commonwealth and is to be taken to have, in addition to any other operation, the effect of the subsequent provisions of the section. On that foundation, subs 16(2) provides the first statutory definition of ‘proceedings’ for the purposes of Article 9. The language is necessarily general but the influence of the common law landmarks discussed above is clear. In so far as it is declaratory, moreover, the definition strengthens misgivings as to the place of the ‘wider principle’, since it is expressly anchored on Article 9 and covers a wide range of contingencies.

Subsection 16(2) of the Act reads:

For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, 'proceedings in Parliament' means all words spoken and acts done in the course of, or for the purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes —

- (a) the giving of evidence before a House or a committee, and evidence so given;
- (b) the presentation or submission of a document to a House or committee;
- (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
- (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

The recent case of *Rowley v O'Chee*<sup>101</sup> centred on the interpretation of subs 16(2) and the 'chilling effect' that court processes are said to have on parliamentary activity. In that matter, the plaintiff in defamation proceedings applied for the defendant Commonwealth Senator to produce all relevant documents for inspection. They included background material not only in relation to the alleged defamation (by way of a radio broadcast) but also for statements previously made by the Senator in Parliament. The application was resisted on the ground that the documents related to the purposes of, or were incidental to, the transacting of the business of the Senate.

At first instance, Williams J acknowledged that 'there has no doubt been a widening of [the Article's] scope to meet modern circumstances'. The subsection reflected that development. But the Act could not be taken to cover material such as that under consideration unless a direct connection with parliamentary business could be shown. An order for production was made.

That was not upheld on appeal. For McPherson JA, one group of the documents did clearly relate to Senate business and satisfied the requirements of para 16(2)(c) 'recording and compiling notes of information and writing letters . . . in anticipation of imminent discussion or debate is what one would ordinarily expect a Member of Parliament to do'. And the protection necessarily continued beyond the time of parliamentary activity. But the position of relevant documents that merely 'came into possession' of the Senator was less clear. Privilege should attach only if the material was adopted and acted on for a parliamentary purpose. In such a case, 'proceedings' would be questioned or impeached if the information was vulnerable to court process.

Concurring in principle, Fitzgerald P noted that the purpose of discovery would be cross-examination, but also emphasised that subs 16(2) 'could not transform every action of a parliamentarian into proceedings'. The legal process should not accept a blanket claim of privilege but should test each document against the statutory criteria. That appears consistent with the approach recently advocated by the Clerk of the Senate.<sup>102</sup> Whether the extended operation of the immunity applies to communications of information to members and other persons is likely to be determined by the closeness of the connection between the material and potential or actual proceedings in a House or committee. That implies case by case — and document by document — decision and necessarily involves an element of subjective judgment.



In another context, the Clerk of the Senate has suggested that *Rowley v O'Chee* highlights a significant difference between the Australian and American approaches. The American test is whether production of the document may be resisted because it is concerned with the legislative **function**: *Brown and Williamson Tobacco Corp v Williams* 62 F 3d 408 (1995). In Australia, the court examines the document to ascertain its connection with proceedings. What is at issue in that case is the document's **status**.<sup>103</sup>

Subsection 16(3) takes up the basic matter of 'impeached or questioned':

In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:

- (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
- (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
- (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

The explanatory memorandum to the Bill explained that each of these three paragraphs deals with a refinement of the 'impeached or questioned' rubric. The first paragraph is not in dispute and prevents parliamentary proceedings from being directly impugned in a court. Paragraph (b) prevents the use of such proceedings to support court action not originating in the proceedings and (c) prohibits the indirect use of proceedings, for example, as the source of an inference by the jury.<sup>104</sup>

Miscellaneous provisions should be noticed briefly. Subsection 16(4) prohibits the admission of any parliamentary evidence taken *in camera*. This is a true example of what the Americans call 'testimonial privilege'. It entrenches a strict refusal to provide the evidence under any circumstances, regardless of the purpose for which its use is sought. Subsection 16(5) removes doubts as to the availability of parliamentary records and the propriety of comment in any action relating to s 57 of the Constitution.<sup>105</sup> Subsection 16(6) provides that parliamentary proceedings are examinable in relation to criminal offences arising from proceedings and for which prosecution is authorised by statute. Under subs 16(7) it is declared that the section is not to have retrospective effect.

The constitutional validity of subs 16(3) was tested in *Amann Aviation Pty Ltd v Commonwealth*<sup>106</sup> and *Hamsher v Swift*<sup>107</sup> and much more severely in *Laurance v Katter*, where it was upheld by majority only.<sup>108</sup> Pincus JA doubted the validity of the subsection as (obiter) an 'improper interference with the functioning of courts exercising federal jurisdiction' (at 485) and held that at least it did not validly operate with respect to defamation suits. His Honour's cry of indignation as to the 'uncertainty' created by the existing state of the law and the provision's practical consequences for the public interest and the rational administration of justice compels sympathy — but would appear to sweep aside that careful consideration of the historical development of Article 9 at common law which is essential to the understanding of the 1987 Act.

Davies JA sets up what is, in effect, a case by case test for the application of the subsection — in the relevant situation, is freedom of speech actually impeached or

questioned?<sup>109</sup> The grounds for such a reading down or modification are unconvincing. Rather, the subsection expresses the legislative intention to exclude specified uses of proceedings on the basis that those uses are *ipso facto* repugnant to Article 9. The approach in those terms is consistent with conventional common law authority.

A recent commentary questions the validity of the subsection on rather more technical grounds.<sup>110</sup> The Parliamentary Privileges Act, it is contended, relies not only on s 49 of the Constitution but also on 51(xxxvi) and 51(xxxix) of the placita. In relation to the incidental powers under the latter, subs 16(3) is said to violate the principle that the means selected by the Parliament to achieve a permissible object must be reasonable and appropriately adapted to that end: *Leask v Commonwealth* (1996) 187 CLR 579. Moreover, s 49 (with or without the aid of the placita) does not confer unrestricted legislative power but is 'constrained by implied constitutional inhibitions. Specifically, the power cannot be used to interfere with the exercise of the judicial power of the Commonwealth, to interfere with the functions of State courts, or to curtail freedom of political communication'.<sup>111</sup>

Subsection 16(3) did however receive a weighty endorsement by the Privy Council in *Prebble*. The Parliamentary Privileges Act, their Lordships declared, made it clear that *R v Murphy* did not represent the law of the Commonwealth. The Act set out what had previously been regarded as the effect of Article 9. In relation to 'impeached or questioned' specifically, 'subsection 16(3) of the Act of 1987 contains what, in the opinion of their Lordships, is the true principle to be applied'.<sup>112</sup>

Clarification of the law would doubtless have been greatly advanced if *Katter v Laurance* had ultimately made its way to the High Court. There is room for differences of opinion.<sup>113</sup> One difficulty that emerges from the commentary outlined is that Article 9 embodies a fundamental constitutional principle and is not to be treated as a rule of evidence. In the present context, it is not practicable to do more than offer the following summary conclusions (which are in general consistent with the judgment of Fitzgerald P in that case):

- (1) the power conferred under s.49 must be taken as free-standing and unfettered by the placita or, subject to conformity with the fundamental character of the parliamentary function, by the implied freedom of political discourse;
- (2) subs (3) is not an impermissible interference with Chapter III judicial power because it does not intrude upon the judicial process or purport to prescribe the manner of the exercise of the judicial power, but simply alters the legal foundation on which that process operates;
- (3) it is not a violation of the essential judicial function to prescribe — under specific constitutional provision and in accordance with a long line of common law authority — statutory limitations on the evidence available in legal proceedings
- (4) the subsection could not be characterised as a disproportionate or excessive exercise of legislative power because it closely follows the conventional construction of Article 9 and any changes in ambit are *eiusdem generis* and not substantial;
- (5) para 16(3)(c) is consistent with the conventional construction of the Article as previously applied in Australia and kindred jurisdictions;

- (6) there is no legal principle on which the application of Article 9 and the Parliamentary Privileges Act to defamation could be validly distinguished from its operation generally, except in terms of subs 10(1) of the Act.

The Act does come to grips with issues that had been contested and provides detailed guidance of some value in the operation of the Article 9 privilege. That conclusion does not exclude reservations. In terms of the preceding analysis, it would appear that orthodox common law understandings have been reasonably accurately incorporated. The writer is at one with the critics, notwithstanding, in the belief that there is a need for the searching reflection on fundamentals which the circumstances of the contemporary world impel. That would imply parliamentary intervention on political and social grounds rather than the dubious expedient of judicial legislation. It is not surprising that the extensive ambit of s16 has been endorsed by a superior court in the United Kingdom, where there has been more reluctance to open up the proceedings of Parliament and rebalance the claims of privilege against latter-day concepts of rights.

### ***What is to be done?***

It is the trend of the preceding analysis that the current common law interpretation of Article 9, as codified for the Commonwealth in the Parliamentary Privileges Act, is not consistent with the origins of the Article and not compatible with present-day community interests and needs. In that context, it is still useful to ask the practical question that confronted the parliamentarians who created the Bill of Rights. What privileges and immunities are necessary to give members adequate security and to enable the Parliament to fulfil effectively the role the community and the constitution expect? As Lord Radcliffe affirmed in *de Livera*,<sup>114</sup> it is proper to ask that question on a foundation of reluctance to concede more than is needed for the performance of essential functions or to go beyond minimum infringement of the liberties of the citizen. It is not forgotten that the internal business of Parliament is to a great extent in its own hands. While privileges confer immunities, Standing Orders and Speaker's Rulings regulate conduct.<sup>115</sup> In the present discussion, these matters of management are not directly in issue. But quite widespread concern as to contemporary parliamentary standards suggests the possibility of more public and accountable controls which might then be integrated with privilege into a single statutory regime. In that event, Lord Radcliffe's minimalist approach would still be relevant.

Statutory intervention might usefully address difficulties that arise when material that would be probative in a court is generated in committee hearings. The 'WA Inc' Commission was seriously handicapped because access was denied to evidence in hearings that anticipated and overlapped the Commission's work. Federal Senate Committee hearings that preceded *R v Murphy* elicited evidence that could have a bearing on the charge of perversion of the course of justice. The Commission was denied access on the ground that 'questioning' was involved. David Hunt J allowed access because it would not create legal jeopardy. But the committee to court connection in *R v Murphy* is even more controversial than that suggests.

The Murphy committees' records were handed over to the Director of Public Prosecutions by the Senate, thus constituting it, in the opinion of Senator Harradine, as 'a common informer for the Executive'.<sup>116</sup> The Clerk of the Senate later defended the decision publicly on the ground that the evidence was not made available 'with any

notion that [it] would be used in any subsequent prosecution' but simply 'as a guide' to any evidence which might be given independently.<sup>117</sup> In the Clerk's opinion, there was nothing to prevent a law enforcement body being alerted to possible criminal offences by evidence given to a parliamentary committee and instituting a prosecution 'based on the same evidence given afresh in court proceedings'. In terms of Article 9, the reasoning is not colourable. Once in the hands of the DPP, the record would be closely analysed and conclusions would be drawn; it would be 'questioned' in relation to, if not directly in, court proceedings. And short of the court, the office of the DPP might surely fit the concept of 'place' deriving from 17th century apprehensions of Crown process.

The moral is that there is still uncertainty as to the application of Article 9 in relation to evidentiary use of committee material. That extends to a practical reason given for an exclusive construction — witnesses will be confident they may speak openly and truthfully. Since most hearings are open to the media, any such confidence would be illusory. As has been suggested,<sup>118</sup> moreover, the proposition stands the reality on its head. A witness is more and not less likely to be truthful knowing that the evidence may be tested later. On the Murphy episode, the conclusion has to be that if the record is passed on to law enforcement authorities, the representation of witness security stemming from Article 9 is a sham. Because of the current importance of parliamentary committees, these inconsistencies are embarrassing. When the Americans took English law across the ocean, they knew better than to extend the speech and debate privilege to the peripheral activities of the legislature. It applies only to members, and witnesses are covered by statutory immunity.<sup>119</sup> That middle course is not inconsistent with the initial scope of Article 9 and warrants close consideration.

'Questioning' is fundamental. The conventional construction excludes the use of parliamentary material if conclusions or inferences are to be drawn and thus restricts its availability to proof of fact. If the regime were to be started again with a clean slate, such a comprehensive limitation would be unlikely. Modern communities have an insistent expectation of openness and accountability in public institutions. Greater visibility and democratisation of the legal system discredit practices under which full and fair evidence cannot be put to the courts. Evidentiary constraints upon institutions of justice and inquiry impose an absurd and humiliating contrast with the ubiquity of media coverage and comment. 'Questioning', it might also be concluded, could not impinge on freedoms and immunities necessary to the expeditious functioning of Parliament except in the rather uncommon case where it became the direct source of a charge or action against the relevant member.

The focus on 'questioning', in the conventional construction, diverts attention from the real issue. It is not an unreasonable or disabling constraint if parliamentary statements that do not directly cause legal jeopardy are examined critically in court, tested for consistency with other statements or conduct or analysed to establish motive. If the material serves the cause of justice, it is in the public interest to have it exposed. Some court revelations may embarrass or discredit a member, but that is an outcome the media may be relied on to have already achieved and which the member has very likely deserved. A cloak over 'questioning' should not be a cloak for questionable conduct.

The real issue is best identified by referring again to the origins of Article 9. In the beginning, 'impeachment and questioning' both related to indictment or other legal harassment by the Crown. The meaning was then extended to include exposure to any

legal process and ‘questioning’ took another semantic leap to cover examination or inquiry in court even if that did not attract legal process at all. The evolving role and functions of Parliament did not provide constitutional justification for that journey. The courts offered legal rationalisation out of excessive deference and upon illusory conclusions as to the basic requirements for adequate protection of the Parliament.

Emphasis on ‘questioning’ has rather overshadowed the significance of ‘impeached’, which is the key to the Article 9 scheme. As has been argued, its only acceptable and legally defensible application is to give members complete protection against the use of their parliamentary statements to put them in legal jeopardy. That narrower interpretation is consistent with the historical perspective and with the degree of protection fairly required. If it became endorsed as authority, current dilemmas in the courts would largely disappear. Except where the specific protection applied, justice would not be obstructed, probative evidence would not be withheld from the courts and their demeaning disadvantage as against the media would be overcome.

The narrower construction would give obvious relief in defamation cases involving a member of Parliament. As will be recalled, the present state of the common law precedents is not encouraging. *Adam v Ward* and *Finlay v News Media* ignore or overlook the problems. *Wright v Lewis* boldly sidelines them. The New Zealand Court of Appeal in *Prebble* would respond to an unfair imbalance of evidence by shutting up shop, thus arbitrarily denying a legal remedy to the plaintiff and the chance of vindicating an imputation to the defendant. That solution discounts the problem that continuation of the proceedings may have great importance to both parties, not least because the matter may be very much in the public eye. The Privy Council in *Prebble* does not countenance a stay save in exceptional circumstances. That is fine for the plaintiff, since the defendant, who has not initiated the action, may have to fight it at a severe disadvantage. Dissenting in *Prebble*, McKay J saw no need for intervention on grounds of unfairness resulting from evidentiary imbalance.<sup>120</sup> Media enterprises know they may be in a jam if they defame politicians and must learn to live with rough justice if they are sued. That may seem rather strong meat for most palates.

On the conventional reading of Article 9, such dilemmas and inconsistencies may well be inescapable. The narrower construction avoids them; there is no reason why the parliamentary evidence should be withheld. Its use could not impose more legal jeopardy for the plaintiff than starting the proceedings has already created. These issues are the more important because the most prominent role of the Article nowadays is in relation to defamation. Is it possible to go further? What adverse consequences would follow if parliamentary speech was entitled to qualified privilege only?

Some curtailment of the present unrestricted licence would be imposed. Until recently, the legal position was that a statement would be privileged only if there was a legitimate interest in making it (which would include any genuine political purpose) and the hearer had an interest or duty to receive it (which for parliamentary speech would have a very wide ambit). The protection would be lost if it could be proved that the statement was actuated by malice. As is well known, detailed application of the defence has varied in accordance with local evolution and codification in a number of jurisdictions.<sup>121</sup>

Recent assertion of a freedom of communication taken to be implied in the Australian Constitution was thought to provide more latitude. In *Theophanous v The Herald and Weekly Times Ltd*<sup>122</sup> and *Stephens v West Australian Newspapers Ltd*<sup>123</sup> the High Court

held that the traditional common law defences inhibit that freedom in relation to governmental and political matters, that it is no longer necessary to prove an interest or duty to publish and that a defendant would not be liable if three specified tests were met. In *Lange v Australian Broadcasting Corporation*,<sup>124</sup> however, the High Court took the unusual step of reconsidering the earlier line of cases. The upshot was to restore the emphasis toward qualified privilege and to confirm its extension to communication to the public of information and opinion concerning 'government and political matters', subject to the publisher proving 'reasonableness of conduct'. This modified regime still marks a considerable departure from traditional concepts.

Not least, it assimilates the speech and debate privilege much more closely to the defamation regime now applicable to the community generally. That accords with contemporary expectations of open and accountable government as implying generous scope for political comment and criticism. The operation of the new rule, however, is not yet definitively settled. As matters develop, it is open to doubt whether the Article 9 regime could be maintained alongside. The loss of that venerable provision would be strenuously resisted.

A New Zealand parallel to the Australian liberalisation suggests more daring possibilities of reform. In *Lange v Atkinson and Australian Consolidated Press NZ* [1997] 2 NZLR 22, it was held by Elias J that defamatory material published to the community at large in the course of political discussion should be protected by qualified privilege **without** the extra requirement of 'reasonableness of conduct' or any adjustment of rules as to malice beyond the scheme of the Defamation Act 1992 (NZ). Her Honour emphasised a particular background of social legislation (including the New Zealand Bill of Rights Act 1990) as impelling a 'transcendent interest in public discussion' (at 45–46). Her Honour's skilful arguments were upheld by the New Zealand Court of Appeal: [1998] 3 NZLR 424.

The matter then went to the Privy Council, where their Lordships were clearly disturbed by the boldness of the innovation. While *Lange* had been moving through the New Zealand courts, it was pointed out, *Reynolds v Times Newspapers Ltd* [1998] 3 All ER 961; [1998] 3 WLR 862 (CA) had been before the Court of Appeal and subsequently the House of Lords. The 'novel' idea of freedom of political expression had not been upheld. The Court of Appeal, in fact, had reverted substantially to traditional criteria for qualified privilege in terms of duty to publish, interest to receive and, in the absence of malice, consideration of the public interest in the relevant circumstances. The House of Lords was unanimous in deciding that the common law should not develop 'political information' as a new category of qualified privilege. Their Lordships also reminded that judges should be conscious not to usurp the role of Parliament.<sup>125</sup>

In the result, their Lordships expressed sensitivity to a particular legislative background and underlying cultural and social differences — but remitted the case to the New Zealand courts for further consideration in the light of *Reynolds*. The Court of Appeal took up that challenge in *Lange v Atkinson* [2000] 3 NZLR 385 and declined to narrow the previous judgment. The difference of perspective was attributed to the local tradition of democratic involvement in government and the critical importance accorded to freedom of speech in respect of political matters. Privilege should be extended to publication relating to government where there was a public interest or concern and the

circumstances constituted a ‘qualifying occasion’ — subject to the possibility that, under s19 of the Defamation Act 1992 (NZ), the privilege might be defeated by misuse.

In the United Kingdom, a constructive if modest innovation was enacted by section 13 of the Defamation Act 1996 in response to the notorious ‘cash for comment’ affair in which the *Guardian* alleged that Neil Hamilton M.P. had accepted cash for asking particular questions in the House of Commons. The source of information (and of the alleged cash) was the well-known businessman Mohamed Al Fayed. Hamilton wished to sue the *Guardian* in defamation, but that would require examination of parliamentary proceedings, thus encountering the obstacle of Article 9. Subsections 13 (1) and (2) of the Defamation Act provide, in brief, that a person whose parliamentary conduct is in issue **may** (emphasis added) waive personal legal protections that prevent the relevant proceedings being impeached or questioned in court.

In the event, the *Guardian* dispute fizzled out, but Hamilton later waived immunity in accordance with the subsections and commenced proceedings when Al Fayed made further comment following the publication of a report, adverse to Hamilton, by the Parliamentary Commissioner of Standards. *Hamilton v Al Fayed* (1999) 1 WLR 1569; [2000] 2 WLR 609; [2000] 2 All ER 224 went as far as the House of Lords. The effectiveness of the waiver was upheld. In the circumstances, that effect was not regarded as inhibited or cancelled by the parliamentary inquiry.<sup>126</sup>

Despite such modifications of Article 9 protection in the defamation field, the larger question does arise whether that kind of parliamentary immunity is still appropriate. Would members have sufficient protection for their utterances without it? In Australia, they would be vulnerable to defamation proceedings only if statements were reckless or unsubstantiated or made with malice. Is that so onerous? In the exercise of public power, it is inherent in freedom that it should be governed by responsibility. Under the conventional Article 9 regime, fulfilment of that basic aspiration is by no means guaranteed.

The floodgates argument is a predictable objection. Would members be harassed and distracted from their duties by a spate of litigation? The first response is that that would depend on themselves. The second is that, where significant law changes have been resisted by reference to that argument, fears have usually been deceivers and a stampede to the courts has not eventuated. The third is that the judges have considerable control in defamation matters and may strike out cases that are frivolous or vexatious or without merit. In the result, exposure to the possibility of defamation proceedings in terms of the liberal Australian regime that is now in place could have salutary effects on the tone of Parliament without impinging on freedom to discharge essential functions responsibly or creating undue disruption to the conduct of parliamentary business.

Accordingly, there is an apparently neat solution for access to parliamentary material by the courts. Committee hearings would not be covered by privilege but protected by limited statutory immunities. Under the privilege regime for Parliament, *Hansard* would be available, as at present, in proof of fact and proceedings might be examined in court provided that did not create legal jeopardy for a member. Regrettably, the application of such a regime could not be entirely straightforward. As has been suggested in relation to discussion of *Cushing v Peters*, it is not always apparent what is the essential source of the jeopardy.

Criminal conduct relating to parliamentary proceedings was once thought, though inconsistently, to be exempt from prosecution under the general law. Fairly generally, that is no longer the case for perjury.<sup>127</sup> Should all criminal offences that are imputable to parliamentary conduct or proceedings lose whatever immunities they are still taken to enjoy? Now that oppressive manipulation of the legal system by the Crown and judges is excluded and the public inclination to ease parliamentarians off traditional pedestals is appreciable, that thought is tempting. For all sorts of reasons, however, politicians may feel a genuine compulsion to oppose the status quo and espouse causes that are contrary to law. In the interests of the liberal tradition, such possibilities must be generously accommodated. Curtailment of protections in the criminal field could only reasonably occur on the step by step basis which the Parliamentary Privileges Act would seem to envisage. Patrick Henry's celebrated exhortation in the Virginia House of Burgesses is a standing reminder of the arguments for latitude — 'If this be treason, make the most of it'.

In most of the cases where the criminal law impinges on parliamentary proceedings, the charge arises from events quite separate from the business of parliament and law enforcement authorities have sufficient evidence for the charge without parliamentary material. Its role is simply corroborative. On the arguments advanced in this analysis, there is then insufficient reason to obstruct the machinery of justice by refusing access because 'questioning' according to conventional criteria would occur. A very different situation arises if parliamentary evidence is fundamental to the charge and not least if a mere fishing expedition is to be undertaken. Whatever construction of Article 9 is favoured, recourse to statute is the safest and most convenient method to overcome — or uphold — Article 9's exclusionary effect.

One difficulty of statutory fragmentation to accommodate new perceptions in defamation and the criminal law is the great prestige of the Bill of Rights as a *grundnorm* of the constitution. None of the relevant jurisdictions would lightly wish Article 9 away. It has been effective, up to a point, and could be more so if the narrower or historical construction were followed.<sup>128</sup> Part of its merit is that it aspires to completeness with great brevity. That is not to say certainty, as developments and confusions in matters of interpretation illustrate. Completeness is also in question now that the 'wider principle' has become prominent. As has been argued, accretion of that concept does not assist the application of a provision that is still workable as well as being a venerable icon of the law.

Some jurisdictions have struggled with one implication of the Article which may not present such problems in a federal system such as that of Australia. As a matter of English law, it is said that the courts cannot investigate the processes behind enacted law or declare it invalid. In *Pickin v British Railways Board*,<sup>129</sup> a disadvantaged property owner alleged that the passage of an Act had been obtained by false or fraudulent recitals. The English Court of Appeal held that, at least in relation to a private Bill, there could be an arguable point of law. In the opinion of Lord Denning MR, 'it is the function of the court to see that the procedure of Parliament itself is not abused and that undue advantage is not taken of it'. That would not be trespassing on the prerogatives of Parliament but 'acting in aid of Parliament, and, I might add, in aid of justice.' The Lords preemptorily rejected this approach. In the reasoning of Lord Simon of Glaisdale, since the courts could not quash an Act, it would be 'odd if that could be done indirectly, through frustration of the enacted law by the application of



some alleged doctrine of equity'<sup>130</sup> In the conditions of the Commonwealth, there is a difference of texture, with less emphasis on parliamentary supremacy and more on constitutional coordination between the branches of government. The way would be more easily open to judicial intervention where a serious irregularity such as fraud was alleged in relation to procedures leading to an enactment.<sup>131</sup>

On a closed shop approach to privilege, Lord Dunedin once suggested, Parliament could become 'an abominable instrument of oppression'.<sup>132</sup> Without privileges, Lord. Ellenborough once declared, it 'would sink into utter contempt and inefficiency'.<sup>133</sup> But the liberality inherent in present arrangements relating to the speech and debate privilege may well be a contributing factor in the low standard of discussion in contemporary parliaments and the dubious reputation of politicians generally. A regime of qualified freedom, reasonably curtailing the privilege, could have more positive results than Lord Ellenborough's dictum might indicate. It would harmonise better with the underlying motivations of the Australian Constitution. It would comply with the 'decent opinion of mankind' and increasingly salient responsibilities under international agreements by ensuring that 'any person whose rights are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity'.<sup>134</sup> It would rescue the judicial system from a humiliating disadvantage as against the media. Now that the era of 'trial by television' is so obtrusively launched, that too is important. Unless justice is seen to be ensured by effective institutions and appropriate rules of law, virtual reality could become the real thing. ▲

---

## Endnotes

- <sup>1</sup> The section prescribes that the powers, privileges and immunities of the Senate and the House of Representatives, and of the members and committees of each House, may be declared by the Parliament, and until declared are those of the House of Commons (UK) and of its members and committees, at the establishment of the Commonwealth. The suggestion has been made, notwithstanding, that some aspects of privilege may be constitutionally entrenched as essential to a legislature, and therefore not amenable to change by statute. *Arena v Nader* (1987) 71 ALJR 1604. *Oggers' Australian Senate Practice* (9<sup>th</sup> edn 1998), p. 29. The effect of s 47 on the subject of qualifications, vacancies and disputed elections relating to senators and members should also be noted.
- <sup>2</sup> 1 Will & Mary, Sess 2 c 2. Below, p. 63. The Article applies in the Australian States under their separate constitutional arrangements, eg, *Constitution Act 1934* (SA), s 38; *Constitution Act 1867* (Qld), s 40A; *Constitution Act 1975* (Vic), s 19.
- <sup>3</sup> Quoted in *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament* (21st ed 1989), p.72 from GR Elton, *The Tudor Constitution* (2nd ed 1982), p.274.
- <sup>4</sup> *R v Sir John Eliot, Denzil Hollis and Benjamin Valentine* (1629) 3 How State Tr 294; Croke Car 606; 79 ER 1121.
- <sup>5</sup> (1684) 13 How State Tr 1370. The episode is outlined well in GF Lock, 'Parliamentary Privilege and the Avoidance of Conflict' (1985) 64 Public Law 68.
- <sup>6</sup> *Lord Peterborough v Williams* 2 Show 506; 89 ER 1068. The case was a libel action against Williams (as Speaker of the House of Commons) in relation to his licensing the publication, by order of the House, of a pamphlet dealing with the historically notorious 'Popish Plot'.

- <sup>7</sup> Erskine May, above n 3, p. 92.
- <sup>8</sup> (1689) 12 How State Tr 822.
- <sup>9</sup> In *Conway v Rimmer* [1968] AC 910 at 981; [1968] 1 All ER 874 at 907, per Lord Pearce.
- <sup>10</sup> Lord Campion (sometime Clerk of the House of Commons) in evidence to the Select Committee on the Official Secrets Act (1 March 1939). See JR Odgers, *Australian Senate Practice* (6th ed 1991), p.100.
- <sup>11</sup> It is noteworthy also that the 8th Declaration of the Bill of Rights emphasises 'subversion of the laws and liberties of the Kingdom by *prosecution* in the Court of King's Bench and by diverse other arbitrary and illegal courses'.
- <sup>12</sup> *R v Murphy* (1986) 5 NSWLR 18 at 25–26.
- <sup>13</sup> Erskine May, above n 3, p.73.
- <sup>14</sup> Coke, 4th Inst 15; Erskine May, above n 3, p.146.
- <sup>15</sup> (1689) 12 How State Tr 822.
- <sup>16</sup> (1703) 2 Ld Raym 938; 92 ER 126; *Lords Journals* (1701–1704), p. 369.
- <sup>17</sup> (1703) 2 Ld Raym 1105; 92 ER 232.
- <sup>18</sup> *Ibid* at 1114; 237.
- <sup>19</sup> An excellent summary of the episode is to be found in *Rost v Edwards* [1990] 2 QB 460 at 468–469 per Popplewell J. Also *Commons Journals* (1702–1704), pp. 555, 560. The 1704 Resolution has never had any legal significance for Australia. Odgers, n 1, p.32.
- <sup>20</sup> See SA de Smith, 'Parliamentary Privilege and the Bill of Rights' (1958) 21 MLR 465 at 475.
- <sup>21</sup> *Wilkes v R* (1770) Wilm 322; 97 ER 123; Erskine May, above n 3, pp 76–79. On the effect of *Wilkes* on United States law, *Powell v McCormack* 395 US 486 (1969).
- <sup>22</sup> *Blackstone's Commentaries* (17th ed 1830) vol 1, p.163.
- <sup>23</sup> *Commons Journals* (1837), pp. 418–419.
- <sup>24</sup> (1811) 14 East 1; 104 ER 501 and (1817) 5 Dow 165; 3 ER 1289.
- <sup>25</sup> (1818) 2 Stark 367; 171 ER 675.
- <sup>26</sup> (1899) 1 WALR 77. (evidence of witness before a committee not admissible against the witness in subsequent proceedings).
- <sup>27</sup> (1839) 9 Ad & El 1; 112 ER 1112.
- <sup>28</sup> *Ibid* at 114; 1156.
- <sup>29</sup> *Case of the Sheriff of Middlesex* (1840) 11 Ad & El 273; 113 ER 419.
- <sup>30</sup> A federal *Parliamentary Papers Act 1908* was enacted in Australia and later subsumed into the Parliamentary Privileges Act. But the background was substantially different, because reporting had never been declared to be a contempt in Australia.
- <sup>31</sup> [1868–1869] LR 4 QB 573. Also *Goffin v Donnelly* (1881) 6 QBD 307. Art 9 was not mentioned. Evidence to a parliamentary committee was equated to evidence in court. The upshot was that an action for slander could not lie in relation to such evidence.

- <sup>32</sup> *Earl of Shrewsbury v Scott* (1859) 6 CBNS 1 160; *Labrador Company v The Queen* [1893] AC 104; *Dingle v Associated Newspapers Ltd* [1960] 2 QB 405; *Pickin v British Railways Board* [1973] 1 QB 219; [1974] AC 765.
- <sup>33</sup> (1884) 12 QBD 271; 53 LJQB 209.
- <sup>34</sup> (1887) 20 LR Ir 600.
- <sup>35</sup> *Ibid* at 612.
- <sup>36</sup> [1870] LR 4 HL 661. Also *Fitzgerald v Muldoon* [1976] 2 NZLR 615.
- <sup>37</sup> James Madison, *Federalist* No 48, quoted in *United States v Johnson* 383 US 169 (1965) at 179.
- <sup>38</sup> Parliamentary Papers Act 1840 (UK).
- <sup>39</sup> *Wason v Walter* (1868) LR 4 QB 73; *Cook v Alexander* [1973] 3 WLR 617; [1974] QB 279. In the Australian federal jurisdiction, it is now beyond doubt that a defendant may tender evidence of defamatory matter contained in a fair and accurate report of proceedings: Parliamentary Privileges Act, s 10.
- <sup>40</sup> Odgers, above n 10, p. 1014.
- <sup>41</sup> The phrase has been considered in relation to bodies such as commissions of inquiry, but its boundaries have not been clearly defined. See WJD, 'Privileges of Parliament' (1944) 18 ALJ 70 ('Brisbane Line' Royal Commission 1943); (1956) 30 ALJ 181 commenting on the judgment of Townley J in *Royal Commission into Certain Crown Leaseholds* (1956) QSR 225. Also *Easton v Griffiths* (1995) 130 ALR 306 (decision on application of Art 9 to be taken by Commissioner and not by the Court) and *Arena v Nader* (1997) 71 ALJR 1604 (special leave application to High Court refused — *Special Commissions of Inquiry Amendment Act 1997* (NSW) allowing the appointment of a Commissioner to inquire into parliamentary affairs 'does not erode the institution of Parliament itself' and could not be regarded as exceeding the powers of the NSW legislature to affect its privileges).
- <sup>42</sup> In *Bradlaugh v Gossett* (1884) 12 QBD 271 at 275. Also SA de Smith, above n 20, pp. 470–471. In Australia, of course, the *Parliamentary Privileges Act 1987* (Cth) resulted from a conflict. Note also difficulties in relation to the proceedings of the Parliamentary Commission on the National Crime Authority (1991). The question was whether general secrecy provisions in the Act establishing the Authority prevented disclosure to the Commission by officers of the Authority. Harry Evans, 'Parliamentary Privilege and Statutory Secrecy Provisions' (1992) 60 *Table*, p. 35.
- <sup>43</sup> SA de Smith, *Constitutional and Administrative Law* (4th ed 1981), p. 325.
- <sup>44</sup> Below, p. 81.
- <sup>45</sup> *R v Murphy* (1986) 5 NSWLR 18 at 80.
- <sup>46</sup> [1993] 3 NZLR 513. Commentaries include a useful note by the Clerk of the New Zealand House of Representatives, David McGee, 'The Application of Article 9 of the Bill of Rights' (1995) 76 *Parliamentarian* (No 2, April 1995), pp. 136–137.
- <sup>47</sup> *Pepper (Inspector of Taxes) v Hart* [1993] AC 593.
- <sup>48</sup> [1989] AC 66. Also *Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191 (use of *Hansard* disapproved); *Factortame Ltd v Secretary of State for Transport* [1990] 2 AC 85 (inference drawn as to compliance with EC law); *Owens Bank Ltd v Bracco* [1992] 2 AC 443 (report of

- Sumner Commission consulted). On the earlier position, it is of interest that in *Ash v Abdy* (1678) 3 Swans 664, 36 ER 1014, Lord Nottingham took judicial notice of his own experience in introducing the relevant Bill in the House of Lords.
- <sup>49</sup> Significant reports (Law Commissions of England and Scotland and Renton Committee on the Preparation of Legislation) had recently advised against relaxation.
- <sup>50</sup> *Pepper v Hart* [1993] AC 593 at 638.
- <sup>51</sup> *Stockdale v Hansard* 9 Ad & El 1 at 114; 112 ER 1112 at 1156, per Lord Denman.
- <sup>52</sup> *Ibid* at 210; 1191 per Patteson J.
- <sup>53</sup> *Attorney-General of Ceylon v de Livera* [1963] AC 103 at 121 per Lord Radcliffe.
- <sup>54</sup> *Church of Scientology of California v Johnson-Smith* [1972] 1 QB 522 at 525 per Browne J. The decision was emphatic that the prohibition on examination of proceedings extended to a cause of action arising outside proceedings.
- <sup>55</sup> *Pepper v Hart* [1993] AC 593 at 638 per Lord Browne-Wilkinson.
- <sup>56</sup> Preamble to the Bill of Rights.
- <sup>57</sup> *Uren v John Fairfax and Sons Ltd* [1979] 2 NSWLR 287. The Committee of Privileges of the House of Representatives reported that the decision of Begg J was wrong and created a 'gross violation' of parliamentary privilege (Parliamentary Paper no 154/1980). This was rejected by David Hunt J in *Henning v Australian Consolidated Press Ltd* [1982] 2 NSWLR 374 at 375.
- <sup>58</sup> (1985) 20 A Crim R 267.
- <sup>59</sup> NSW District Court, Loveday J, 21 August 1987, unreported.
- <sup>60</sup> (1987) 46 SASR 1. On appeal, Zelling ACJ and Prior J addressed (obiter, as it turned out) the question whether repetition of parliamentary statements outside Parliament still attracted parliamentary privilege. Below, n 69.
- <sup>61</sup> *Wright and Advertiser Newspapers Ltd v Lewis* (1990) 53 SASR 416; (1990) Aust Torts Rep 81-026.
- <sup>62</sup> (1978) 142 CLR 1.
- <sup>63</sup> [1982] 2 NSWLR 369 (decided in 1975).
- <sup>64</sup> (1983) 50 ACTR 1; (1983) 78 FLR 449.
- <sup>65</sup> [1987] 8 NSWLR 116.
- <sup>66</sup> [1972] 1 QB 522. *Finnane v Australian Consolidated Press Ltd* [1978] 2 NSWLR 435 and *R v Secretary of State for Trade, Ex parte Anderson Strathclyde Plc* [1983] 2 All ER 233 (court refused access in relation to judicial review) were more restrictive than the *Scientology* case, but the former cannot stand with *Mundey v Askin* [1982] 2 NSWLR 369 and the latter was expressly disapproved in *Pepper v Hart* [1993] AC 593.
- <sup>67</sup> [1990] 2 QB 460. In a scholarly judgment, Popplewell J favoured a construction of Article 9 that would exclude only harmful material, but regarded himself as bound by precedent (at 470). 'It might have been thought that the juxtaposition of the word 'questioned' with the word 'impeached' in the Bill of Rights would have led the courts to construe it as meaning 'adversely question or criticise' or 'attribute improper motive'. That was not, however, how the law developed.'

- <sup>68</sup> ‘Parliamentary Privilege: Reasons of Mr Justice Cantor: an analysis’ in *Legislative Studies* (Autumn 1986) and ‘Parliamentary Privilege: Reasons of Mr Justice Hunt: an analysis’ in *Legislative Studies* (Autumn 1987).
- <sup>69</sup> (1971) 23 DLR (3d) 292, [1972] 1 OR 444. In *Stopforth v Goyer* (1978) 87 DLR (3d) 373, the *Roman Corporation* case was referred to but the Court declined to hold that absolute privilege existed in favour of a Minister responding to questions by reporters outside Parliament. *Re Clark v Attorney-General of Canada* (1978) 81 DLR (3d) 33 advanced the proposition that privilege extended to the distribution of parliamentary information to the media, but not beyond that to constituents (per Evans CJHC at 58).
- <sup>70</sup> In *Attorney-General of Ceylon v de Livera* [1963] AC 103 at 121.
- <sup>71</sup> A United States illustration of Executive-Parliament tension is found in *United States v Gravel* 408 US 606 (1972). In response to a ‘potential usurpation’ by the Executive on Vietnam policy, the ‘Pentagon papers’ were read into the proceedings of the United States Senate Subcommittee on Public Buildings and Grounds. The document was highly classified.
- <sup>72</sup> Report of the Commission (October 1992), Part I, vol 1 and Part II esp. at 5.8.6 and 5.8.7. The Commission’s difficulties are discussed in RKF Davis, ‘Parliamentary Privilege and the WA Royal Commission’ (1993) 67 ALJ 671.
- <sup>73</sup> *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1 at 10; [1995] 1 AC 321 at 336 per Lord Browne-Wilkinson.
- <sup>74</sup> *R v Murphy* (1986) 5NSWLR 18 at 29.
- <sup>75</sup> (1990) 53 SASR 416; (1990) Aust Torts Rep 81–026.
- <sup>76</sup> [1993] 3 NZLR 513 (CA). [1994] 3 NZLR 1; [1995] 1 AC 321 (PC).
- <sup>77</sup> On the ground that a privilege entrenched by statute could be revoked only by statute: *Fitzgerald v Muldoon* [1976] 2 NZLR 615. Also *Odgers’ Australian Senate Practice* (8th edn 1997), p.64. As is pointed out there, the enactment of the *Parliamentary Privileges Act 1987* (Cth) made it clear that privilege could not be waived by a member (and probably cannot be overcome by permission of the House concerned). *Hamsher v Swift* (1992) 33 FCR 545 at 564 per French J. Also Enid Campbell, ‘Waiver of Parliamentary Privilege’ in (2000) 16 *Legislative Studies* No. 1, pp. 1–21.
- <sup>78</sup> Privilege Resolutions of 1988, resolution 5 (Cth). *Odgers*, *ibid* pp.65–66. This initiative of the Australian Senate has been extended to the House of Representatives. It also applies in the New Zealand Parliament and in the Legislative Council of the State of Victoria.
- <sup>79</sup> [1917] AC 309.
- <sup>80</sup> *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1 at 10; [1995] 1 AC 321 at 336.
- <sup>81</sup> *Wright v Lewis* (1990) 53 SASR 416 at 425; (1990) Aust Torts Rep 81–026 at 67,866, per King C.J.
- <sup>82</sup> [1970] NZLR 1089.
- <sup>83</sup> *Prebble v Television New Zealand Ltd* [1993] 3 NZLR 513 at 520.
- <sup>84</sup> *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1 at 10; [1995] 1 AC 321 at 336.
- <sup>85</sup> District Court, Wellington, Dahlmer J, 18 May 1996, unreported. High Court, Wellington, Ellis and Greig JJ, 14 November 1997, unreported. A useful commentary appears in J.A. Joseph, ‘Constitutional Law’ [1998] *New Zealand Law Review* 197 at 214–219.

- <sup>86</sup> [1935] 1 KB 594. Also *Williamson v Norris* [1899] 1 QB 7 (barman prosecuted but found not to be the person who should be licensed). Such matters are usually dealt with nowadays by statute. For example, the *Parliamentary Privileges Act 1987* (Cth), s 15 declares, for the avoidance of doubt, that subject to parliamentary powers and immunities, a law in force in the Australian Capital Territory applies in the parliamentary precincts according to its tenor.
- <sup>87</sup> (1981) 48/2 SAIR 604.
- <sup>88</sup> The episode is usefully discussed in SA de Smith, above n 20. In Australia, it provoked considerable discussion: *Senate Debates*, 16 Sept 1957, pp. 322–4.
- <sup>89</sup> *In re Parliamentary Privilege Act 1770* [1958] AC 331; [1958] 2 All ER 329.
- <sup>90</sup> Appendix to GF Lock, above n 5, p.87.
- <sup>91</sup> SA de Smith, above n 20, p.480.
- <sup>92</sup> Erskine May, above n 3, p.93.
- <sup>93</sup> *Ibid*, p.92.
- <sup>94</sup> *Prebble v Television New Zealand Ltd* [1993] 3 NZLR 513 at 517 per Cooke P and at 527–528 per Richardson J.
- <sup>95</sup> [1949] AC 127.
- <sup>96</sup> (1868) LR 4 QB 573. Also *Barton v Taylor* (1886) 11 App Cas 197 at 203 per Lord Selborne and *Gipps v McElhone* (1881) 2 NSW 18 at 21 per Martin CJ.
- <sup>97</sup> *Prebble v Television New Zealand Ltd* [1993] 3 NZLR 513 at 527–531.
- <sup>98</sup> *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1 at 7; [1995] 1 AC 321 at 332.
- <sup>99</sup> Appendix to GF Lock, above n 5, p.89.
- <sup>100</sup> [1949] AC 127. In relation to a defamation action in the Seychelles, there was a question as to the validity of the local Penal Code (under Letters Patent and the Colonial Laws Validity Act 1865 (Imp)), which incorporated Article 9.
- <sup>101</sup> Supreme Court of Queensland, Williams J, 18 April 1997, unreported. (1997) 150 ALR 199; [2000] 1 Qd R 207 (CA).
- <sup>102</sup> Harry Evans, 'Protection of Persons who provide Information to Members'. Paper presented to 27th Conference of Presiding Officers and Clerks (Hobart, 1996). The view of the Clerk was expressly adopted in the 67<sup>th</sup> Report of the Senate Committee of Privileges, 1997. The 92<sup>nd</sup> Report, June 2000 (Matters arising from the 67<sup>th</sup> Report of the Committee of Privileges) criticised the interlocutory judgment in *Rowley v Armstrong* (Jones J, Supreme Court, Queensland, 12 April 2000) to the effect that 'an informant in making a communication to a parliamentary representative is not regarded as participating in 'proceedings in Parliament''. Opinions commissioned from the Clerk and from Bret Walker SC emphasised again that the protection of parliamentary privilege was available for categories of communications for the purposes of, or incidental to, parliamentary proceedings, as contemplated by the Act.
- <sup>103</sup> Harry Evans, 'Parliamentary Privilege: Seizure of Documents under Search Warrant' hc/pap/12376, 14 May 1999.
- <sup>104</sup> Odgers, above n 77, p.32.
- <sup>105</sup> See also *Cormack v Cope* (1974) 131 CLR 432.

- <sup>106</sup> (1988) 19 FCR 223; 81 ALR 710. (*Hansard* not admitted to reveal an improper parliamentary purpose).
- <sup>107</sup> (1991) 33 FCR 545. (*Hansard* not admitted to characterise parliamentary action by Minister).
- <sup>108</sup> (1996) 141 ALR 447; [2000] 1 Qd R 147 (CA).
- <sup>109</sup> *Ibid*, esp at 490–491.
- <sup>110</sup> Professor Enid Campbell, ‘Parliamentary Privilege and Admissibility of Evidence’ (1999) 27 FL Rev No. 3, pp. 367–390.
- <sup>111</sup> *Ibid*, p. 381.
- <sup>112</sup> *Prebble v Television New Zealand Ltd* [1994] 3 NZLR 1 at 7–8; [1995] 1 AC 321 at 333.
- <sup>113</sup> Cases bearing on the relation between the legislative powers of the Commonwealth and the indefeasible foundation of the judicial power under Chapter III include: *Nicholas v The Queen* (1998) 193 CLR 173; *Chu Kheng Kim v Minister for Immigration* (1992) 176 CLR 1, esp at 27; *Williamson v Ah On* (1926) 39 CLR 95, esp at 122–3.
- <sup>114</sup> *Attorney-General of Ceylon v de Livera* [1963] AC 103 at 121.
- <sup>115</sup> For the Commonwealth, the authoritative guide is *Odgers’ Australian Senate Practice* (9th ed 1998). For New Zealand, D McGee, *Parliamentary Practice in New Zealand* (2nd ed 1994). Also Richard Best, ‘Freedom of Speech in Parliament: Constitutional Safeguard or Sword of Oppression’ (1994) 24 VUWLR 91. The Standing Orders of the New Zealand Parliament were reissued in revised form in 1996.
- <sup>116</sup> *Senate Debates*, 6 Sept 1984, pp.548–549 and 10 Sept 1984, p.731. The matter is usefully discussed in Sir Clarrie Harders, ‘Parliamentary Privilege — Parliament versus the Courts: Cross-examination of Committee Witnesses’ (1993) 67 ALJ, pp. 109, 945.
- <sup>117</sup> Harry Evans, ‘Parliamentary Privilege’ (1993) 67 ALJ 457.
- <sup>118</sup> Notably by the ‘WA Inc’ Commission — Hon Mr Justice Geoffrey Kennedy, senior puisne judge of the Supreme Court of Western Australia, Sir Ronald Wilson, retired judge of the High Court of Australia and Hon Peter Brinsden, retired judge of the Supreme Court of Western Australia.
- <sup>119</sup> 18 USCA 6002 Pt V. The United States position is discussed and compared with the Australian regime in Sir Clarrie Harders, above n 116.
- <sup>120</sup> *Prebble v Television New Zealand Ltd* [1993] 3 NZLR 513 at 546.
- <sup>121</sup> An admirable summary appears in JG Fleming, *The Law of Torts* (9th ed 1998), ch 25, esp at pp. 629–635.
- <sup>122</sup> (1994)182 CLR 104.
- <sup>123</sup> (1994)182 CLR 211.
- <sup>124</sup> (1997)189 CLR 520. See also *Victoria v Commonwealth* (1996)187 CLR 416.
- <sup>125</sup> *Lange v Atkinson* [2000] 1 NZLR 257 esp at 262.
- <sup>126</sup> This episode and the matter of waiver of privilege generally are admirably dealt with in Enid Campbell, n 77 above.
- <sup>127</sup> Statutory provisions commonly override Article 9 in relation to perjury. *Parliamentary Privileges Act 1987* (Cth), subs 16(6); *Perjury Act 1911* (UK); *Crimes Act 1961* (NZ), s 108. Such provisions should not be confused with the power of Parliament to imprison for

contempt, resorted to only once by the Commonwealth Parliament and upheld in *R v Richards, Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157. As referred to, the contempt power has now been curtailed by the Parliamentary Privileges Act, s 6. The United States Congress has enacted statutes for the punishment of certain contempts by ordinary legal process: Odgers, above n 77, p.54.

<sup>128</sup> This was the logic of the 1992 Private Member's Bill introduced by Mr Duncan Kerr MP. The main purpose was to allow credibility to be tested by comparison.

<sup>129</sup> [1973] QB 219; [1974] AC 765.

<sup>130</sup> [1974] AC 765 at 798.

<sup>131</sup> Australian federal courts do have limited powers in relation to procedural irregularity, eg, for legislation under s 57 of the Constitution: *Victoria v Commonwealth* (1975) 134 CLR 81. Odgers, above n 77, p.31. Whether Australian courts may intervene to prevent an enactment where the legislative process is defective is controversial. *Cormack v Cope* (1974) 131 CLR 432. Also *Halsbury's Laws of Australia* (1993, as updated) vol 5, p. 164.309. In *Arena v Nader* (1997) 42 NSWLR 429 (CA), a State court accepted that an implied freedom controls legislative powers but held that the relevant legislation did not transgress. In refusing leave to appeal, the High Court confirmed that a House may authorise a Commissioner to inquire into allegations made by a member in relation to proceedings. *Arena v Nader* (1997) 71 ALJR 1604 at 1605 per Brennan C.J, Gummow and Hayne JJ.

<sup>132</sup> In *Adam v Ward* [1917] AC 309 at 324.

<sup>133</sup> In *Burdett v Abbot* (1811) 14 East 1 at 152; 104 ER 501 at 559.

<sup>134</sup> *International Covenant on Civil and Political Rights*, Pt II, Art 2(3)(a).