Senate Brief

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Parliamentary Privilege

The meaning of parliamentary privilege

The term 'parliamentary privilege' refers to two significant aspects of the law relating to Parliament: the privileges or immunities of the houses of the Parliament, and the powers of the houses to protect the integrity of their processes, particularly the power to punish contempts. These immunities and powers are very extensive, but they carry with them great responsibilities. They are deeply ingrained in the history of free institutions, which could not have survived without them.

Parliamentary privilege exists for the purpose of enabling the houses of the Parliament to carry out effectively their functions. The primary functions of the houses are to inquire, to debate and to legislate, and parliamentary privilege assists and protects these functions.

The term 'privilege', in relation to parliamentary privilege, refers to an immunity from the ordinary law, which is recognised by the law as a right of the houses and their members. Privilege in this restricted and special sense is often confused with privilege in the colloquial sense of a special benefit or special arrangement. The word 'immunity' is best used in relation to privilege in the sense of immunity under the law.

The principal immunity is the freedom of parliamentary debates and proceedings from question and impeachment in the courts, the most significant effect of which is that members of Parliament cannot be sued or prosecuted for anything they say in debate in the houses. The principal powers are the power to compel the attendance of witnesses, the giving of evidence and the production of documents, and to adjudge and punish contempts of the house.

Parliamentary immunities and powers part of ordinary law

Parliamentary immunities and powers are part of ordinary law. The only way in which the houses can alter their immunities and powers is by passing legislation, as authorised by the Constitution.

The courts uphold parliamentary immunities by preventing any violation of those immunities in the course of proceedings before the courts, and they uphold parliamentary powers, especially the power to punish contempts, in any test of the legality of the exercise of those powers.

Immunities of the houses

The principal parliamentary immunity is the immunity from civil or criminal action, and examination in legal proceedings, of members of the houses and of witnesses and others taking part in proceedings in Parliament. This immunity is known as the right of freedom of speech in Parliament, because it has the effect of ensuring that members, witnesses and others cannot be sued or prosecuted for anything they say or do in the course of parliamentary proceedings. This freedom of speech has always been regarded as essential to allow the houses to debate and inquire into matters without fear of interference.

Freedom of speech was codified in the *Parliamentary Privileges Act 1987* (hereafter the 1987 Act). The Act declares the scope of freedom of speech in parliamentary proceedings. 'Proceedings' are defined in subsection 16(2) of the Act as:

> *... all words spoken and acts done in the course of, or for 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 a 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 meaning of 'impeached or questioned' is also defined. It is not lawful in any court or tribunal to question the truth, motive, good faith, or intention of any person by reference to parliamentary proceedings, or to draw any inferences or conclusions from those proceedings.

This does not prevent the use of proceedings of Parliament in court to establish a material fact, for example, to prove that a person was at a particular place at a particular time, to test the fairness and accuracy of a press report of parliamentary proceedings, or to prosecute certain offences against Parliament.

Minor immunities

Members of the houses possess some minor legal immunities, principally exemptions from compulsory attendance before a court or tribunal when the Parliament is sitting.

Powers of the houses

There are two significant powers of the houses: the power to conduct inquiries and the power to punish contempts.

Power to conduct inquiries

Each house has the power to require the attendance of persons and the production of documents and to take evidence under oath. This power supports one of the major functions of the houses: that of inquiring into matters of concern as a necessary preliminary to debating those matters and legislating in respect of them. The power is dependent upon the power to punish contempts, by which the houses may enforce the attendance of witnesses, the answering of questions and the production of documents.

The power to conduct inquiries is usually not exercised by the houses themselves, but is delegated to committees by giving those committees the powers to require the attendance of witnesses and the production of documents. Proceedings in parliamentary committees are proceedings in Parliament, and the immunity from impeachment or question in the courts attaches to words uttered in committee proceedings by members and witnesses and to the production of documents to committees, as declared by the 1987 Act.

Although the question has not been adjudicated, there is probably an implicit limitation on the power of the houses to summon as witnesses members of the other house or of the house of a state or territory legislature.

Rights of witnesses

Subject to what is said above about members of other houses, there is no limitation on the power of the houses to compel the attendance of witnesses, the giving of evidence and the production of documents.

This gave rise to concern in the past about the treatment of witnesses. It was contended that witnesses could be seriously disadvantaged when compelled to appear and give evidence before parliamentary committees in so far as there was no requirement on committees to grant rights to witnesses, particularly the right to consult or be represented by counsel, and the right to refrain from answering questions where their answers might incriminate them.

The Senate has adopted a range of practices designed to safeguard the rights of witnesses and of people who may be accused of wrongdoing in the course of committee proceedings.

These practices were codified by the *Privilege Resolutions*, passed by the Senate on 25 February 1988. The first of these resolutions provides a code of procedures for Senate committees to follow for the protection of witnesses. The resolution confers a number of rights on witnesses, particularly the right to object to questions put in a committee hearing and to have such objections duly considered. Persons referred to adversely in evidence are entitled to respond, and all witnesses must be protected against any interference on account of their evidence. Witnesses may make application to be accompanied by and to seek advice from counsel before answering questions. Witnesses are to be supplied with copies of the procedures, and may appeal to the Senate if a committee fails to observe the procedures.

Witnesses to parliamentary committees are protected by the powers of the houses to punish contempts and by certain provisions of the 1987 Act. It is an offence punishable by fine or imprisonment to interfere with a parliamentary witness. Specifically witnesses may not be improperly influenced by fraud, intimidation, force or threat nor may they be offered any inducement or bribe in relation to their evidence. No penalty or injury may be inflicted on a witness on account of their evidence.

Executive privilege

Another use of the word 'privilege', which is indirectly related to parliamentary immunities and powers, is in the expression 'Crown privilege', more recently called 'executive privilege'. This term refers to a claim of the executive government, the ministry, to be immune from being required to present certain documents or information to the courts or to the houses of Parliament.

The courts have determined the law of executive privilege in respect of the courts, but only the houses of Parliament can determine whether they admit the existence of such a privilege in relation to documents or information required by the houses, or whether they will insist upon the production of documents and information which they require. The Senate has not conceded the existence of any conclusive executive privilege in relation to its proceedings.

Power to punish contempts

Each house of the Parliament possesses the power to declare an act to be a contempt and to punish such an act, even when there is no precedent for such an act being so judged and punished. This power to deal with contempts is the exact equivalent of the power of the courts to punish contempts of court.

The punishments for contempts which either house may apply are set by the 1987 Act as fines of $5,000 for individuals and $25,000 for corporations, and up to six months imprisonment for individuals.

The rationale of the power to punish contempt of the houses is that the houses should be able to protect themselves from acts which directly or indirectly impede them in the performance of their functions.

Section 4 of the 1987 Act defines contempt as:

> *Conduct (including the use of words)... [which] amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.*

Enactment of this provision means that it is no longer open to a house, as it was under the previous law, to treat any act as a contempt. The provision restricts the category of acts which may be treated as contempts, and is subject to judicial interpretation. A person punished for a contempt of Parliament could bring an action in the courts to attempt to establish that the conduct for which the person was punished did not fall within the statutory definition. This could lead to a court overturning the punishment imposed by a house for contempt of Parliament.

Matters constituting contempts

One of the 1988 Privilege Resolutions of the Senate sets out, for the guidance of the public, acts which may be treated by the Senate as contempts. This is not intended to be an exhaustive or all-inclusive list of contempts and does not derogate from the Senate's power to determine that particular acts constitute contempts. Some examples of acts which could be considered contempts are: interference with the authority of the Senate or a committee; interference with a senator performing his duty as a senator; disturbance of the Senate; false report of proceedings; interference with a witness; and obstruction of a Senate inquiry.

Protection of accused persons

One of the 1988 Senate Privilege Resolutions confers special rights on persons accused of contempts of the Senate.

Cases of alleged contempts are heard by the Committee of Privileges, and all persons appearing before the committee have the right to be informed of any specific allegations against them, to respond to such allegations, to be represented by counsel, to call witnesses, to cross-examine other witnesses, and to make final submissions to the committee. These rights are more extensive than those of a person involved in criminal trials before the courts.

The Senate has found persons and organisations guilty of contempt in very few cases, mostly involving serious interference with witnesses (e.g., threatening witnesses in relation to their evidence). In no case has the Senate imposed any penalty, but has accepted apologies and remedial action, and has preferred to adopt the course of educating people involved with Senate inquiries in their responsibilities. In this respect the Senate has been much more lenient with contempts of the Senate than are the courts with contempt of court.

Citizens' right of reply

Senators are enjoined by a Senate resolution to exercise their freedom of speech responsibly. There is always, however, the possibility that members may unfairly defame individuals who have no legal redress and who, if they are not themselves members, have no forum for making a widely publicised rebuttal.

One of the 1988 Senate Privilege Resolutions provides an opportunity for a person who has been adversely referred to in the Senate to have a response incorporated in the parliamentary record (Senate

Hansard). A person aggrieved by a reference to the person in the Senate may make a submission to the President of the Senate requesting that a response be published. The submission is examined by the Committee of Privileges, and provided the suggested response is not in any way offensive and meets certain other criteria, it may be incorporated in the Hansard.

Further reading

Harry Evans and Rosemary Laing (eds.), *Odgers' Australian Senate Practice*, 13th edn, Chapter 2, Department of the Senate, Canberra, 2012, available on-line at: http://aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/odgers

A number of documents for the guidance of witnesses at Senate committee inquiries are available on the Internet at http://aphnew.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=wit_sub/index.htm . These include the document 'Government guidelines for official witnesses before parliamentary committees and related matters', November 1989.

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