



NO. 13—PRIVILEGE

RAISING MATTERS OF PRIVILEGE AND THE RIGHT OF REPLY

What is “privilege”?

The term “parliamentary privilege” refers to two 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, including the power to punish contempts.

The chief immunity from the ordinary law is the freedom of parliamentary debates and proceedings from question and impeachment in the courts. For example, members of Parliament cannot be sued or prosecuted for anything they say in debates; witnesses before parliamentary committees cannot be sued or prosecuted for the evidence they give or the fact that they have given it.

The principal powers of the Houses are the power to compel the attendance of witnesses, the giving of evidence and the production of documents and the power to adjudge and punish contempts. A *contempt* is a breach of the immunities of a House or any action which improperly obstructs a House or its members in the performance of their duties.

For more information, see [Senate Brief No. 11—Parliamentary Privilege](#); [Odgers’ Australian Senate Practice, 11th edition, Chapter 2](#).

Why are these powers and immunities necessary?

These powers and immunities, or privileges, are fundamental to the operation of free institutions. They protect the right and ability of the Houses of the Parliament, and their committees, to carry out their functions of inquiring, debating and legislating without interference and to deal effectively with any attempted interference.

What is the legal framework?

Section 49 of the [Constitution](#) declared the powers, privileges and immunities of the Commonwealth Parliament to be the same as those of the House of Commons of the United Kingdom at the time the Commonwealth was established. The Constitution also provided that the Commonwealth Parliament could declare its own privileges if it chose to do so.

In 1987, a significant declaration of the Commonwealth Parliament’s privileges was made in the form of the [Parliamentary Privileges Act 1987](#). This Act declares some important privileges, abolishes others and defines the penalties that a House may impose for contempt. The definition of “proceedings in Parliament” in [section 16](#) overcomes some lack of clarity in the activities covered by that expression.

To supplement the Act, the Senate agreed to a series of resolutions in [February 1988](#) (the “Privilege Resolutions”) to establish certain procedures for the Senate and its committees, such as procedures to protect the rights of witnesses, and to set out how the Senate, through its Committee of Privileges, would investigate possible contempts. The latter is particularly important in guaranteeing procedural fairness for all participants.

The Senate Committee of Privileges, through its many inquiries into possible contempts, has established a body of “case law” which assists the Senate to administer and interpret its privileges. The Committee’s inquiries and findings, to December 2005, are summarised in its [125th report](#). Other reports may also be found on the [Senate website](#).

What is a matter of privilege?

A matter of privilege is any action which may constitute a contempt of the Senate and which the Senate may refer to its Committee of Privileges for investigation. The potential or actual improper interference caused by such conduct with the ability of a House, its committees or its members to perform their functions is a key factor in adjudging whether a contempt has been committed.

The following are examples of possible contempts:

- a witness gives evidence to a committee that he or she knows to be false;
- a government agency punishes one of its officers for giving evidence to a committee that goes against the official agency line;
- a potential witness is given an inducement not to give evidence to a committee;
- a key witness is uncooperative at a committee hearing and refuses to provide documents sought by the committee;
- a person threatens legal action against a senator to prevent him or her raising a particular issue in the Senate.
- a member of a committee gives a copy of the committee’s draft report to a journalist; the journalist writes an article about the implications of the committee’s proposed recommendations and the article is published before the report is tabled;
- a member of a committee gives a copy of a confidential submission received by the committee to a Minister’s office;

A non-exhaustive list of matters that may constitute contempts is contained in [Privilege Resolution 6](#).

Raising matters of privilege

[Standing order 81](#) sets out the procedure for raising matters of privilege in the Senate for investigation. The first step is for the senator who intends to raise the matter of privilege to write to the President of the Senate describing the matter.

The President is required to consider the matter against criteria which are also set out in the Privilege Resolutions ([Resolution 4](#)). In determining, as soon as practicable, whether to give precedence to a notice of motion to refer the matter to the Committee of Privileges, the President must consider:

- the principle that the Senate’s power to adjudge and deal with contempts should be used only where it is necessary to provide reasonable protection for the Senate and its committees and for senators against improper acts tending substantially to obstruct them in the performance of their functions, and should not be used in respect of matters which appear to be of a trivial nature or unworthy of the attention of the Senate; and
- the existence of any remedy other than that power for any act which may be held to be a contempt.

The President’s decision is conveyed to the senator and, in most cases, to the Senate. While the matter is under consideration by the President the senator concerned must not take any other action in relation to the matter or refer to it in the Senate.

In most cases, the President decides that the matter should be given precedence. After this decision is notified to the Senate, the senator concerned gives a notice of motion to refer the matter to the Committee of Privileges for inquiry and report. The notice appears at the top of the *Notice Paper* on the relevant day, under the heading "Matter of Privilege". It is usually dealt with as formal business (see [Brief Guide No. 2—Notices of Motion](#)) but if debate is required, a matter of privilege is dealt with ahead of all other categories of business (see [Brief Guide No. 8—Categories of Business](#)).

If the President determines that a matter of privilege should not be given precedence, it is open to the senator concerned to take any action that is in accordance with the rules of the Senate; for example, referring to the matter in debate or giving notice of a motion seeking specified action, including a reference to the Committee of Privileges. It is then up to a majority of the Senate to decide if that action should be taken.

While only a senator may raise a matter of privilege (other than a right of reply or adverse reflection in committee evidence—see below), aggrieved persons may ask senators or committees to raise matters on their behalf.

The Right of Reply

In 1988, the Senate is believed to have been the first legislature to grant people a right of reply to adverse references to them in proceedings. Since then, most Australian legislatures and others throughout the Commonwealth have adopted similar procedures.

The right of reply consists of an opportunity for a person who claims to have been adversely affected through being named or otherwise identified in Senate proceedings to have a response incorporated in the parliamentary record. The person makes a submission to the President of the Senate requesting publication of a response. If the submission is not trivial or frivolous, the President refers it to the Committee of Privileges to ensure that the suggested response is not offensive and does not itself contain material that would unreasonably adversely affect or injure another person or invade their privacy or add to or aggravate any such adverse effect, injury or invasion of privacy. The Committee does not inquire into the truth or merits of the statement in the Senate or the response, but if it is satisfied that a response should be published, it recommends that course of action to the Senate. All such recommendations have been accepted and the responses published in the Committee's report and incorporated in *Hansard*.

The procedure, which is set out in [Resolution 5](#), does not apply to Senate committees which are governed by other procedures for dealing with evidence that adversely reflects on another person. These procedures, which are contained in [paragraphs \(11\) to \(13\) of Resolution 1](#), also ensure procedural fairness.

The responsibilities of free speech

The Senate also agreed to a resolution in 1988 that enjoined senators to exercise their right of freedom of speech responsibly, taking into account the potentially damaging effect of allegations, the limited opportunity for affected persons to reply, the need to observe the rights of others and to ensure that any adverse reflections were soundly based. This exhortation is contained in [Resolution 9](#).

Need assistance?

Advice on any of the matters covered by this Brief Guide is available from the Clerk of the Senate on extension 3350. Specific advice on the operations of the Committee of Privileges is available from the Secretary on extension 3360.

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This publication is available electronically at <http://www.aph.gov.au/senate/pubs/guides/index.htm>.