



### NO. 22—SENATORS AND PARLIAMENTARY PRIVILEGE

#### 1. *What is parliamentary privilege?*

Parliamentary privilege is a function of the separate constitutional roles of parliament and the courts which enable these institutions to go about their business without being subject to outside interference or control.

Parliamentary privilege is commonly described as a set of immunities from the operation of certain laws. The term includes powers to protect the integrity of parliamentary processes, for example, the power to punish contempts.

#### **—Freedom of speech**

The most significant immunity is freedom of speech in parliament whereby words uttered and acts done in parliament are not actionable in a court of law. For example, a person cannot take action for defamation against a member of parliament on the basis of words spoken in parliament.

However, the protection does not apply if a member of parliament repeats those words outside of parliamentary proceedings.

#### **—Effective repetition**

There have also been cases in recent years where courts (erroneously, on the parliamentary view) have allowed reference to be made to parliamentary statements for the purpose of defamation actions, to establish the meaning of statements made outside parliament. Members of parliament who have said words to the effect of "I stand by what I said in the chamber" or, "I do not resile from what I said in the chamber" have been sued for defamation on the basis that they have effectively repeated outside the parliament what was said inside. (see the [134<sup>th</sup> Report of the Committee of Privileges, Effective Repetition](#)).

#### **—"Proceedings in parliament" defined**

Parliamentary privilege protects those who participate in "proceedings in parliament" from outside interference or suit. The basic protection is provided by article 9 of the Bill of Rights 1689 which is incorporated into Australian law by section 49 of the [Constitution](#) and by section 16 of the [Parliamentary Privileges Act 1987](#):

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.

The 1987 Act defines "proceedings in parliament" to include:

- 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.

It includes:

- the act of giving evidence to a House or committee
- the evidence given
- the presentation or submission of a document to a House or committee
- the preparation of a document for purposes of or incidental to the transacting of the business of a House or committee
- formulating, making or publishing a document by or pursuant to an order of a House or committee
- the document formulated, made or published by or pursuant to such an order.

Examples of documents prepared for or incidental to the transacting of the business of a House or committee include:

- submissions to parliamentary committees
- draft questions to ministers (with or without notice)
- questions briefs or possible answers prepared by departments or agencies for their ministers or for their own appearances at Senate estimates
- letters from constituents which seek parliamentary action and which can be shown to have a direct connection with parliamentary proceedings – such as a request from a constituent to ask a question or raise a particular matter in debate (but see below).

Examples of documents or actions **not** covered include:

- general constituency correspondence, including with ministers, passing on concerns or issues raised by constituents – such as problems with government agencies or programs (but a qualified privilege may apply – see [Odgers' Australian Senate Practice](#), page 45)
- the circulation of petitions (see the [11<sup>th</sup> Report of the Committee of Privileges](#))
- party or caucus meetings (including meetings of party or caucus committees).

Examples of documents formulated, made or published pursuant to an order of a House or committee include:

- business documents such as the *Notice Paper*, *Journals of the Senate* and the *Parliamentary Debates* (Hansard)
- answers to Senate questions on notice
- government reports ordered to be printed by a House
- committee reports
- correspondence or documents authorised for publication by a committee.

Note that publication of Hansard attracts absolute privilege but not the publication of extracts, such as part of an individual senator's speech. Publication of "pinks" (subedited drafts provided to senators to check their speeches) by a senator to a journalist (for example) **may** attract qualified privilege, along with press reports of proceedings, or the use of extracts of speeches in senators' newsletters. For qualified privilege, see [Odgers](#), page 54.

## 2. ***What is contempt?***

A contempt is a breach of the immunities of a House or any action which improperly obstructs a House or its members or committees in the performance of their duties. The power to punish contempts is one

of the major powers available to most parliaments to protect the integrity of their processes (the other main power being the inquiry power – to require the production of persons and documents).

Whether a person has committed a contempt is determined by a majority vote of the Senate, taken after at least 7 days' notice ([Privilege Resolution 8](#)) and usually on the recommendation of the Privileges Committee after an inquiry has been conducted.

### —**Contempts by senators**

Examples of contempts that may be committed by senators include:

- failure to comply with the resolutions of the Senate relating to the registration of senators' interests (a **serious** contempt, see [Resolution 1 of 17 March 1994](#), as amended)
- unauthorised disclosure of draft committee reports, unpublished evidence or submissions, or committee deliberations
- asking for, obtaining or receiving a benefit in return for discharging the senator's duties under outside influence
- disobeying a lawful order of the Senate or a committee (for example, to appear before a committee or produce documents to the Senate).

Some of these matters are also covered by the criminal law (s.13, *Parliamentary Privileges Act 1987*; s.141.1, *Criminal Code Act 1995*).

### —**Contempts against senators**

Examples of contempts that may be committed by other persons in relation to senators include:

- obstruction of a senator in the exercise of his or her duties
- improper influence of a senator
- molestation of a senator.

These contempts may cover such actions as a threat of legal action against a senator to prevent him or her raising a particular matter in the Senate.

Since the first such case of alleged intimidation of a senator was investigated by a select committee of privilege in 1904, the Senate has taken a fairly robust view as to whether senators have been improperly obstructed, probably on the basis that senators are capable of looking after themselves. The greater emphasis has been on the protection of other persons, particularly witnesses before committees, and on the integrity of committee processes.

### —**Other common contempts**

By far the most commonly investigated contempts involve conduct by or in relation to witnesses appearing before Senate committees, including:

- the giving of false or misleading evidence
- interference with witnesses (for example by punishing them for having given evidence or by giving them an inducement not to give evidence).

Summaries of the many cases of possible contempt investigated by the Senate Privileges Committee are published online on the committee's [website](#).

### **—Penalties**

In the worst cases, contempt may be punished by a term of imprisonment or the imposition of a fine. The Senate has never imposed such a penalty. Other penalties include admonishment or, in appropriate cases, the withdrawal of access to facilities at Parliament House (for example, the Press Gallery).

### **3. How is a matter of privilege raised?**

Matters of privilege – unless they arise suddenly in relation to proceedings before the Senate – are raised in writing with the President under standing order 81.

This process is covered in detail in [Brief Guide to Senate Procedure No.13 – Raising matters of privilege and the right of reply](#).

### **4. The Senate privilege resolutions**

After the enactment of the *Parliamentary Privileges Act 1987*, the Senate agreed to a series of resolutions early the following year to establish certain procedures for the operation of the Senate and its committees, such as procedures to protect the rights of witnesses. The resolutions also set out procedures for the investigation of contempts and the criteria for determining matters relating to contempt. [Resolution 6](#) sets out a non-exhaustive list of matters that may constitute contempts.

[Resolution 5](#) establishes procedures for the protection of persons referred to in the Senate. The Senate was the first known legislature to provide persons referred to in the Senate with a right of reply where those persons felt adversely affected in reputation or in dealings with others, or injured in some sense, including by unreasonable invasion of their privacy. See [Brief Guide No. 13](#) for details.

[Resolution 9](#) enjoins senators to use their great power of freedom of speech responsibly and to take into account:

- the damage that allegations made in parliament can do to the subject of the allegations and the institution of parliament
- the limited opportunity available to persons other than members of parliament to respond to such allegations
- the need for senators to have due regard to the rights of others
- the desirability of ensuring that any adverse reflections on a person are soundly based.

### **5. Senators and the law**

Apart from the immunities conferred by parliamentary privilege on senators in the exercise of their duties, senators are subject to the ordinary law like any other person. (See [Brief Guide No.23 – Provisions governing the conduct of senators](#))

Section 15 of the [1987 Act](#) indicates that the police may exercise in the parliamentary precincts the powers which they possess under the ordinary law. Likewise, electorate offices are within the jurisdiction of the ordinary law.

Senators have no overall immunity from subpoenas, orders issued by courts or tribunals for the discovery of documents, or search warrants. However, the use before a court or tribunal of documents so obtained is restricted by the law of parliamentary privilege.

See [Odgers](#), pp. 46-47, for a discussion of the case law supporting an effective immunity from compulsory production of documents where the documents are so closely connected with proceedings

in parliament that their production would involve unlawful questioning or impeaching of those proceedings, contrary to section 16 of the 1987 Act.

### —**Search warrants**

In the only relevant Australian case involving the execution of search warrants on a senator's offices (*Crane v Gething*, see [Odgers](#), p.46), the court said that it did not have jurisdiction to determine whether parliamentary privilege prevented the seizure of documents by the police because the issue of search warrants is an executive act, not a judicial proceeding. The matter was returned to the Senate to sort out, which it did by engaging an independent third party to assess the documents and determine which ones were covered by parliamentary privilege (on the basis that all parties would accept the umpire's determination).

Since then, the Presiding Officers have entered into a [memorandum of understanding](#) with the Attorney-General and Minister for Justice, endorsing an [Australian Federal Police Guideline](#) on the execution of search warrants in members' and senators' offices. A similar arrangement has been entered into with the Tasmanian government. Other states have not yet followed suit.

The guidelines provide an opportunity for senators to claim parliamentary privilege over particular documents uncovered in the course of the search, and for such documents to be sealed and provided to a neutral third party pending a determination of the claim of parliamentary privilege.

### —**Are there any other immunities that apply to senators?**

In addition to the major immunity of freedom of speech in parliament there are some minor immunities that preserve senators' freedom to attend parliamentary business without interference from the courts.

These minor immunities (which, in practice, rarely arise or are of little significance) are:

- the immunity from arrest in civil (as opposed to criminal) causes (codified in s.14 of the *Parliamentary Privileges Act 1987*)
- the exemption from jury service (codified in the *Jury Exemption Act 1965*)
- the exemption from compulsory attendance in a court or tribunal (also codified in s.14 of the 1987 Act and limited to 5 days either side of a meeting of a House or committee).

### —**Detention of a senator**

A [resolution of the Senate of 18 March 1987](#) declares that it is the right of the Senate to receive notification of the detention of its members (and the cause thereof) including:

- from a court, where a senator is held in custody pursuant to an order or judgment by the court
- from the Governor-General, if a senator is held in custody by order of a court martial or officer of the Defence Force
- from the police, if a senator has been arrested.

## 6. **Need assistance?**

Advice on any of the matters covered by this Brief Guide is available from the Clerk of the Senate on extension 3350. 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 online at <http://www.aph.gov.au/senate/pubs/guides/index.htm>. The online version contains hyperlinks to various other sources.