

It is meant to protect free speech in parliament, but it's also used to score political points. Gerard Carney looks at whether parliamentary privilege needs a make-over.

The power of privilege

Most people think of parliamentary privilege as the immunity members of parliament rely upon when they make accusations against individuals in the course of parliamentary debates. This is, of course, the most controversial manifestation of privilege. Yet parliamentary privilege extends beyond this immunity to include other matters which are regarded as essential to the functioning of parliament. It confers on each house of parliament a range of powers, in particular the power to control its own proceedings, to regulate its members, and to punish conduct which it judges to be in contempt of the house. Each house is also empowered to conduct inquiries into matters of public importance. This power is of increasing importance in holding the executive accountable to parliament. Nowhere is this more apparent than during the financial estimates hearings conducted by Senate committees which grill senior government officials on the operations of their department.

All of these privileges and powers derive originally from those of the House of Commons in the United Kingdom where they developed through the centuries as the House strove to establish parliamentary supremacy over the Crown and the courts. For instance, the immunity of members for what they say in the course of parliamentary proceedings was finally secured in England by Article 9 of the Bill of Rights in 1689 which

prevents any speech, debate or proceedings in parliament from being questioned outside parliament. Until this privilege was confirmed by statute, it was not uncommon for outspoken members of the House of Commons to be charged with offences for speeches disapproved of by the Crown. The establishment of this privilege ensured the capacity of members to scrutinise the activities of the Crown and, hence, assisted the subsequent development of responsible government by which the executive is accountable to the lower house. Professor Enid Campbell once wrote that without this privilege, parliament would merely have evolved into "polite but ineffectual debating societies"!

Today, parliamentary privilege continues to assist the role of law-making as well as to facilitate the scrutiny of the executive. Over time, the latter purpose is acquiring more significance, particularly in upper houses such as the Senate. As the Chief Justice of the High Court, Sir Gerard Brennan, observed in *Arena v Nader* (1997), these privileges "exist not for the benefit of the members of parliament but for the protection of the public interest". Hence the freedom of speech enjoyed by members is in every sense a *privilege* which must be exercised in the public interest. There is clearly a need to regularly reassess the necessity for the continued enjoyment of these privileges. Their justification must be based on the needs of contemporary government, not the historical battles fought in earlier ages.

Furthermore, despite their age, there remains uncertainty as to the scope of significant principles of parliamentary privilege. A partial veil of mystery still envelopes them. The Commonwealth's *Parliamentary Privileges Act 1987* clarifies the position somewhat but further clarification is needed. Most problematic is the Article 9 immunity of freedom of speech, although difficulties also arise in respect of the powers to punish contempt of parliament and in relation to the conduct of parliamentary investigations. A brief reference is made to these two significant powers before considering the Article 9 freedom of speech.

Contempt power: Conduct which interferes with the functioning of the parliament can be punished by each house as contempt of parliament. The house exclusively determines whether the conduct constitutes contempt, and the punishment imposed. Not only can a member be suspended from the house for contempt, but anyone found in contempt of the Commonwealth parliament may be fined or imprisoned by the house. The only instance of the latter was in 1955 when the House of Representatives imprisoned a newspaper owner and a journalist for three months for attempted intimidation of a member. Clearly, there is an issue whether a house should retain these punitive powers, or whether the courts should assume this responsibility.

Parliamentary investigations: Each house is empowered to conduct inquiries into matters of public interest. This power is usually delegated to parliamentary committees which hold inquiries within their respective terms of reference. The house and its committees can summon witnesses to appear before them to give evidence on oath and to produce documents. Failure to cooperate constitutes contempt. Armed with these coercive powers and protected by Article 9 freedom of speech, parliamentary inquiries become potent investigative tools.

Article 9 Freedom of speech: This immunity of freedom of speech provides members with complete immunity from the law in respect of everything they say or do in the course of parliamentary debate. No doubt this immunity was essential to the evolution of parliament in the seventeenth

century and its capacity to call the executive to account. But does it remain essential in the twenty-first century? Certainly members are able by this immunity to raise concerns in the public interest which may not otherwise be brought to the attention of relevant authorities. Revelations of police corruption in the Queensland parliament in the 1980s eventually led to the establishment of the Fitzgerald Commission of Inquiry. On the other hand, accusations are made under privilege without foundation, and

accusations made against them by having their response incorporated in Hansard under privilege. While this citizen's right of reply is available in both Commonwealth houses and most state and territory houses, it has its limitations. The reply must be in terms acceptable to the house (eg not offensive). It therefore lacks immediacy as replies can take some time to be accepted by a house and incorporated in Hansard. By then the press have lost interest in the story. Nor does publication of a reply in Hansard imply any



in some cases have led to tragic consequences, such as the suicide of Penny Easton in Western Australia in 1992, following the presentation of a petition by her former husband. Others have their reputations sullied, if not destroyed.

Some, like High Court Justice Michael Kirby, receive an apology from the member concerned, while others are left to defend themselves. Some take advantage of the right to reply to the

confirmation of the veracity of the reply. Moreover, it is unclear whether the right of reply has any deterrent effect on members abusing their privilege.

Of particular concern is the use of the privilege to allege criminal conduct by others. This tends to undermine both the presumption of innocence and the police investigation. Such allegations should be made to the police directly rather than in parliament unless the member is

Continued page 30 ►

convinced on clear evidence that there is some sort of cover-up.

A related issue of practical importance is whether communications with a member, which are relied upon in making accusations under privilege, are similarly protected by the freedom. The traditional view has been that they attract no protection. However, this view is gradually being eroded in Australia, so that protection appears to extend to at least those communications which are acted on in some way by a member with a view to raising it in parliament. It may even extend to all communications with members until a decision is actually made by the member on what action to take.

The freedom of speech enjoyed by members is in every sense a privilege which must be exercised in the public interest.

It needs to be appreciated that the immunity of freedom of speech extends beyond parliamentary debates, to the proceedings of parliamentary committees and to the testimony of witnesses appearing before those committees. It also extends to all documents tabled in a house and to its committees, as well as petitions presented to a house by a member. The Penny Easton affair involved a petition from Mr Easton presented by a member to the Western Australian Legislative Council which alleged that his former wife had given false testimony in their divorce proceedings, and that the Leader of the Opposition had provided her with confidential information. As a petition tabled in a house, those allegations attracted absolute immunity.

So what safeguards are in place to curtail the irresponsible use by members and others of this privilege of freedom of speech during the course of parliamentary proceedings?

Certain restrictions on parliamentary debates are already in place in all Australian houses by virtue of their standing orders. But these rules have no effect on the legal immunity of freedom of speech which remains intact. There is the sub judice rule which prevents comment on current legal proceedings, and there are rules against the use of offensive words against the judiciary and the confinement of allegations against a judge only on a substantive motion. These rules are only enforced by each house, and are capable of being easily subverted. Senator Heffernan demonstrated this in

2002 when the subject of his allegations, Justice Michael Kirby, was only revealed at the very end of his parliamentary speech, thereby evading the requirement of a substantive motion.

The Senate has prescribed guidelines/rules which require a senator to have regard to a range of matters before exercising the freedom. Resolution No 9 includes the need to exercise the freedom in a responsible manner, to have regard to the damage which may be done and to the rights of others, and that the statements made are soundly based. No similar guidelines are prescribed for members of the House of Representatives, although cautionary comments are quoted in *House of Representatives Practice* (the House's procedure and practice guide).

The issue remains whether the freedom of speech ought to be restricted to reduce the potential for future abuse. The most radical option is to abolish the freedom altogether. Instead, members and others would rely on the legal defence of qualified privilege, but this only protects them in defamation cases provided there is no malice. The 1992 Report of the WA Inc Royal Commission recommended this approach because it believed that members were more likely to speak truthfully in parliament if the privilege were removed. The drawback with this approach, however, is that it puts members in an invidious position—they risk being sued every time they make accusations against others. And if sued, they bear the onus of proof to establish the defence of qualified privilege—even when convinced they are justified in doing so in the public interest. The issue is really whether this 'chilling effect' on members is outweighed by the advantages flowing from the abolition of the absolute freedom of speech. In my view, it is not.

An alternative approach is not to abolish the freedom but to restrict it, so that it no longer extends, for example, to allegations of criminal conduct or to violations of court suppression orders. Another suggestion is to require members to preface their remarks with express reliance on the privilege (suggested by Michael Kroger in 2000). There is also the option to prevent privilege attaching to all documents tabled during parliamentary proceedings. Most of these possible reforms require statutory enactment (the blanket protection on tabled papers could be removed by changing the standing orders). They would also need to be consistent with the implied freedom of political communication which prevents

the abrogation of the right of all Australians to communicate on any public issue.

Currently, the only accountability mechanisms in place for members' abuse of the freedom lie solely within the power of the member's house and the electorate. While abuse only occurs occasionally, there is a glaring lack of disciplinary action by the relevant member's house. Yet this is really what Article 9 of the Bill of Rights intended. By exempting members from being questioned outside parliament, the clear implication is that they will be held to account within parliament—by their own house. A Commonwealth house could suspend or fine a member. Other houses can expel or imprison a member. Yet, it is extremely rare for any of these powers to be exercised. For instance, Senator Heffernan merely incurred a Senate censure, despite the minority status of his party in that house.

Interference with the Article 9 freedom of speech also constitutes contempt. Recent instances include: where a person threatened to sue those who provided a member with information which was used to make certain allegations under privilege; and where a university took disciplinary action against an employee for providing documents tabled by a senator.

At the state level, at least two independent inquiries have investigated allegations made under privilege. Serious allegations made in 1997 by Mrs Franca Arena MLC in the NSW Legislative Council against the NSW Premier, the Leader of the Opposition and a judge were investigated by a statutory commission of inquiry. On being found to be completely without foundation, Mrs Arena made a 'statement of regret' which was accepted by the Legislative Council. In the Penny Easton affair, the petitioner, Mr Easton, was subsequently gaoled for seven days in 1995 by the WA Legislative Council for contempt for failing to comply with an order to apologise for misleading statements in his petition.

Obviously there is difficulty in relying on self-regulation here. The same concern arises in relation to the enforcement of a code of conduct for members. How can you expect a house divided on party lines to determine objectively the misuse of privilege by its members? The answer may lie in the establishment of a parliamentary ethics committee. That is another chapter. ■

Gerard Carney is Professor of Law at Bond University and author of Members of Parliament: law and ethics, 2000.