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Workshop 2
Privilege cases concerning members of Parliament*

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Introduction

As an introduction to this paper and to this workshop on parliamentary privilege it is perhaps worth saying something about the general context and purpose of parliamentary privilege.

The first point to make, which a number of leading commentators on parliamentary privilege have made, is that the terms ‘privilege’ and ‘privileges’ have unfortunate connotations in a modern democratic society¹ or could be seen in a pejorative sense in an egalitarian age.² This is particularly unfortunate if we are looking at privilege issues as they concern individual members of Parliament as the term itself can create an impression that parliamentary privilege exists to provide special rights to members of Parliament that are not available to ordinary citizens. As a former Clerk of the UK House of Commons, Sir Malcolm Jack put it:

... in common usage, ‘privilege’ tends to be thought of as an advantage over others gained by someone because of his or her position or status. That is bad enough but when the public become convinced that Members of Parliament were not behaving as they should, the suspicion hardened into hostility.³

In fact, parliamentary privilege is not about providing special rights or privileges of individual members of Parliament, but ensuring the ability of Parliament and its constituent elements to perform their proper functions. David McGee, the former Clerk of the New Zealand House of Representatives, has stated:

Parliamentary privilege ... helps to preserve Parliament’s freedom from outside contest and to give it and its members the legal tools and confidence that they will need to perform their constitutional functions.⁴

In a similar vein, *House of Representatives Practice* notes that:

* This paper has drawn on cases from the Australian House of Representatives to illustrate the general points that are made. It is hoped that the discussion will raise cases from other jurisdictions.

¹ See Malcolm Jack, ‘Parliamentary privilege: a dignified or efficient part of the Constitution’, *The Seventeenth Policy and Politics Annual Lecture*, University of Bristol, 29 March 2012, p 1.

² David McGee, ‘The scope of parliamentary privilege’, *The New Zealand Law Journal*, March 2004, pp 84-88 at p 84.

³ Jack, *op cit.*

⁴ McGee, *op cit.*

The term parliamentary privilege refers to the special rights and immunities which apply to the Houses, their committees and their members, and which are considered essential to the proper operation of the Parliament.⁵

The particular relevance to this presentation is that members of Parliament only enjoy the protection of parliamentary privilege when they are performing their core roles as members, ie participating in the processes of the House or its committees or, in certain aspects, in carrying out their responsibilities to their constituents. An important issue can be whether members are performing duties as a member in relation to any matter that may be the subject of a complaint of a breach of privilege or a contempt or whether the actions of a member or a person outside the parliamentary sphere threaten those core responsibilities of the Parliament.

In addition to having the right to carry out their core responsibilities as members, members also can be held accountable to the House for their actions and conduct. While such matters can be dealt with in the House or committees under the authority of the standing orders, they also can give rise to allegations of a breach of privilege.

In this paper it is proposed to examine the sort of privilege matters which involve individual members of Parliament.

Types of matters that may involve members

The sorts of matters that relate to individual members that can arise as matters of privilege can be placed into two categories.

The first category is one in which members could be regarded as the ‘victims’ of some action or alleged action. This is principally where there are allegations that members have been subject to improper interference, intimidation, obstruction or influence as they have gone about performing their duties as a member. Such matters have become a regular staple of the work of the Australian House of Representatives Standing Committee of Privileges and Members’ Interests, with a number of inquiries being conducted over recent years.

A further range of matters that used to fall into this category, reflections on members, has been abolished by the passage of the *Parliamentary Privileges Act 1987* (the Privileges Act). Section 6 of the Act states that:

Words or acts shall not be taken to be an offence against a House by reason only that those words or acts are defamatory or critical of the Parliament, a House, a committee or a member.

In earlier years there were a number of matters referred to the Committee of Privileges in relation to reflections on members either individually or collectively. The investigation of such matters did not bring great credit to the Parliament as an institution as it fed the perception that parliamentary privilege existed to protect members from criticism, however unfair that criticism might be. Matters involving reflections on members are still open to be regarded as potential contempts in some other jurisdictions, but their consideration would be dependent on the particular circumstances of the case.

The second category of matters are those in which the member can be described as the ‘accused’. These are matters which generally involve allegations of misconduct of some kind

⁵ *House of Representatives Practice*, 6th edn, p 731.

by a member. They could be allegations of deliberate misleading of a House; the failure to meet the requirements for the registration of members' interests; misconduct in the House or in a committee; or misconduct of a more general nature. In a number of instances, particularly where they relate to allegations of misconduct in the House or a committee, matters can be dealt with under the standing orders by the Presiding Officer or the Chair of the committee and would not usually be pursued as matters of privilege. However, there are matters which arise which cannot readily be dealt with in this immediate way and which raise broader issues about the actions of a member and the role of the House in dealing with these. It often is not the case that these matters may give rise to matters of privilege; they can instead be matters of conduct rather than privilege.

I will now discuss each of these two categories in more detail and refer to the particular issues which characterise consideration of, or investigation into, the matters that can arise.

Privilege cases concerning members – members as ‘victims’

As noted earlier, there has been a steady stream of cases which has been considered by the House Committee of Privileges in relation to matters raised by, or on behalf of, members alleging that there has been improper interference with them in the performance of their duties as a member or attempts to influence a member in his or her conduct by means of intimidation, threats or bribery. Shortly I will discuss a few of the more recent cases to illustrate how these cases are dealt with. However, it is worth noting that the most significant privilege case in the history of the House of Representatives concerned allegations of threats being made against a member to intimidate him in relation to the performance of his duties. In this case, a newspaper publisher and journalist were found guilty of a contempt and were sentenced by the House to a term of imprisonment.

Case study 1: Browne/Fitzpatrick

In the famous Browne/Fitzpatrick case in 1955, the then Member for Reid, Mr Morgan, raised a matter of privilege concerning an article that had appeared in a local Sydney newspaper in his electorate, the *Bankstown Observer*, published by Mr Raymond Fitzpatrick. The article, written by the journalist Mr Frank Browne, made allegations that Mr Morgan had been involved in immigration rackets. Mr Morgan claimed that the article was a direct attack on his integrity and conduct as a member of the House. The House agreed to refer the matter to the Committee of Privileges for investigation and report. Subsequently, further articles from the *Bankstown Observer* on the same subject were referred to the committee.

The evidence taken by the committee showed that Mr Fitzpatrick had had the articles published with the intent of intimidating Mr Morgan into no longer raising in the House matters adverse to Mr Fitzpatrick's interests. Mr Brown was essentially the tool used by Mr Fitzpatrick to produce the articles with the direction from Fitzpatrick that he 'get stuck into him (Morgan)'. Mr Browne admitted that he had written the original article in such a way that it could be inferred that the alleged corrupt activity by Morgan was happening at this time (1955) rather than in the 1940s when these allegations were first raised in relation to Morgan.

The Privileges Committee reported on 8 June 1955 and its key finding was that Mr Fitzpatrick and Mr Browne were guilty of a serious breach of privilege by publishing articles intended to influence and intimidate Mr Morgan in his conduct in the House and in deliberately attempting to impute corrupt conduct on the part of Mr Morgan for the express purpose of discrediting and silencing him. The committee recommended that the House should take appropriate action.

The report was considered by the House on 9 June 1955 and agreed to. It was also resolved that Messrs Fitzpatrick and Browne be advised that on the following day the House would hear them at the bar of the House before proceeding to decide what action it would take against them in relation to the breaches of privilege.

On the following day, both Fitzpatrick and Browne were heard at the bar of the House, the only occasion on which this has happened. Mr Fitzpatrick apologised. Mr Browne, who at one stage was asked by the Speaker to ‘take your hands off the bar’,⁶ proceeded to defend his actions and to claim that he had been denied natural justice.

Neither approach was successful in preventing the House sentencing the two for their offences. In each case they were found guilty of a serious breach of privilege and sentenced to gaol for a period of three months.

Source: House of Representatives Practice, 6th edn, pp 754-55.

The second more recent case concerned a referral to the House Committee of Privileges in 2004. In this case no contempt was found and there was a recognition of the political context in which matters of privilege are raised.

Case study 2: The Latham/Murphy case

On 2 December 2004, the then Leader of the Opposition, Mr Latham, and the Member for Lowe, Mr Murphy, raised separate, but connected matters of privilege concerning allegations that a journalist from *The Australian* newspaper had issued threats to them, in telephone conversations, in an endeavour to unreasonably influence their conduct as members.

In his memorandum to the committee, the Clerk of the House referred to the Browne/Fitzpatrick case as the nearest precedent to the matter referred to the committee. The Clerk recited the circumstances of the Brown/Fitzpatrick case, as outlined above. The Clerk emphasised that the Browne/Fitzpatrick case had been decided on the basis that there had been a direct attempt to influence and intimidate Mr Morgan in his duties as a member.

From the background, the Clerk raised a number of issues for the committee to consider. These are summarised in the committee’s report as:

⁶ House of Representatives Hansard, 10 June 1955, p 1625.

- there would need to be consideration of what is meant by the ‘free performance of the member’s duties as a member’. While ‘free performance’ could be understood relatively easily from its literal interpretation as being unconstrained by improper means, the term ‘member’s duties as a member’ is more difficult. The Clerk noted that the duties of a member could extend to the exercise by the Leader of the Opposition of duties as Leader in relation to members of the Opposition;
- in assessing whether alleged threats amounted to contempt, the threats would need to be regarded as an ‘improper interference’ in the free performance of a member’s duties (note the relevance of the enactment of section 4 of the Privileges Act);
- in assessing ‘improper interference’ regard would have to be had to the knowledge and intentions of those involved; and
- it was important to consider any alleged threats in the context of the robust exchange which takes place, and is expected to take place, between the media and politicians in a democratic society.

I cannot go into the details of the evidence the committee received or its deliberations. However, the committee concluded that while the journalist concerned had had telephone conversations with a member of Mr Latham’s staff and with Mr Murphy, any alleged threats made in those conversations did not amount to an improper interference with either Mr Latham or Mr Murphy in the performance of their duties as members. The committee considered the conversations should be seen in the context of the robust exchange that occurs between the media and parliamentarians in an open, democratic society.

Source: House of Representatives Standing Committee of Privileges, *Report concerning the alleged threats to Mr Latham MP and Mr Murphy MP*, February 2005.

The third case, which was examined by the Committee of Privileges, was referred in 2005. This case illustrates that parliamentary privilege continues to have value in protecting core parliamentary processes and relationships.

Case study 3: The Nairn case

In 2005, the question of whether two incidents, where alleged fraudulent and inaccurate documents purportedly from the Member for Eden-Monaro, the Hon Gary Nairn MP, were distributed to media outlets and to a recipient of government funding in his electorate, constituted contempts was referred to the Committee of Privileges for investigation. The committee presented a report on the inquiry to the House on 31 May 2007.

Both incidents involved documents dated 1 April 2005 (April Fools’ Day) which were carefully fabricated to make it appear as though they had been sent by Mr Nairn. The fabrication included the use of a version of Mr Nairn’s letterhead, Mr Nairn’s signature,

the same style of envelope used by Mr Nairn and, in the case of one of the documents which was distributed by facsimile, the embedding of Mr Nairn's fax number in the document. Mr Nairn indicated he had not been responsible for preparing or sending the documents.

The committee delayed its own inquiry into the matter as it became aware that the Australian Federal Police (AFP) was conducting an investigation of the incidents. The AFP concluded its investigation without any outcome.

Subsequently, the committee became aware of three further incidents of correspondence, sent on 1 April 2006, apparently on the letterhead of the Member for Eden-Monaro and with his signature. One of these letters was sent to the Secretary of the Committee of Privileges and asked the committee to expedite its inquiry into the earlier incidents. Again Mr Nairn indicated that he was not responsible for preparing and distributing any of the documents.

The AFP investigated these further incidents. While the AFP was able to identify a suspect and prepared a brief of evidence for the Commonwealth Director of Public Prosecutions, the matter did not proceed to prosecution. However, the AFP advised the committee that the evidence it had collected on the case established a clear and manifest connection of a resident of the South Coast of New South Wales, to the preparation and distribution of the documents that were the subject of the inquiry. When this person appeared before the Committee, she did not deny this evidence and, in response to a specific question, she admitted that she was responsible for the preparation and distribution of the documents.

Having established the identity of a person responsible for the incidents, the committee assessed whether the incidents amounted to a contempt of the House.

Communication with constituents, including communication with the local media, is an important part of the duties of a member, and members rightly rely on this communication being seen as honest and being free from interference. In preparing and distributing the press release and letters to make it appear as though they had been sent by Mr Nairn, the person stated her intention was to draw attention to the issue of logging in south-east New South Wales forests by the use of an April Fools' Day joke.

However, the test as to whether a matter amounts to a contempt as provided in section 4 of the Parliamentary Privilege Act does not just go to the intention of the conduct but also whether it amounts, or is likely to amount, to an improper interference with the free performance by a member of his or her duties. Evidence from Mr Nairn showed that there was interference with his communication with his constituents and such interference could be expected as a likely outcome of such misuse. The committee considered the misuse of a member's letterhead and signature, regardless of the specific intentions, would either amount to, or be likely to amount to, an interference with a member's ability to communicate freely and honestly with his or her constituents. The committee also considered that such interference in these circumstances, when there was a deliberate attempt to misrepresent a member by fabricating a letterhead and signature, was improper and constituted a contempt of the House.

The committee found the person guilty of a contempt of the House in that she had undertaken conduct which amounted to an improper interference in the free performance by Mr Nairn of his duties as a member.

The committee considered that the contempt committed was a very serious matter and considered that an appropriate penalty would be for the House to reprimand the person for her conduct. It indicated that further such conduct by the person could give rise to more serious consequences.

The committee recommended that the House:

1. find the person guilty of a contempt of the House in that she undertook conduct that amounted to an improper interference with the free performance by Mr Nairn of his duties as a member; and
2. reprimand the person for her conduct.

Subsequently, on 14 June 2007, the House having considered the recommendations of the committee's report, resolved:

That the House agrees with the recommendation of the report of the Committee of Privileges presented on 31 May 2007 about allegations of documents fraudulently and inaccurately written and issued in a member's name, and:

1. finds the person guilty of a contempt of the House in that she undertook conduct that amounted to an improper interference with the free performance by the Member for Eden-Monaro of his duties as a member; and
2. reprimands the person for her conduct.

The terms of the House's resolution were conveyed to the person.

The committee's inquiry was notable in that it is relatively unusual for a matter of privilege to be resolved in this way with a person responsible being identified, found guilty of an offence and a penalty being imposed.

Source: House of Representatives Standing Committee of Privileges, *Report on allegations of documents fraudulently and inaccurately written and issued in a member's name*, May 2007.

These cases illustrate a number of points about the consideration of such matters, some of which may be obvious from the cases themselves and some not so obvious.

First, it is not possible to generalise about such matters involving members. Each case turns on its own specific circumstances and these need to be teased out through a thorough examination of the evidence. A committee of privileges is generally well placed to undertake this investigation, although there can be particular challenges if there is no obvious person or persons identified as being responsible for the action complained of. It also is essential to establish that in any such case there is a direct effect on the ability of members to perform

their duties as members. Actions which may interfere with members of Parliament but do not relate to them performing their duties as members would not be a proper matter for complaint.

Second, such matters generally are dealt with by recognising the principle of self-restraint in the exercise of the penal jurisdiction of the House, as recommended by the Report of the Joint Select Committee on Parliamentary Privilege in 1984.⁷ As recommended by the committee, the penal jurisdiction should be exercised by the House:

... as sparingly as possible and only when it is satisfied to do so is essential in order to provide reasonable protection for the House, its members, its committees or its officers from improper interference or attempt at or threat of obstruction as is causing, or is likely to cause, substantial interference with their respective functions.⁸

The requirement since the passage of the Parliamentary Privileges Act that for conduct to be found to be a contempt it must meet the test of section 4 of the Act, ie it must amount, or be intended or likely to amount, to an improper interference with the free exercise by a House or a committee with its authority or functions, or with the free performance by a member of the member's duties as a member, has reinforced the requirement for restraint. Only the most serious matters should be investigated and considerable care needs to be taken to ensure that only matters which would need to be dealt with to protect the ability of members freely to perform their duties are the subject of any findings. The exercise of self-restraint in such cases is critical to the perception that members are not a 'protected' species.

Third, such matters can be characterised by the sharing among members of a common interest. It could be referred to as the 'there but for the grace of God go I' phenomenon. In these circumstances, members can recognise that if another member is under threat from some form of action which may damage their ability to perform their duties, at some time in the future they may face the same sort of threat and they would expect to have the support of their colleagues. This phenomenon can influence the behaviour of members generally in the House when such matters are raised, but also the approach of members of committees of privileges when considering such matters. The influence of this phenomenon can lead to suggestions that members will 'look after their own'. As a result, there have been calls at various times for some or all aspects of the penal jurisdiction of Houses of Parliament to be taken away and exercised by the courts.⁹

However, in the case of matters which impinge on members, it also means that members are in a very good position to understand realistically the impact on a member of particular actions. This is perhaps well illustrated by the Nairn case referred to above.

Finally, a countervailing phenomenon that can characterise such matters is partisanship. This phenomenon is perhaps more usually present when a matter in which a member is the 'accused' is being examined (and I will refer to this shortly). Nevertheless, if a matter involved other members as the alleged perpetrators of the threats or involved political interests acting contrary to the interests of the member who was the subject of the inquiry, then the potential for partisanship could arise.

⁷ Joint Select Committee on Parliamentary Privilege, *Final Report*, October 1984, PP 219/1984, pp 82-83.

⁸ *Ibid*, p 83.

⁹ See Report of the UK Joint Committee on Parliamentary Privilege, Volume 1 – Report and Proceedings of the Committee, 1999, pp 79-81. The arguments for and against transfer of the penal jurisdiction were also canvassed in the Report of the Joint Select Committee on Parliamentary Privilege, *op cit*, pp 90-91.

One such example, was the referral to the House Committee of Privileges and Members' Interests in 2010 of an inquiry into allegations that there had been improper, or attempted improper, interference with a member in freely performing his duties as a result of the actions of a political party.¹⁰ Although this inquiry did not proceed to completion because of the general election in August 2010, it might have been expected to have aroused some political partisanship had it been pursued.¹¹

It is worth noting that matters involving allegations of interference with and intimidation of members can be given differing emphases in different jurisdictions. For example, in the Australian Senate, the Senate Committee of Privileges has noted in relation to the category of possible contempts, there:

... is the improper obstruction of senators or committees in the exercise of their duties. In the three matters, involving four references, on which the committee has reported in recent years, the committee has continued the practice first established in 1904 of taking a robust view as to whether senators have been improperly obstructed.¹²

This is not dissimilar to the concept of the exercise of restraint in relation to such matters, but perhaps points to the particular importance of caution where members of Parliament are prosecuting matters of privilege in support of other members.

Matters involving members – members as the ‘accused’

Those matters of privilege in which members become the ‘accused’ are perhaps the most difficult matters to deal with, as the potential for partisanship to gain a political advantage can be a real factor. In addition, there are the implications that can arise from members sitting in judgement over another member.

A number of historical cases are referred to in *House of Representatives Practice* and these are covered below.

Historical cases

The first case relates to the only occasion on which the House of Representatives expelled a member. On 11 November 1920, the Prime Minister moved:

That, in the opinion of this House, the honorable Member for Kalgoorlie, the Honorable Hugh Mahon, having, by seditious and disloyal utterances at a public meeting on Sunday last, been guilty of conduct unfitting him to remain a Member of this House and inconsistent with the oath of allegiance which he has taken as a Member of this House, be expelled this House.

¹⁰ House of Representatives, Votes and Proceedings, 2008-09-10, pp 1825-26.

¹¹ Although I am not aware of the ‘behind the scenes’ details of the case, the case reported from the ACT Legislative Assembly in ‘Unauthorised diversion and receipt of a Member’s e-mails’ appears to be an example where some degree of political partisanship may have been an issue. The report was the subject of a substantive dissent from the opposition member on the committee. See Legislative Assembly for the Australian Capital Territory, *Unauthorised diversion and receipt of a Member’s e-mails*, Report of the Select Committee on Privileges, November 2002.

¹² Senate Committee of Privileges, *Parliamentary Privilege: Precedents, Procedures and Practice in the Australian Senate 1966-1999*, 76th Report, June 1992, p 25.

The speech to which the motion referred was delivered at a public meeting in Melbourne, and concerned British policy in Ireland at that time. The Leader of the Opposition moved an amendment to the effect that the allegations against Mr Mahon should not be dealt with by the House, and that a charge of sedition should be tried before a court, but the amendment was negated and the original motion was agreed to on division. After the motion of expulsion was agreed to, a further motion was moved declaring the seat vacant which was agreed to on division. Mr Mahon stood for re-election in the resulting by-election but was not successful.

In commenting on this case, the Joint Select Committee on Parliamentary Privilege noted:

The Mahon decision was made on party lines and it is a decision which we find troubling. We believe that if the power to expel is to remain ... it should be exercised only in the most outrageous and compelling cases. This follows both from the great severity of the sanction and the consideration that it is for the electors to determine who should be in Parliament, rather than the Houses themselves. This latter consideration may be answered by the argument that it would be quite competent for the expelled Member to recontest his seat and to be re-elected. This argument overlooks the political reality that the mere fact of expulsion may so blight the expelled Member's political reputation thus his prospects of successfully recontesting an election (or obtaining pre-selection) would be negligible.¹³

With the passage of the Privileges Act in 1987 the power of the House to expel a member has been removed (section 8).

In the *McGrath Case* (1913) a Member was suspended from the service of the House for a statement made outside the House which reflected on the Speaker. The Member was suspended '... for the remainder of the Session unless he sooner unreservedly retracts the words uttered by him at Ballarat ... and reflecting on the Speaker, and apologises to the House'. However, in the next Parliament the House resolved to expunge the resolution of suspension from the journals of the House 'as being subversive of the right of an honourable Member to freely address his constituents'.

In the *Tuckey Case* (1987) a Member was suspended for seven sitting days, including the day of suspension, following remarks critical of the Speaker made outside the House.

In the *Aldred Case* (1989) a Member was suspended for two sitting days. The Committee of Privileges had found that the Member had offended against the rules of the House in making certain statements about another Member which the committee concluded should have been put forward in a substantive motion. The House adopted the report and called on the Member to withdraw the allegation and apologise. He declined to do so and was suspended for two sitting days.

Source: *House of Representatives Practice*, 6th edn, pp 157 and 765.

¹³ Report of the Joint Select Committee on Parliamentary Privilege, *op cit*, pp 96-97.

Among more recent cases have been some where it has been alleged that members have committed a contempt by failing to meet the requirements of the House for the declaration of members' interests. The resolution of the House relating to the requirements for members to register their interests states that a member who 'knowingly' fails to meet the requirements 'shall be guilty of a serious contempt of the House of Representatives and shall be dealt with by the House accordingly'.¹⁴ This is, if you like, the stick by which the House can enforce member's fulfilment of the requirements.

Thomson and Kelly cases

On 21 May 2012, the Manager of Opposition Business raised as a matter of privilege allegations that the Member for Dobell (Mr Craig Thomson MP) had failed to comply with the requirement of the House in relation to his declaration of pecuniary interests.

Immediately afterwards the Leader of the House raised a matter of privilege concerning the Member for Hughes (Mr Craig Kelly MP) alleging that he also had failed to meet the requirements of the House in relation to the registration of his pecuniary interests.

In accordance with SO16, complaints about the registering or declaring of interests are considered by the Committee of Privileges and Members' Interests. Accordingly these matters were considered by the Committee.

On 20 August 2012, the Chair of the Committee reported to the House that the Committee had considered the matters raised and had obtained information from the members concerned. The Chair stated: 'The Committee has concluded that there are no grounds for further action'.

Source: House of Representatives Debates, 21 May 2012, pp 4831-34 and 20 August 2012, pp 9117-18.

However, the most significant matter in recent times has been the referral to the Committee of Privileges of an inquiry into whether, in making a statement to the House on 21 May 2012, the Member for Dobell deliberately misled the House.

Thomson case

There had been reports in the media over some time about allegations of the actions of the Member for Dobell, Mr Craig Thomson MP, while he was an official with the Health Services Union prior to becoming a member of Parliament. Calls had been made for Mr Thomson to make a statement to the House of Representatives about the allegations.

On 21 May 2012, Mr Thompson made a detailed statement to the House on the allegations.

¹⁴ *House of Representatives Standing and Sessional Orders as at October 2010*, 'Registration of Members' Interests – requirements of the House of Representatives', p 119.

The next day, 22 May, the Manager of Opposition Business raised as a matter of privilege whether, in making his statement, Mr Thomson had deliberately misled the House.

In accordance with the standing orders, the matter was referred to the Speaker for consideration as to whether a *prima facie* case of a contempt had been made out and so whether precedence should be given to refer the matter to the Committee of Privileges and Members' Interests.

The Deputy Speaker reported the Speaker's statement later that day. The Speaker concluded that a *prima facie* case had not been made out as it did not appear that evidence had been presented that the House had been misled and that the misleading was deliberate. However, the Speaker indicated he understood the concerns many members had about the matters raised. While precedence would not be given to a motion being moved to refer the matter to the Committee of Privileges and Members' Interests, it would still be open to the House to determine a course of action in relation to the matter.

The case was unusual in that the Manager of Opposition Business then moved, by leave, that the following matter be referred to the Committee of Privileges and Members' Interests:

Whether, in the course of his statement of 21 May 2012, the Honourable Member for Dobell deliberately misled the House.

In indicating that the government would not oppose the motion, the Leader of the House cautioned that it should not establish a precedent whereby when disagreements arise as to the factual basis of matters raised in the House, they should be the subject of a reference to the Committee of Privileges.

The reference was carried on the voices. The Committee of Privileges and Members Interests is still pursuing its inquiry.

Source: House of Representatives Debates, 21 May 2012, pp 4715-28; 28 May 2012, pp 4995-99 and 5063-65.

The Thomson case has not yet been concluded and so it is not possible to draw out any issues at this stage from that case.

However, it is possible to make some general remarks drawing on some of the issues discussed in the previous section in relation to privilege matters where members are the victims of alleged breaches of privilege.

Perhaps the most important point to make is that members are placed in the very difficult position of sitting in judgement over the actions of one of their fellow members. While it is very clear that Houses have the power, and the responsibility, to discipline their own members for their conduct, such power and responsibility brings with it significant issues. The complexity of the issues that can be involved in such cases is well expressed in the forward by the Chair of the New South Wales Legislative Council Standing Committee on Parliamentary

Privilege and Ethics to the Committee's report on the 'Inquiry into the conduct of the Honourable Franca Arena MLC'. The Chair stated:

During the inquiry the Committee was mindful of the importance and seriousness of the issues at stake, including the nature of parliamentary freedom of speech, the need to protect the dignity and standing of the House, the importance of protecting individual reputations from unnecessary damage, the possible consequences for the Member concerned and, ultimately, for all Members of the House.¹⁵

The complexities make all such matters difficult balancing acts. Also those contradictory factors referred to earlier of, on the one hand members being concerned that, if a case is pursued against a member, it could well set a precedent for the future and, on the other hand, recognising that there is the potential for political advantage in pursuing an opponent for alleged contempt or misconduct, come clearly into play when accusations are made against members.

There is rightly a concern that if the bar is set too low on matters on which members may be seen to be held at fault by the membership of the House at large, it is likely that similar matters will be pursued against other members in the future. This gives pause to members when they are considering whether matters in relation to individual members should be pursued and how they should be pursued. It can also be relevant to members of committees of privileges when they are investigating such matters

On the other hand, the potential for political partisanship in such cases is a very real one. In such cases against individual members there can be considerable opportunity to gain a political advantage. This can become a particular issue in a parliament in which the numbers are very close and the impact of adverse findings against a member could have great significance. It is also the case that members from the same side of the political fence may see their responsibility as protecting one of their own, rather than looking impartially at the issues which may be involved. It also raises the possibility into the future of 'tit for tat' allegations being raised, potentially debasing the perception of parliamentary privilege.

How can these dangers be guarded against? Obviously it is not possible to prevent action being pursued for partisan reasons under the cloak of allegations of parliamentary privilege. One safeguard which is available in some jurisdictions, including in the House of Representatives, is that the procedures for raising matters of privilege require that the matter raised is given preliminary consideration by the Presiding Officer. In the case of the House of Representatives the Speaker must determine whether there is a prima facie case such that precedence should be given to refer the matter to the Committee of Privileges. This provides the opportunity for matters to be filtered. For example, you will note that the Speaker had not considered the Thomson matter (referred to earlier) to be a prima facie case of a breach of privilege and the motion to refer it to the Committee of Privileges and Members' Interests proceeded by leave.

Another safeguard for the interests of all members is the adoption of procedures which require a proper process to be followed and procedural fairness to be provided to a person who is the subject of an investigation or charge. This has been recognised in the Australian House of Representatives with the adoption of procedures which require procedural fairness in the way

¹⁵ Parliament of New South Wales, Legislative Council, Standing Committee on Parliamentary Privilege and Ethics, *Report on Inquiry into the conduct of the Honourable Franca Arena MLC*, June 1998, p (i).

in which any inquiry is undertaken.¹⁶ It is worth noting that these requirements would apply equally to a person who was not a member and was the subject of an investigation or a charge. The following of a carefully laid out process which provides a person accused of an offence with the opportunity to respond does not guarantee that the process will not be taken over by partisan politics. However, it does provide some degree of protection from the potential excesses of politically motivated inquiries.

Matters in which a member's conduct is at issue

It is also worth commenting on the extent to which matters relating to the actions of a member which are raised as a breach of privilege or a contempt, may be dealt with better as matters of conduct.

Two relatively recent cases in the House of Representatives illustrate this point well.

Mirabella/Neal case

During proceedings in the Main Committee on 28 May 2008, there were exchanges between the Member for Robertson (Ms Belinda Neal MP) and the Member for Indi (Mrs Sophie Mirabella MP) that were outside the formal proceedings and not recorded by Hansard. Mrs Mirabella was reported to have referred to Ms Neal as a 'pathetic man hater' and Ms Neal to have said on a number of occasions to Mrs Mirabella (who was pregnant) words to the effect 'Your child will turn into a demon if you have such evil thoughts'.

Subsequently, Mrs Mirabella asked the Chair to have Ms Neal withdraw her comment. Ms Neal denied she had made the statement in the terms in which it was reported to the Chair and so declined to withdraw it. The Chair did not take any further action.

First thing the next day in the House, Ms Neal made a statement on indulgence in which she said she had reflected on the incident and although the comments she was said to have made were not completely accurate, she unreservedly withdrew any remarks that may have caused offence to Mrs Mirabella.

On 17 June 2008, the House referred to the Committee of Privileges and Members' Interests the issue of the exchange between the Member for Robertson and the Member for Indi on 28 May 2008 and the subsequent withdrawal and apology by the Member for Robertson on 29 May 2008.

In reporting on the matter, the committee noted it is essentially concerned with matters which may constitute a breach of privilege or a contempt. However, this reference did not come to the committee as an alleged breach of privilege or contempt. Rather it was referred as a series of events for the committee's review. The committee considered that, in being asked by the House to review this series of events, its role was to assess

¹⁶ House of Representatives Standing and Sessional Orders, 'Procedures for the protection of witnesses before the Committee of Privileges and Members' Interests' and 'Procedures of the House of Representatives for dealing with matters of contempt', pp 123-25.

whether there was a breach of privilege or contempt that rose from the events and whether it had any other relevant comments to make about the events.

The only potential matter of privilege arising from the events referred by the House was a question of possible deliberate misleading of the House by the Member for Robertson in denying that she made certain statements in the Main Committee.

When asked to withdraw, the Member for Robertson denied the specific comments were made and refused on two occasions to withdraw. In denying that she had made the comments in the precise terms alleged by the Member for Indi, the committee concluded the Member for Robertson had not been deliberately misleading such that it would give rise to a contempt. However, the committee noted that comments of a very similar nature to those raised by the Member for Indi had been made by the Member for Robertson.

The Member for Robertson's withdrawal in the House on the following day was an acknowledgement by the Member that she had made comments of that general nature. The Member for Robertson's remarks during the withdrawal that 'the comments were not completely accurate' is, strictly speaking, also correct, and hence the Committee did not find it deliberately misleading such that it would give rise to a contempt.

While the committee did not find a breach of privilege it did observe that the Member for Robertson's remarks fell below the standards expected of a member and did not reflect well upon her.

In relation to the exchanges generally between the two members, the committee considered the terms used by the members and the tenor of the exchange fell below the standards expected of members and did not reflect well upon them.

The committee noted that the actions of the members involved in this case raised issues that were more to do with appropriate standards of behaviour and conduct of members, than to do with matters of privilege. It noted, that while the standing orders cover most aspects of the behaviour of members when they are in the Chamber and Main Committee and can be used to enforce appropriate standards of behaviour, there was no broader code of conduct to cover the conduct of members generally.

The committee considered the issue of a code of conduct for members should be revisited. It said that there are strong reasons for a code being established, not least of which are community expectations about appropriate standards of behaviour for members of Parliament. It noted that it proposed to review the question of a code of conduct for members and report back to the House. This matter lapsed with the conclusion of the Parliament in 2010.

Source: House of Representatives Standing Committee of Privileges and Members' Interests, Report on the issue of the exchange between the Member for Robertson and the Member for Indi on 28 May 2008 and the subsequent withdrawal and apology by the Member for Robertson on 29 May 2008, October 2008.

Bidgood case

On 3 December 2008, the then Manager of Opposition Business raised in the House allegations surrounding the then Member for Dawson (Mr James Bidgood MP). The circumstances related to the taking of a photograph by Mr Bidgood at the front of Parliament House of a protestor who had doused himself with petrol and threatened to set himself alight. It was alleged the photograph had been passed on to a news outlet (perhaps in exchange for some return) which published it, attributing it to the member. Although the matter was not raised initially as a matter of privilege, the Manager of Opposition Business subsequently suggested that consideration may have to be given to referring it to the Committee of Privileges for investigation. Mr Bidgood apologised to the House for his actions and described them as 'highly insensitive and inappropriate'.

In responding to the matter, the Speaker stated that Mr Bidgood's actions had not interfered in any areas for which he as Speaker had responsibility (such as security of the building). While, Mr Bidgood's actions may be seen as insensitive and inappropriate (as described by Mr Bidgood himself) they did not give rise to any further action. However, the Speaker noted the comments made by the Committee of Privileges about matters to do with the conduct of members and referred the incident to the Committee as an example where issues of conduct were involved.

The Manager of Opposition Business indicated the Opposition would not pursue the matter further, although he made some observations about the members' actions.

Source: House of Representatives Debates, 3 December 2008, pp 12472-28 and 4 December 2008, pp 12725-27.

These two cases illustrate that the conduct of members can give rise to concern among other members, but such conduct does not easily fall into a category for being a contempt ie there is no offence against the House, or its committees or processes. However, there can nevertheless, be a concern about the effects of the conduct of members on the perception of the standing of the parliamentary institution generally and its members. In such circumstances, the opportunity to pursue a matter as a breach of a code of conduct for members may provide an alternative.

A number of parliamentary jurisdictions have implemented codes of conduct for members and have processes to deal with alleged breaches of their codes. This is not the forum to canvass the success or otherwise of such codes, but to note that when considering issues to do with the conduct of members dealing with them as breaches of privilege or contempt provides a very blunt instrument and is fraught with other potential dangers.

In the Australian House of Representatives there have been developments in relation to a code of conduct for members.

As part of the process of negotiation for minority government in the 43rd Parliament a number of formal agreements were concluded and these agreements provided for a code of conduct to be implemented for Federal parliamentarians. Subsequently, the House referred to the Committee of Privileges and Members' Interests the development of a code of conduct for

members. The Committee presented a discussion paper to the House in November 2011. While the paper did not reach a concluded view on the implementation of a code, it did include a possible draft code. In November 2012 the House agreed to a resolution which had been moved by the independent Member for Lyne, Mr Robert Oakeshott MP, endorsing the draft code proposed in the Committee's discussion paper. The code and any associated changes to the standing orders or other framework changes are still to be adopted formally by the House.

In its discussion paper on the code of conduct, the Committee of Privileges and Members' Interests referred to the two matters outlined above and noted that a code could provide ethical guidance to members and an improved framework within which matters of members' conduct could be addressed.¹⁷

Conclusion

Matters of privilege involving members of parliament can be the most difficult for Houses and their associated committees of privileges to deal with.

Often they can be surrounded by political issues and partisanship in a way that does not characterise other matters of privilege. There is the potential for the concept of parliamentary privilege to be debased for political purposes. In addition to political issues, they also can often involve other sensitive or difficult issues and spill over into matters that may need to be dealt with by the courts or which extend beyond the parliamentary sphere. These sorts of issues can create additional complexities.

As they involve individual members they will often bring into conflict the importance of safeguarding the rights of individual parliamentarians whilst protecting the reputation and dignity of the parliamentary institution. This difficult balancing act is not made any easier by the fact that such matters involve members presiding over the conduct and actions of a fellow member, creating perceptions of 'looking after their own' that need to be dealt with.

There are three ways in which the difficult issues raised by such matters can be ameliorated.

First, it is essential to focus on the core of what parliamentary privilege is designed to protect and here I refer back to the opening comments on the paper. As noted, parliamentary privilege is designed to protect the core processes of the Parliament and so, in relation to members it is about ensuring they can freely perform their core parliamentary responsibilities without improper interference. In relation to their conduct as members, it is a recognition that they are accountable to their House for their actions and conduct. Related to focussing on the core principles of parliamentary privilege, it also is important to exercise restraint in the use of the penal jurisdiction enjoyed by the Houses. This means that exercising these powers of the Houses should be reserved for those matters where its core processes could be under threat.

Second, at all stages the action and attitude of key members is very important. The role of the Speaker can be critical. In some jurisdictions the Speaker has the duty of giving preliminary consideration to complaints and deciding whether they should have priority over other

¹⁷ House of Representatives Standing Committee of Privileges and Members' Interests, Draft Code of Conduct for Members of Parliament – Discussion Paper, November 2011, p 21.

business. From a long-term perspective it is a good thing if the Speaker is able to maintain approaches which have seen the less substantive sort of matters not given priority. If there are grounds for priority but the matter seems highly problematic, the terms of the Speaker's statement may be an opportunity for some guidance to be given.

Third, it is essential to exercise proper inquiry processes and afford procedural fairness to those who may be facing accusations or allegations. The use of proper and fair process significantly decreases the potential for criticism of the way such matters are pursued and also can help to defuse the possibility of partisan politics unduly intruding. It also ensures that the powerful application of parliamentary privilege, whether it be to members or to non-members, is balanced by the ability of the 'accused' to put their case.