Some cases and commentary relevant to the operation of the *Parliamentary Privileges Act 1987* (the Privileges Act)

The operation of existing provisions of the Privileges Act

Section 4 – What constitutes a contempt

4 Essential element of offences

> Conduct (including the use of words) does not constitute an offence against a House unless it 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.

Service of writs for defamation against persons involved in a statutory declaration read to the House by a member

A member read a statutory declaration to the House and informed the House Committee of Privileges that, the statutory declaration had been made solely for use in Parliament and the testimony of the persons making the declaration was vitally important to the performance of his work as a member. The Committee stated that the question of whether the action of preparing and publishing the statutory declaration was a proceeding in Parliament was for the court to decide. The Committee concluded that the initiation of actions such as those complained of were proper legal actions and no evidence given to the Committee convinced it that there was any intention to impede or obstruct the member in his work as a member or that improper interference had occurred. The Committee stated that the privilege of freedom of speech should be used judiciously where the reputation or welfare of persons may be an issue. Members should make all reasonable inquiries as to the truth of allegations, as members would be judged according to their actions.[1]

Disruption to member's electorate office in execution of search warrant

The House Committee of Privileges considered whether a contempt was committed in the execution of a search warrant on a member's electorate office. The Committee found that the action by the Australian Federal Police (AFP) had caused disruption to the work of the office, had impeded the ability of constituents to communicate with the member, had a prejudicial effect on the willingness of some persons to communicate with the member, and amounted to interference with the free performance of the member's duties. There was no evidence that

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[1] House of Representatives Committee of Privileges (HCP) *Report concerning actions initiated against Mr A Cross and Mr R Ellems*, December 1994.

there was any *intention* to infringe the law concerning the protection of Parliament and no evidence that the interference should be regarded as improper. Therefore the Committee concluded that the action was not improper interference for the purposes of s. 4 of the Privileges Act and that no contempt had been committed.[2]

See below ***Protection of members' records***, on the current process in relation execution of search warrants by the AFP.

Section 7 – Penalties

7 Penalties imposed by Houses

(1) A House may impose on a person a penalty of imprisonment for a period not exceeding 6 months for an offence against that House determined by that House to have been committed by that person.

(2) A penalty of imprisonment imposed in accordance with this section is not affected by a prorogation of the Parliament or the dissolution or expiration of a House.

(3) A House does not have power to order the imprisonment of a person for an offence against the House otherwise than in accordance with this section.

(4) A resolution of a House ordering the imprisonment of a person in accordance with this section may provide that the President of the Senate or the Speaker of the House of Representatives, as the case requires, is to have power, either generally or in specified circumstances, to order the discharge of the person from imprisonment and, where a resolution so provides, the President or the Speaker has, by force of this Act, power to discharge the person accordingly.

(5) A House may impose on a person a fine:

(a) not exceeding $5,000, in the case of a natural person; or

(b) not exceeding $25,000, in the case of a corporation;

for an offence against that House determined by that House to have been committed by that person.

(6) A fine imposed under subsection (5) is a debt due to the Commonwealth and may be recovered on behalf of the Commonwealth in a court of competent jurisdiction by any person appointed by a House for that purpose.

(7) A fine shall not be imposed on a person under subsection (5) for an offence for which a penalty of imprisonment is imposed on that person.

(8) A House may give such directions and authorise the issue of such warrants as are necessary or convenient for carrying this section into effect.

Both Houses have the power to declare an action to be a contempt and to punish such an action. The rationale is that the Houses should be able to protect

[2]HCP *Report concerning the execution of a search warrant on the electorate office of Mr E H Cameron MP*, October 1995.

themselves from actions which directly or indirectly impede them in the performance of their functions in a similar way to the power of the courts to punish contempts of court. Section 7 of the Privileges Act authorises the imposition of fines up to $5000 for individuals and $25 000 for corporations, or imprisonment for up to six months. A decision to impose a penalty of imprisonment may be subject to review by a court. The court may determine whether the conduct or action in question, particulars of which must be set out in the warrant committing the person, was capable of constituting an offence.

Lesser punishments such as admonition, reprimand or suspension of a member are also available under the normal powers and processes of the House. The Senate has imposed a penalty for contempt (reprimand before the Senate) only once in 1971. The House of Representatives has once imposed imprisonment for contempt in 1955 (Browne/Fitzpatrick, 1955).[3] The Privileges Act specifically removes the power of the Houses to expel a member (s. 8). The Senate Committee of Privileges published a comprehensive information paper on penalties for contempt in 2000. The paper makes no recommendations.[4]

Section 12 – Protection of witnesses

12 Protection of witnesses

(1) A person shall not, by fraud, intimidation, force or threat, by the offer or promise of any inducement or benefit, or by other improper means, influence another person in respect of any evidence given or to be given before a House or a committee, or induce another person to refrain from giving any such evidence.

Penalty:

(a) in the case of a natural person, $5,000 or imprisonment for 6 months; or

(b) in the case of a corporation, $25,000.

(2) A person shall not inflict any penalty or injury upon, or deprive of any benefit, another person on account of:

(a) the giving or proposed giving of any evidence; or

(b) any evidence given or to be given;

before a House or a committee.

Penalty:

(a) in the case of a natural person, $5,000 or imprisonment for 6 months; or

(b) in the case of a corporation, $25,000.

(3) This section does not prevent the imposition of a penalty by a House in respect of an offence against a House or by a court in respect of an offence against an Act establishing a committee.

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[3] See various references to the matter in *House of Representatives Practice*, chapter on parliamentary privilege.

[4] Senate Committee of Privileges (SCP) 95th report, September 2000.

Alleged intimidation of Corporal Craig Smith

The Defence Subcommittee of the Joint Standing Committee on Foreign Affairs, Defence and Trade reported that Corporal Craig Smith claimed that he had been harassed and threatened following his involvement in the subcommittee's inquiry into the conduct of military justice. The House Committee of Privileges investigated the matter and concluded that the harassment was serious and could reasonably be concluded as relating to Corporal Smith's evidence to the subcommittee. However, the person or persons responsible for the harassment could not be identified and so the Committee was unable to find that a breach of privilege had been proved against any person. The Committee suggested that if it received information that the matter was ongoing it might seek further evidence and report to the House again. The Committee recommended that the attention of the Director General Personnel – Army and the equivalent officers in the Navy and Air Force be drawn to the circumstances of the case and that these officers do all within their power to accommodate any request for a service transfer by Corporal Smith.[5]

Alleged intimidation of Detective Wayne Sievers

An article published in a newspaper reported that Detective Wayne Sievers, a person who had provided information to the Joint Standing Committee on Foreign Affairs, Defence and Trade, could face disciplinary action by the Australian Federal Police (AFP). When the matter was first raised in the House, the Speaker referred to the importance of the protection of witnesses but said that given the statement by the AFP that issues being pursued with the witness did not relate to his involvement with the committee he was not convinced that improper interference had occurred. The Speaker stated that, because of the seriousness of the case if further evidence came to light he would be prepared to reconsider the matter. Some months later the matter was raised again. The Speaker, again stating the importance of the protection of committee witnesses, concluded that as far as he could see no new information concerning any issue of privilege had been presented. If the committee wished to present further information he would consider it.[6]

Senate cases

The Senate Committee of Privileges has reported on 20 cases of possible intimidation since 1988. Of these it made six findings of contempt. The Senate privilege resolutions require that when its Committee of Privileges has determined findings to be included in a report, a person affected by those findings shall be acquainted with the findings before the report is presented to the Senate. In at least one case this action resulted in proposed disciplinary action against a person who had been a witness being withdrawn.[7]

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[5] HCP *Report concerning the alleged threats or intimidation against a witness before the Defence Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade*, May 2001.
[6] *Votes and Proceedings*, 15 February, 15 March, 3 and 5 October 2000.
[7] SCP 107th report: *Parliamentary Privilege Precedents, Procedures and Practice in the Australian Senate 1996-2002*, pp. 43–52; SCP 116th Report, 2 March 2004.

Section 13 – Unauthorised disclosure of in camera evidence

13 Unauthorised disclosure of evidence

A person shall not, without the authority of a House or a committee, publish or disclose:

(a) a document that has been prepared for the purpose of submission, and submitted, to a House or a committee and has been directed by a House or a committee to be treated as evidence taken in camera; or

(b) any oral evidence taken by a House or a committee in camera, or a report of any such oral evidence;

unless a House or a committee has published, or authorised the publication of, that document or that oral evidence.

Penalty:

(a) in the case of a natural person, $5,000 or imprisonment for 6 months; or

(b) in the case of a corporation, $25,000.

Section 13 prohibits the disclosure of any in camera evidence unless it has been authorised for publication by a House or a committee. Premature disclosure of ordinary evidence is covered by standing order 242.

Apparent disclosure in the media of information confidential to a committee

Time magazine contained an article dealing with matters under consideration by the Defence Subcommittee of the Joint Standing Committee on Foreign Affairs, Defence and Trade and apparently revealing confidential information. That committee reported to the House that substantial interference in its work had occurred but it had not been able to ascertain the source of the disclosure. The matter was referred to the House Committee of Privileges which found that a person or persons with access to the proof transcript of in camera evidence had inadvertently or deliberately disclosed the information but could not identify the person(s) responsible. The Committee found also that there had been unauthorised disclosure of a copy of the proof transcript to an officer in the Department of Defence and expressed concern about the circumstances surrounding the retrieval of this transcript. The Committee was unable to make recommendations in relation to the particular matter complained of but recommended certain procedures be adopted for the handling of in camera transcripts. Action was subsequently taken by the Clerk of the House in relation to the handling of in camera material, conduct of staff appearing before parliamentary committees and the terms and conditions of staff seconded from outside the parliamentary service to assist committees.[8]

[8] HCP *Report concerning the possible unauthorised disclosure of in camera evidence to the Defence Sub-Committee of the Joint Standing Committee on Foreign Affairs, Defence and Trade*, June 2001.

Unauthorised disclosure of in camera submissions

The Senate Committee of Privileges has reported on two significant cases of disclosure of in camera submissions to parliamentary committees. In the first case a submission from a police officer to the Joint Committee on the National Crime Authority was tabled in a State Parliament. The Senate committee found it constituted a serious contempt but was unable to establish the source of the disclosure. It recommended that should the source subsequently be identified the matter should again be referred to the committee with a view to a possible prosecution for an offence under s. 13 of the Privileges Act. The second matter involved an in camera submission to the Joint Committee on Corporations and Securities which was revealed in a newspaper article. The source of the disclosure was not able to be identified. The Senate committee recommended that the publishers be formally reprimanded by the Senate and that, if found, the discloser of the information be subject to a fine or prosecution under the Act. The Senate committee also cautioned committees against too readily according in camera status to documents or evidence.[9]

Subsection 16(2) – What constitutes proceedings in Parliament

16 Parliamentary privilege in court proceedings

(2) For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, ***proceedings in Parliament*** means 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.

Circulation of petitions

The Senate Committee of Privileges concluded that the circulation for collection of signatures of a petition containing defamatory material was not covered by privilege. Persons with specific grievances could themselves petition the Senate and their petitions, if in order, could be presented and thus would be covered by privilege. The Senate committee considered it inappropriate that privilege,

[9] SCP 54th report, 1995 and 99th report, 2001 reported in SCP 107th report: *Parliamentary Privilege Precedents, Procedures and Practice in the Australian Senate 1996-2002*, pp. 40 and 42.

whether absolute or qualified, should extend to the malicious circulation of defamatory material purportedly to collect signatures for a petition.[10]

Action in relation to report tabled in Parliament

A report had been prepared for the ACT Government under the Inquiries Act, which provides that such a report *may* be tabled in the Legislative Assembly by the Chief Minister or otherwise made public by the Chief Minister. Action was taken in the ACT Supreme Court by public servants claiming that they were denied procedural fairness by being prevented from tendering a copy of the report, which the Chief Minister was intending to table in the Legislative Assembly.

Counsel for the Speaker intervened in the case to claim that the report was a proceeding in Parliament for the purposes of s. 16(2) of the Privileges Act (which applies in the ACT). Counsel argued that if it were made public by the Chief Minister before tabling in the Assembly, the report would attract the same privileges and immunities as if it had been tabled. This argument was founded on several claims; that the Assembly had played a pivotal role in calling on and directing the Government to establish the Board of Inquiry, that during the course of the inquiry members had questioned the Government about the matter, that extracts from the interim report were tabled, and that a consistently high level of interest was taken by the Assembly in the final outcome.

Crispin J ruled that, whilst it was possible that the copy of the report of the Board of Inquiry, proposed to be tendered by counsel representing one of the four public servants, was produced for purposes of or incidental to the transaction of business of the Legislative Assembly, he had found no evidence to that effect. Crispin J ruled that privilege had not been established and the copy of the report could be admitted in evidence.[11]

Protection of members' records

The issue of the status of the records and correspondence of members was investigated and reported upon by the House Committee of Privileges in 2000.[12] The report of the Committee reviewed relevant cases including HCP *Report concerning a letter received by Mr Nugent MP*, HCP *Report concerning Writ of Summons served on Mr Sciacca MP*, *Rowley v O'Chee* and *Crane v Gething*. Details of these cases are set out in the report of the Committee.

The Committee recommended that there be no change to the current provisions of the law but that various other actions be taken to ensure, that members and others

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[10] SCP 11th report, 1988, reported in SCP 107th report; *Parliamentary Privilege Precedents, Procedures and Practice in the Australian Senate 1996-2002*, p. 27.
[11] *Szwarcbord v Gallop* (2002) 167 FLR 262; *Privilege and the Supreme Court*, Paper presented to 33rd Conference of Australian and Pacific Presiding Officers and Clerks by Mr Wayne Berry MLA, Speaker, ACT Legislative Assembly, July 2002.
[12] HCP *Report of the inquiry into the status of the records and correspondence of Members*, November 2000.

are fully informed about what protection, if any, might apply and that investigations affecting members' records are carried out appropriately. Another recommendation was that a memorandum of understanding be concluded between the Presiding Officers and the Minister for Justice on the execution of search warrants by Commonwealth law enforcement officers to assist members when dealing with these situations. The Senate had made a similar recommendation in 1998.

A memorandum of understanding, signed by the President of the Senate, the Speaker of the House of Representatives, the Attorney-General and the Minister for Justice and Customs was put in place on 9 March 2005. It records their understanding on the process to be followed should the Australian Federal Police (AFP) propose to execute a search warrant on premises occupied or used by a member or senator, including her or his Parliament House office, electorate office and residence. The agreed process is set out in the *AFP National Guideline for Execution of Search Warrants where Parliamentary Privilege may be involved*.

Search warrants: Crane v Gething

A number of documents were seized from Senator Crane's electorate and parliamentary offices under search warrants issued in respect of a criminal matter. Senator Crane claimed parliamentary privilege in relation to some of the documents. French J found that the issuing of search warrants was an administrative not a judicial act, noting that the issue of a search warrant is an executive act in aid of an executive investigation. The investigation may lead to the initiation of criminal proceedings, but the issue of the search warrant itself did not commence any judicial proceeding. French J stated also that it did not fall to the court to deal with any question of parliamentary privilege in these circumstances.

Commentators have questioned this judgment especially in relation to the court's responsibility to consider issues of privilege in relation to the seizure of documents. It has also been suggested that even if the issue of search warrants is an administrative act, the protection created by article 9 of the Bill of Rights refers to 'any place out of Parliament' and is not confined to judicial proceedings.[13] The decision of French J was affirmed on appeal to the Full Federal Court.[14]

Search warrants: Senator Harris

Queensland Police seized, under search warrant, documents from Senator Harris' Queensland electorate office which the senator claimed were subject to parliamentary privilege. The matter was raised with the President of the Senate during the period of prorogation for an election and the Clerk of the Senate wrote to the Queensland Police to alert them to possible issues of parliamentary privilege. The Senate Committee of Privileges considered the matter in the new Parliament. The Senate committee concluded that the Queensland Police had fulfilled their obligations in respect of parliamentary privilege impeccably and that

[13] FCA 45, 18 February 2000.
[14] FCA 762, 2 June 2000.

the committee had no role to play until Senator Harris took up the offer of the Queensland Police to inspect the records and make a specific claim of privilege in relation to identified material. The Senate committee recommended that the establishment of guidelines between the Presiding Officers and the AFP be developed and the guidelines apply to the police forces of the states and the Northern Territory.[15]

Committee proceedings as 'proceedings in Parliament'

The scope of 'proceedings in Parliament' includes the proceedings of a parliamentary committee which is validly constituted and is acting within power. McPherson JA, in *Criminal Justice Commission v Parliamentary Criminal Justice Commissioner*, has stated that a committee that purports to inquire into a matter contrary to express legislative provision, may not attract privilege to its inquiry because such action may not be a valid proceeding of Parliament.[16]

Subsection 16(3) – Use of parliamentary proceedings in legal proceedings

16 Parliamentary privilege in court proceedings

(3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:

(a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;

(b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or

(c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

A common type of legal proceeding in which the parties seek to rely upon parliamentary proceedings is an action in defamation.

Defamation action: 'effective' repetition of words spoken in Parliament

The Court of Appeal of New Zealand ruled a member liable to action for defamation in a case where the member had made a defamatory statement in the House of Representatives and had later stated outside the House that he 'did not

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[15] SCP 105th report: *Execution of search warrants in Senators' offices—Senator Harris*, June 2002.

[16] *Criminal Justice Commission v Parliamentary Criminal Justice Commissioner* [2002] 2 Qd R 8, per McPherson JA at 25.

resile from what he said in Parliament'.[17] The court ruled that he 'effectively' repeated the parliamentary statement in its entirety and it was therefore in order for the court to consider the words of the statement made in Parliament to decide the defamation action. The court drew a distinction between effectively repeating the statement and merely 'acknowledging' that the statement had been made. The judgment includes considerable discussion on whether s. 16(3) of the Australian Parliamentary Privileges Act merely restates Article 9 of the Bill of Rights in modern language or whether it represents a different legal byway.

The case was taken on a further appeal to the Privy Council and the Privy Council dismissed the appeal stating its agreement with the reasons of the majority of the Court of Appeal.[18]

Defamation action: statutory declaration read in Parliament and comments made in the media

Writs for defamation were served against persons involved in a statutory declaration read to the House by a member. After making the statements in the House Mr Katter had referred to the matter on radio and television stating 'I am not alleging anything except for the statements I have made inside Parliament.' He also referred to the documentary evidence he had which he said was available (to the interviewer) but did not repeat the substance of the statements. It was argued that the statements could not support an action for defamation unless they could be understood in the context of the statements in the House. The Queensland Court of Appeal considered the application of s. 16(3) of the Privileges Act and differing views were expressed on the interpretation and scope of the provisions of that subsection. The majority of the court decided that s. 16(3) did not prevent Mr Laurance from relying on statements Mr Katter had made in the House in an action for defamation in connection with the statements allegedly made later in the course of the interview. The decision was appealed to the High Court but the case was settled before it was decided.[19] This effectively leaves unsettled the issues which divided the Queensland Court of Appeal.

The constitutional validity of s. 16(3) was upheld by the majority judgment, and also the case contains a consideration of whether the provisions of s. 49 of the Constitution are limited by the implied freedom of political communication as well as the constitutional prohibitions which prevent the Parliament from interfering with the way the courts exercise their judicial powers (on this point see the note on *Rann v Olsen* below).

Defamation action: use of parliamentary debates to increase damages award

The plaintiff, Ms Erglis, was a nurse employed by Queensland Health who brought defamation proceedings against 11 of her colleagues. The plaintiff alleged

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[17] *Jennings v Buchanan* CA106/01, 23 May 2002; *Members of Parliament and Defamation: an update*, Paper presented to 33rd Conference of Australian and Pacific Presiding Officers and Clerks by David McGee QC, Clerk of the House of Representatives New Zealand, July 2002.
[18] *Jennings v Buchanan* [2004] UKPC 36
[19] *Laurance v Katter* (1996) 141 ALR 447.

that the letter signed by them and sent to the Minister for Health contained material which defamed her. She pleaded that as a consequence of a copy of the document being tabled and read in the Queensland Legislative Assembly by the minister on 5 December 2001, the imputations became widely known to the public. The plaintiff did not pursue the minister, and claimed that the cause of action was not based on the original publication to the minister. However, the plaintiff sought 'to recover as a consequence of the original publication to the Minister, the damage she has suffered by reason of its repetition [in the Legislative Assembly].' Use of the material in parliamentary debate was relied upon to establish a wider publication to the public at large of the imputations in the letter, thereby being relevant to the question of the appropriate amount of damages arising from the original publication.

The defendants argued that the plaintiff's statement of claim infringed s. 8 of the *Parliament of Queensland Act 2001*, similar in effect to provisions in s. 16 of the Privileges Act together with s. 49 of the Constitution. They applied to have the offending parts of the statement of claim struck out.

Philippides J, the judge at first instance, ordered that the relevant paragraphs of the statement of claim be struck out and the plaintiff appealed the decision. The Court of Appeal, by a majority of 2-1, upheld the appeal. McPherson JA stated that the claim did not allege the minister had improper motives in publishing the letter, nor did it reflect on her in any way. His Honour found that the claim alleged adverse consequences against the defendants as being a foreseeable result of their having placed the letter in the minister's hands in the expectation that the defamatory imputations would become known to the public at large. McPherson JA concluded that the plaintiff was therefore not impeaching or questioning freedom of speech and debates or proceedings in the Assembly.[20]

Later, in a claim for damages in relation to the same facts, Helman J determined that the two subject defendants were entitled to rely on absolute privilege.[21] His Honour found that parliamentary privilege applied to the acts done by the defendants from the time the minister solicited the letter to when it was received by her, and that after that time the publication of the letter within the hospital ward was not protected.

Other issues relating to privilege and not codified in the Privileges Act

Waiver of privilege

The cases cited above in relation to s. 16(3) are also relevant to consideration of the issue of possible waiver of parliamentary privilege in certain circumstances.

[20] *Erglis v Buckley* [2004] QCA 223.
[21] *Erglis v Buckley* [2005] QSC 25.

Section 13 of the Defamation Act (UK)

This section allows individual members of the United Kingdom Parliament (and other participants in parliamentary proceedings eg witnesses) to waive parliamentary privilege so as to permit admission of evidence of parliamentary proceedings in actions for defamation. This provision was enacted primarily to deal with a problem arising from a particular case. (It has been suggested by some commentators that the section was enacted in haste and it has attracted some criticism.) In that case a newspaper had published statements alleging that a member (Mr Hamilton) had received cash in return for asking questions in the House of Commons. The statements suggested that Mr Hamilton had engaged in corrupt conduct and he initiated an action for defamation against the newspaper. The newspaper was granted a stay of proceedings on the ground that it could not defend the action without adducing evidence of Mr Hamilton's conduct in the House which would be contrary to Article 9 of the Bill of Rights. Mr Hamilton was dissatisfied because he was unable to clear his name.

The amendment of the Defamation Act that followed this case provides that where the conduct of a person in or in relation to proceedings in Parliament is in issue in defamation proceedings, the person may waive for the purposes of those proceedings, so far as concerns him or her, the protection of any enactment or rule of law which prevents proceedings in Parliament being impeached or questioned in any court or place out of Parliament. The power of waiver is given to individuals (including members, witnesses and petitioners) rather than to the Houses of Parliament. It is exercisable only in relation to the reception of evidence in defamation proceedings. The waiver by one person does not affect the operation of privilege in relation to another person. Protection from legal liability for words spoken or things done in Parliament is not affected.[22]

The provision in s. 13 of the Defamation Act has since been reviewed by a Joint Committee on Parliamentary Privilege. The joint committee recommended that the provision be repealed and replaced with a new provision under which the House (rather than an individual) could make a general waiver of article 9 in an appropriate case (not necessarily a defamation action). It could not do so if the waiver would expose the member or other person concerned to any risk of legal liability.[23]

Special Commissions of Inquiry in NSW

In NSW, Special Commissions are a type of statutory Royal Commission appointed by the Governor. In 1997 the NSW Parliament enacted provisions to allow for a Special Commission to ascertain the truth of accusations made under parliamentary privilege. Under the provisions each of the Houses of Parliament was empowered to authorise, by a resolution of two thirds of its members, inquiry by Special Commission into a matter relating to parliamentary proceedings within or before the House or one of its committees. If a House waived privilege in this

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[22] *Waiver of Parliamentary Privilege*, Enid Campbell, Legislative Studies, vol 15, No.1, Spring 2000.
[23] *Joint Committee on Parliamentary Privilege* (UK), Report, 9 April 1999, HL 43/HC 214 (1998-99).

way an individual member could still assert privilege in respect of what he or she had said or done in the course of parliamentary proceedings. The legislation was used in the matter of accusations made by Mrs Franca Arena in the Legislative Council and Mrs Arena unsuccessfully challenged the constitutionality of the legislation.[24]

Implied freedom of political communication/separation of judicial powers under Chapter III of the Constitution

In a series of decisions in the early 1990s (including ***Theophanous v Herald & Weekly Times*** and ***Stephens v Western Australian Newspapers***[25]) the High Court recognised an implied guarantee of political communication. This was based on constitutional provisions establishing a system of responsible government which requires that electors are able to exercise a free and informed choice.

Lange v Australian Broadcasting Corporation

In 1997 the High Court affirmed that the constitutional implication of freedom of political communication does not establish in Australia a general or personal right of free speech but acts as an inhibitor on governmental or parliamentary efforts to limit what may be said on political matters. The implied freedom is not absolute but limited to what is necessary for the effective operation of that system of representative and responsible government provided for by the Constitution. The court held that the implied constitutional freedom of political communication applies to both the common law and statute law. It held that the implied freedom will not invalidate a law enacted to satisfy some legitimate end if the law satisfies two conditions. First, the object of the law must be compatible with the maintenance of the constitutionally prescribed system of representative and responsible government. Second, the law must be reasonably appropriate and adapted to achieving that legitimate object or end. There is a strong possibility the Privileges Act would be seen as satisfying those conditions.

The court determined that defamation law in NSW does not infringe the implied constitutional freedom. The court stated that the Australian people have an interest in receiving and discussing information on government and political matters that affect them. It further considered that the reputations of those defamed by widespread publications would be adequately protected by requiring the publisher to prove reasonableness of conduct provided that publication was not actuated by malice. In effect, the court entrenched the common law action of qualified privilege in the Constitution.[26]

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[24] Ibid.
[25] (1994) 182 CLR 211.
[26] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Lange v ABC: Still Dancing in the Streets?* Department of the Parliamentary Library, Research Note 3 1997–98.

Rann v Olsen

In this case both parties were members of the South Australian Parliament. Mr Olsen, in answering questions from the media, claimed that Mr Rann had lied to a Commonwealth parliamentary committee in saying that he (Olsen) had leaked confidential information to the then opposition party. The South Australian Supreme Court held that s. 16(3) of the Privileges Act would prevent Mr Olsen from supporting his plea that his statement was true ie that Mr Rann lied to the committee. A majority of the court decided that this restriction was not such as to render the trial unfair so as to justify a stay of action.

The court also rejected submissions to the effect that the Privileges Act was invalid because it impermissibly infringed the implied constitutional guarantee of freedom of political communication. Doyle CJ (with whom the other judges agreed on this aspect of the case) held that most often s. 16 would act to enhance the freedom of speech by protecting members and witnesses from legal action for their statements made in Parliament. In this case s. 16 inhibited the freedom of political communication by making it more difficult for Mr Rann to succeed in a claim under the law of defamation, preventing him from relying on the truth of his evidence to the committee. Doyle CJ stated this was a burden on conduct or speech critical of those involved in the processes of Parliament. He commented that 'Just as the protection of those who speak in the course of proceedings in Parliament is important, so is the freedom of speech of those who speak about or comment on what happens in Parliament'. However, his conclusion was that the potential infringement of political communication could only occur in limited circumstances and the law was not invalid. Doyle CJ also commented that 'the Court must allow Parliament to make the decision about the extent to which it should exclude the Courts from considering and passing judgment upon matters that occur in proceedings in Parliament'.

The court upheld the constitutional power of the Parliament to widen and narrow the existing privileges and immunities enjoyed by members of Parliament in pursuance of ss 49 and 51(xxxvi) of the Constitution and held that s. 16 of the Privileges Act should be seen as a valid exercise of this power. The court rejected arguments suggesting that the restrictions on evidence that could be adduced in a case by reason of s. 16 were constitutionally invalid as an impermissible interference with the exercise of judicial power contrary to Chapter III of the Constitution.[27] Despite this case and also *Laurance v Katter*, discussed above, doubts remain on the extent to which the provisions of s. 49 of the Constitution are limited by the implied freedom of political communication and also the constitutional prohibitions which prevent the Parliament from interfering with the way the courts exercise their judicial powers.

[27] *Rann v Olsen* (2000) 76 SASR 450.

Resolution of conflicts between power to call for documents and claims for refusal (eg public interest immunity, commercial in confidence)

The issue of enforcing orders to produce documents has arisen mostly in the Senate although it can also arise in the context of committees. Usually orders for the production of documents have eventually been complied with or appropriate reasons given. The question of what sanctions might be imposed by a House on a government or other body not complying with such an order has not been determined. In November 2000 the Senate included in an order for documents a provision that should the documents not be produced, the responsible Senate minister would be obliged to make a statement to the Senate and a debate could then take place. The documents were produced and the provision was not tested.

Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill

A private senator's bill was introduced in 1994 proposing that the Federal Court act as an independent arbiter should the executive government refuse a Senate demand for material. The Senate Committee of Privileges reporting on specific instances of failure to comply with Senate orders for the production of documents concluded that removing the responsibility to make such determinations from the Senate to the courts was inappropriate. The Senate committee suggested the ultimate power lay within the Senate and it was for the Senate to assert that power. It also suggested that it might be possible for an independent arbiter, such as a retired judge or the Auditor-General, to examine material on behalf of the Senate.[28]

Obligations on members in exercising privileges especially freedom of speech

Members of the House have on a number of occasions raised as a matter of privilege, allegations made by a member against a person which were subsequently proved to be false. One of the more serious examples is set out below (it was not referred to the House Committee of Privileges). It should be noted that since these incidents the House has instituted a procedure whereby citizens can apply to have a response incorporated in the records of the House if they are aggrieved by remarks made about them in the House. The House has acceded to one application from a citizen, upon recommendation from the Committee of Privileges that a response be incorporated in *Hansard*. In recommending that the response be so incorporated, the Committee emphasised that, as required by the resolution on the right of reply, it has not considered or judged the truth of any statements made by the members in the House or by the person seeking a response.[29] The Committee of Privileges has itself reminded

[28] SCP 107th report: *Parliamentary Privilege Precedents, Procedures and Practice in the Australian Senate 1996-2002*, p. 28.
[29] HCP *Report concerning an application from Mr IDS Collie for the publication of a response to a reference made in the House of Representatives*, November 2003

members of the need to exercise judgment in making allegations against individuals in the House.[30]

Allegations of criminal activity made against a person based on documents proved to be forgeries

A member, when speaking in debate, had made certain claims of wrongdoing against a senior public servant and a prominent lawyer. Another member asked the Speaker to consider referring the matter to the Committee of Privileges implying that the action was an abuse of the rights and prerogatives of the House and that the member had spoken knowingly, willingly and without regard to the damage to the reputation of others.

In responding, the Speaker stated that on the information available to him there was no evidence to support a conclusion that a prima facie case of contempt had been made out, and the matter was not further pursued. The Speaker referred to precedent in the United Kingdom House of Commons when action of a member found to have deliberately misled the House had been held to be a contempt. The Speaker reminded members that the privileges of the House came with responsibilities to act diligently and commended members to a draft code of conduct which had been tabled in the House.[31]

Claim that member involved in conspiracy to misuse forms of House

This matter related to the same allegations (against the prominent lawyer, also a member of the Jewish community) referred to above and arose after further information was revealed suggesting that the member concerned (by then a former member) may have conspired with other persons prior to making the allegations in the House. The Speaker responded by again referring to the need for members to take responsibility for their actions in the House; when a member has made allegations under privilege and later discovers that he was in error, the member would be considered to have a duty to withdraw and apologise. The Speaker stated that the House may consider it a matter of regret that this duty was not fulfilled, nevertheless the House has left it to members to make their own judgments about the use of privilege, and concluded by noting that the standing of the House does suffer when abuse occurs.[32]

Further source material

G Carney, *Members of Parliament: law and ethics* (2000 Prospect Publishing)

- Generally: Ch 6 “Freedom of speech” p. 207ff
- Scope of freedom created by Article 9 of the Bill of Rights 1689 as expanded by s. 16 of the Privileges Act at pp. 207–219

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[30] HCP *Report concerning actions initiated against Mr A Cross and Mr R Ellems*, December 1994, see discussion of case in relation to s. 4 of the Privileges Act above.
[31] House of Representatives Debates 27 September 1995.
[32] House of Representatives Debates 28 June 1996.

- Effect of freedom of speech: admissibility of evidence concerning parliamentary proceedings at pp. 220–232
- Effect of freedom of speech in defamation proceedings at pp. 232–238
- Privileges Act and the implied freedom of political communication at pp. 238–241.

E Campbell, *Parliamentary Privilege* (2003)

Table of Cases