

PARLIAMENTARY PRIVILEGE: *HAMILTON V AL FAYED*

Significant observations about the nature of parliamentary privilege were made by the Court of Appeal in the United Kingdom in two recent judgments in the case of *Hamilton v Al Fayed*. I thought that I should draw these observations to the attention of the committee.

The exposition of parliamentary privilege made by the Court of Appeal clarified several issues. These clarifications are in accordance with the understanding of parliamentary privilege at the federal level in Australia and are reflected in the *Parliamentary Privileges Act 1987*, but they refute misunderstandings which are raised from time to time, particularly by critics of parliamentary privilege, and it is valuable to have a judicial statement of them.

The judgments were given on appeal from judgments by two different Queen's Bench Division judges on different, but closely related, aspects of the case. They arose out of a defamation action brought by Mr Neil Hamilton, a former member of Parliament, against Mr Mohamed Al Fayed, a businessman, in respect of statements made by Mr Al Fayed to the effect that he had paid bribes to Mr Hamilton to influence Mr Hamilton's performance of his parliamentary duties. The Parliamentary Commissioner for Standards had inquired into Mr Al Fayed's allegations and reported to the House of Commons that Mr Hamilton had indeed taken money from Mr Al Fayed. Mr Hamilton was defeated at a general election before the House of Commons could deal with the Commissioner's report. Mr Al Fayed brought an action to have Mr Hamilton's defamation suit struck out on the basis that the allegations against Mr Hamilton had already been upheld by a parliamentary inquiry, and that to subject them to judicial proceedings would infringe parliamentary privilege. He appealed against a refusal to strike out the defamation action, and also against a ruling that he could not refer in his defence to the fact that another member had admitted receiving bribes from him. The Court of Appeal held that the defamation action could proceed, and references to the other member could be made, provided that parliamentary privilege, properly understood, was observed.

In so holding, the court made observations about the nature of parliamentary privilege which may be summarised as follows.

- (1) An inquiry and report by a person or body acting on behalf of a House of the Parliament, such as the Parliamentary Commissioner for Standards, are part of proceedings in Parliament and therefore attract the protection of parliamentary privilege.
- (2) There is nothing to prevent judicial proceedings involving the same facts and circumstances as have been examined in a parliamentary inquiry, provided that the parliamentary inquiry itself is not impeached or questioned.
- (3) Judicial proceedings, however, may not be used as a vehicle for an attack upon parliamentary proceedings. The court did not elaborate on how this might occur, but

clearly in this instance Mr Hamilton cannot attack the findings of the Parliamentary Commissioner as part of his case.

- (4) Parliamentary privilege is essentially a separation of powers safeguard: it prevents the other two branches of government, the executive and the judiciary, calling into question or inquiring into the proceedings of the Houses of the Parliament. In particular, it prevents the courts passing judgment on parliamentary proceedings and therefore being in the position of criticising anything said or done in parliamentary proceedings. Parliamentary privilege does not prevent public criticism of parliamentary proceedings as such. (This lays to rest a persistent misunderstanding of parliamentary privilege which has reappeared in other court judgments and the writings of commentators.)
- (5) Parliamentary proceedings may be referred to in judicial proceedings as part of background information to a case, but cannot be used probatively. (This is what section 16(3) of the *Parliamentary Privileges Act 1987* seeks to clarify.)

One of the judgments also referred to section 13 of the UK *Defamation Act 1996*. This provision was enacted when the previous UK government was in office and was designed to allow Mr Hamilton to pursue his defamation action. The provision allows individuals to waive the protection of parliamentary privilege so far as it applies to them in defamation suits. This was to prevent Mr Al Fayed claiming that he could not defend himself against Mr Hamilton's action because some evidence relating to Mr Hamilton's conduct was protected by parliamentary privilege and could not be used in the defence. On that basis, Mr Al Fayed was able to have the action stayed in accordance with the principle applied by the court in *Prebble v Television NZ Limited* 1994 3 NZLR 1. The hasty and ill-considered enactment of section 13 has been much criticised as a serious inroad on the principle that parliamentary privilege is for the protection of the parliamentary process in the public interest and does not belong to the members. The Joint Select Committee on Parliamentary Privilege, which recently reported, recommended that it be replaced by a provision allowing the House to grant a waiver, but it remains to be seen whether this proposal, which has also been regarded as objectionable in the past, will be adopted. The provision, however, was not central to the Court of Appeal's judgments.

The judgments will not be binding but will be persuasive in any future Australian consideration of the nature of parliamentary privilege, in particular in supporting section 16(3) of the *Parliamentary Privileges Act*.