

1987

HOUSE OF REPRESENTATIVES

PARLIAMENTARY PRIVILEGES BILL 1987

(including amendments made by the Senate)

EXPLANATORY MEMORANDUM

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Purpose of the Bill

This Bill has a two-fold purpose:

- (a) to provide for the principal changes in the law recommended by the Joint Select Committee on Parliamentary Privilege; and
- (b) to avoid the consequences of the interpretation of freedom of speech in Parliament by the judgments of Mr Justice Cantor and Mr Justice Hunt of the Supreme Court of New South Wales.

Origin of the Bill

In putting forward this Bill, Mr President McClelland responded to requests and suggestions by Honourable Senators following his statement in the Senate on 9 April 1986 concerning the judgment of Mr Justice Hunt. It was put to him that it would be appropriate for him to initiate the necessary legislative proposal to avoid the consequences of the court judgments and, at the same time, to give the Parliament the opportunity of considering the legislative changes recommended by the Joint Committee. Accordingly, Mr President McClelland arranged for the

Bill to be drafted by one of the Senate Department's consultant draftsmen, Mr C.K. Comans, C.B.E., Q.C., formerly First Parliamentary Counsel. The Bill takes note of the provisions of the Parliamentary Powers, Privileges and Immunities Bill introduced into the Senate by Senator Macklin in 1985 and the Parliament (Powers, Privileges and Immunities) Bill introduced into the House of Representatives by Mr Spender in 1985. Those two Bills were designed to put into effect the recommendations of the Joint Committee. There are some departures from the recommendations of the Joint Committee in the Bill, and these are noted and the reasons for them explained in this memorandum.

Explanation of clauses

Clause 1: Short title

Clause 2: Commencement

The Bill is to come into operation on Royal Assent.

Clause 3: Interpretation

This clause provides the definitions necessary for the Bill.

The definition of "committee" covers all committees of either House, including committees of the whole, joint committees, and sub-committees.

"Document" is defined to include part of a document. The Acts Interpretation Act defines "document" to include any material containing meaningful symbols and any article from which sound, visual images or writing are capable of being reproduced.

"Tribunal" is defined to include any body having power to examine witnesses on oath, but does not include a court, which is separately defined to include all Australian courts, or a parliamentary committee.

Sub-clause (2) makes it clear that a written submission received as evidence by a House or committee is to be regarded as evidence given before the House or committee.

Sub-clause (3) provides for a single phrase, "offence against a House", to be used for acts commonly called breaches of privilege but more correctly called contempts of a House.

Clause 4: Essential element of offences

This clause provides that conduct does not constitute an offence against a House unless it amounts to an improper interference with a House, its committees or members. Such a provision was not recommended by the Joint Committee, but it is thought to be a useful adjunct to clause 9, and together the two clauses will provide for review by the courts of any imprisonment of a person by a House (see notes on clause 9).

Clause 5: Powers, privileges and immunities

This clause provides that the powers, privileges and immunities of each House continue in force except to the extent that they are altered by the Bill. This is in accordance with the recommendations of the Joint Committee.

Clause 6: Contempts by defamation abolished

This clause provides that it shall no longer be an offence against a House for any person to defame or criticise a House or its members or committees, in accordance with the recommendation of the Joint Committee.

Sub-clause (2) provides that this does not apply to words spoken or acts done in the presence of a House or committee. This is to ensure that a House or a committee can take appropriate action in a situation where a witness or a member of the public makes insulting or offensive remarks at a sitting of a House or a committee.

Clause 7: Penalties imposed by Houses

This clause provides that a House may impose a penalty of a fixed term of imprisonment not exceeding six months and may impose fines, and abolishes the existing power to imprison a person for a period not extending beyond the end of a session, in accordance with the recommendations of the Joint Committee.

Sub-clause (1) provides the power of the Houses to impose a fixed term of imprisonment not exceeding six months.

Sub-clause (2) makes it clear that the statutory fixed term of imprisonment may extend beyond the end of a session.

Sub-clause (3) makes it clear that the old power to imprison a person for an indefinite period not extending beyond the end of a session is abolished by the clause.

Sub-clause (4) gives the Houses the power to delegate to their Presiding Officers the authority to release a person from imprisonment when the House concerned is not sitting. This authority could be exercised in any appropriate circumstances, e.g., if a person ends their contempt by complying with an order to produce documents to a committee, or if a person becomes ill.

Sub-clause (5) provides the power to impose fines not exceeding \$5,000 for a person and \$25,000 for a corporation.

Sub-clause (6) provides the method of enforcing a fine, which may be collected as a debt due to the Commonwealth by normal legal process.

Sub-clause (7) provides that a fine and imprisonment may not be imposed for the same offence.

Sub-clause (8) makes it clear that a House may give directions and issue warrants to put the provisions of the clause into effect.

(Note: Sub-clauses (2) to (4) and (8) were added by amendment in the Senate. Further explanation of these sub-clauses is contained in the opinion dated 4 February 1987 of Mr C.K. Comans, C.B.E., Q.C., incorporated in Senate Hansard on 17 March 1987.)

Clause 8: Houses not to expel members

This clause abolishes the power of the Houses to expel their members, in accordance with the recommendations of the Joint Committee.

Clause 9: Resolutions and warrants for committal

This clause provides that if a House imposes a penalty of imprisonment upon a person, the resolution of the House and the necessary warrant to commit the person to custody shall set out particulars of the offence committed by the person. This provision is in accordance with the recommendations of the Joint Committee.

The Bill does not contain the provision recommended by the Joint Committee for the High Court to make a non-enforceable declaration concerning an imprisonment of a person by a House. Advice was received that a legislative provision to that effect would be invalid, because it would amount to requiring or empowering the High Court to give an advisory opinion. The Bill also does not prevent a person who is imprisoned by a House from seeking a review by a court of the House's action by other means, such as by application for a writ of habeas corpus.

Any requirement for specification of the offence in a warrant would have the effect that a court could determine whether the ground for the imprisonment of a person was sufficient in law to amount to a contempt of a House: R. v Richards: ex parte Fitzpatrick and Browne (1955) 92 C.L.R. 157, at p. 162. This clause, in conjunction with clause 4, will have the effect that a court may review any imprisonment of a person by a House to determine whether the person's conduct was capable of constituting an offence as defined by clause 4.

Clause 10: Reports of proceedings

This clause provides for the defence of qualified privilege for the publication of reports of parliamentary proceedings, in accordance with the recommendations of the Joint Committee. The clause follows the draft Bill proposed by the Australian Law Reform Commission in its report on unfair publication (report No. 11, 1979). Qualified privilege is not extended to publication of tabled papers not published by a House, since clause 11 provides absolute privilege only for limited publication of such papers (see notes on clause 11).

Clause 11: Publication of tabled papers

Under the Parliamentary Papers Act 1908, and perhaps under section 49 of the Constitution in the absence of that Act, the publication of papers presented to a House and ordered to be published attracts absolute privilege.

This clause provides for absolute privilege for the publication, by officers of a House to members, of a document laid before a House, in accordance with the recommendations of the Joint Committee.

The standing orders of both Houses provide that a tabled document is public, and in practice papers tabled in the Senate are given virtually unlimited publication. Because of this, consideration was given to extending absolute privilege to any publication of a tabled document, but this may be thought to be unduly wide. The passage of this clause in its current form would leave an inconsistency between the law and the standing orders. If it is desired to make the law reflect the procedure the words "to a member" should be deleted from the clause.

Clause 12: Protection of witnesses

This clause creates criminal offences and provides for penalties in respect of interference with parliamentary witnesses, in accordance with the recommendations of the Joint Committee.

Clause 13: Unauthorised disclosure of evidence

This clause creates a criminal offence and provides penalties in respect of the unauthorised disclosure of in camera evidence taken by a House or committee. This was not recommended by the Joint Committee, but it is thought that it is a logical extension of the provision for protection of witnesses.

Clause 14: Immunities from arrest and attendance before courts

This clause restricts the immunities of members, officers and witnesses from civil arrest and from compulsory evidence before a court to days on which the relevant House or committee sits and, in the case of members and officers, to the period extending from five days before and five days after such a sitting, in accordance with the recommendations of the Joint Committee.

Clause 15: Application of laws to Parliament House

The Joint Committee recommended that doubts about the application of particular laws to Parliament House should be removed. This clause provides that a law in force in the A.C.T. applies in Parliament House subject to the powers, privileges and immunities of the Houses and any contrary statutory provision. The clause is unnecessary because it is clear that the powers, privileges and immunities of the Houses do not involve any general abrogation of the law in Parliament House, but the clause is included because of persistent, though ill-founded, doubts about this.

The clause is drafted so as to be consistent with another Bill prepared by Mr President McClelland, the Parliamentary Precincts Bill 1986, which is designed to put into effect the recommendations of the Joint Committee on the New Parliament House in relation to the parliamentary precincts.

Clause 16: Parliamentary privilege in court proceedings

The purpose of this clause is to avoid the consequences of the interpretation of article 9 of the Bill of Rights 1688 by the judgments of Mr Justice Cantor and Mr Justice Hunt of the Supreme Court of New South Wales.

Article 9, which applies to the Australian Parliament by virtue of section 49 of the Constitution, provides

"That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament."

In the past the courts have held that the article prevents parliamentary proceedings from being examined or questioned in a wide sense or used to support a cause of action (Church of Scientology of California v Johnson-Smith (1972) 1 QB 522, R. v Secretary of State for Trade and others, ex parte Anderson Strathclyde plc, (1983) 2 All ER 233, Comalco Ltd v Australian Broadcasting Corporation (1983) 50 ACTR 1; these judgments were based on authorities stretching back to 1688).

In each trial of R. v Murphy, in the Supreme Court of New South Wales, counsel instructed by the President of the Senate submitted that article 9 prevents the cross-examination of witnesses or the accused on

evidence which they gave before parliamentary committees for the purpose of impeaching the evidence of witnesses or the accused.

On 5 June 1985 Mr Justice Cantor, before the first trial, gave a judgment to the effect that article 9 does not prevent the cross-examination of persons in court proceedings on their parliamentary evidence, that the test of a violation of article 9 is whether there is any adverse effect on parliamentary proceedings, and that the protection of parliamentary proceedings must be "balanced" against the requirements of court proceedings. Subsequently in the course of the trial a witness was extensively cross-examined on evidence given before a Senate committee, including evidence given in camera, and the truthfulness of that evidence was questioned. The accused was cross-examined on a written statement which he had submitted to a Senate committee and which had been treated as in camera evidence, and the prosecution made submissions to the jury questioning the truthfulness of the accused on the basis of that evidence, despite objections by the defence.

In R. v Foord, Mr Justice Cantor's judgment was followed and witnesses in that trial were extensively cross-examined on the truthfulness of their evidence before Senate committees and their motives in giving that evidence.

On 8 April 1986 Mr Justice Hunt, before the second trial in R. v Murphy, gave a judgment which expressly repudiated the law expounded in the cases cited, and which held that article 9 prevented only parliamentary proceedings being the actual subject of criminal and civil action, but allowed the use of parliamentary

proceedings as evidence of an offence, to impeach the evidence of witnesses or the accused or to support a cause of action.

The clause would prevent such use of proceedings in Parliament and restore the interpretation of article 9 contained in the earlier judgments. (A more detailed analysis of the law and the judgments is contained in the documents presented to the Senate by Mr President McClelland on 7 October 1986. Attention is also drawn to the reasons for judgment in R. v Jackson, presented to the Senate by the President on 17 March 1987.)

The clause declares that article 9 applies in respect of the Australian Parliament and that it has the effect indicated by the provisions of the clause. The clause has been drafted in this way largely to avoid the difficulty which may be created for other jurisdictions if the Australian Parliament were to legislatively accept that article 9 as such has the restricted meaning given to it by the recent judgments and requires legislative supplementation to be given its broad interpretation. Article 9 is part of the law in many jurisdictions around the world, including the Australian States, and it has been indicated that Parliaments in those jurisdictions would not wish the Australian Parliament to be in any way accepting that article 9 may be read narrowly and that it requires such legislative supplementation.

Sub-clause (1): This sub-clause declares that article 9 applies in relation to the Australian Parliament and is to be construed in accordance with the provisions of the clause.

Sub-clause (2): It is necessary to define the phrase "proceedings in Parliament", which sets the scope of the immunity contained in article 9. The phrase is defined to include all words spoken and acts done in transacting the business of the Houses or their committees, including the preparation and submission of documents.

Sub-clause (3): This sub-clause prevents the use of parliamentary proceedings in court or tribunal proceedings -

(a) in a manner involving questioning or relying on the truth, motive, good faith or intention of words spoken or acts done in the parliamentary proceedings;

(b) to attack or support the evidence or credibility of persons giving evidence in court or tribunal proceedings; and

(c) to draw inferences or conclusions for the purposes of the court or tribunal proceedings.

The following is a further exposition of those paragraphs:

(a) calling into question parliamentary proceedings

This is the most obvious and clear prohibition contained in article 9. It prevents, for example, a statement in debate by a member of Parliament or the evidence of a parliamentary witness being directly attacked for the purpose of court proceedings, or the motives of the member or the witness in speaking in Parliament

or giving evidence being attacked. Thus, it cannot be submitted that a member's statements in Parliament were not true, or reckless, to support a submission that the member is an untruthful, or reckless, person.

- (b) attacking the credibility, motives, etc. of a person on the basis of proceedings in Parliament

This would prevent, for example, a member's speech in debate or a parliamentary witness's evidence being used to establish their motives or intention for the purpose of supporting a criminal or civil action against them, or against another person. Thus a member's statements outside Parliament cannot be shown to be motivated by malice by reference to alleged malice in the member's statements in Parliament.

- (c) drawing inferences or conclusions to support a criminal or civil action

This would prevent, for example, a jury being invited to infer matters from speeches in debate by members of Parliament or from evidence of parliamentary witnesses in the course of a criminal or civil action against them or another person. Thus a member's speech in Parliament cannot be used to support an inference that the member's conduct outside Parliament was part of some illegal activity. This would not prevent the proving of a material fact by reference to a record of proceedings in Parliament which establishes that fact, e.g., the tendering of the Journals of the Senate to prove that a Senator was present in the Senate on a particular day.

These prohibitions express the limitations on the use of parliamentary proceedings which were held to flow from article 9 in the earlier court judgments. Basically, what they prevent is proceedings in Parliament being "used against" a person in the broad sense, that is, not only being made the subject of a criminal or civil action, such as where a member is sued for words spoken in debate, but also being used to support a civil or criminal action against a person.

Sub-clause (4): This sub-clause prevents evidence which has been taken in camera by a House or a committee and not published from being used in court proceedings, as was done in R. v Murphy and R. v Foord. The sub-clause covers documents specifically prepared for submission to a House or a committee and accepted as in camera evidence, and oral evidence taken in camera.

Sub-clause (5): It may be necessary for a court to examine proceedings in Parliament for the purpose of determining a question arising under section 57 of the Constitution after a double dissolution (e.g., whether the Senate failed to pass a Bill), or interpreting an Act of the Parliament (the Acts Interpretation Act allows for that purpose reference to parliamentary proceedings, including second reading speeches, reports of committees and amendments moved and determined). This sub-clause therefore provides that neither this clause nor the Bill of Rights shall be taken to prevent the admission in evidence in the court proceedings of parliamentary records for those purposes. Nothing in the sub-clause makes admissible anything which would otherwise not be admissible.

Sub-clause (6): This Bill would provide for statutory offences (interference with witnesses, clause 12, and unauthorised disclosure of evidence, clause 13) which relate to proceedings in committees. There are also Acts establishing statutory parliamentary committees which provide for offences relating to proceedings in those committees (e.g., giving false evidence before a committee). It may well be impossible to conduct any proceedings in the courts in relation to such offences without use of evidence relating to the relevant parliamentary proceedings. This sub-clause therefore provides that neither this clause nor the Bill of Rights shall be taken to prevent the admission of evidence concerning parliamentary proceedings in relation to such court proceedings.

Sub-clause (7): This sub-clause would prevent the provisions of the Bill from applying to court proceedings commenced before the Bill comes into operation, but does not prejudice article 9 itself, as properly interpreted, in its application to such court proceedings.

Clause 17: Certificates relating to proceedings

This clause provides for the Presiding Officers of the Houses and chairmen of committees to certify various matters relating to the proceedings of the Houses or committees for evidentiary purposes. Under the clause a certificate, for example, signed by the President of the Senate indicating that a person is an officer of the Senate, would be accepted as proof of that fact in the absence of any evidence to the contrary.

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LIST OF CLAUSES SHOWING CORRESPONDING RECOMMENDATIONS
OF THE JOINT SELECT COMMITTEE ON PARLIAMENTARY PRIVILEGE
AND DIFFERENCES BETWEEN THE BILL AND THE RECOMMENDATIONS

Clause	Recommendation No. and pages in report	Differences in Bill
5 Powers, privileges and immunities preserved	13,17 (pp 79-82, 90-94)	
6 Contempts by defamation abolished	15 (pp 4, 83-7)	an exception made for contempts in the presence of a House or committee as indicated in the explanatory memorandum
7 Penalties imposed by Houses	18, 19 (pp 8, 94-100)	the fine for corporations increased from \$10,000 to \$25,000
8 Houses not to expel members	25 (pp 28,121-7)	non-enforceable review by High Court not adopted, as explained in explanatory memorandum
9 Resolutions and warrants for committal	23 (pp 9, 115-21)	
10 Reports of proceedings	7) (pp 14, 63-5)	see explanatory memorandum for notes on treatment of tabled papers
11 Publication of tabled papers	6) (pp 13, 62-3)	

Clause	Recommendation No. and pages in report	Differences in Bill
12 Protection of witnesses	34 (pp 15, 146-9)	
14 Immunities from arrest and attendance before courts	10, 12 (pp 18, 70-2, 73-5)	extended to officers and witnesses before committees, but only on the day of their appearance in the case of witnesses
15 Application of laws to Parliament House	31 (pp 19, 141-2)	extended to all laws in force in the ACT, as indicated in explanatory memorandum