

Parliamentary privilege and the common law of parliament: can MP's say what they want and get away with it?

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Introduction

Parliamentary privilege can be broadly defined as the powers, rights and immunities of parliament and its members. The privileges enjoyed by the parliament are linked historically to the privileges of the UK House of Commons which have their origin in the procedures of the Parliament of Westminster:

..to be found chiefly in ancient practice, asserted by Parliament and accepted over time by the Crown and the courts of law and custom of Parliament.²

The privileges of parliament are defined by the rulings of each House in respect of its own practices and procedures when a matter of privilege arises. The use of the terms 'history', 'procedure', and 'tradition' give the impression of uncertainty, and make those in the legal profession feel most uneasy. The legal world is inhibited by statute, rules, forms and precedent, surrounded by the cocoon of the common law as developed by the courts. Parliamentary privilege and the development of the common law of parliament is based on different principles to those of the common law as developed by the courts. It certainly bears little resemblance in its form and structure to legal professional privilege.

The privileges of parliament have changed over time, some are simply not relevant in our modern parliamentary democracy (such as freedom of members from arrest), others (such as the power to detain a person in breach of the privilege) have fallen out of use. These privileges tend to develop as the need arises in a particular House. For this reason, it may be more accurate to refer to the *privileges of parliament*, rather than *parliamentary privilege*.

This paper will explore the definition and development of parliamentary privilege, and highlight some examples of where matters of privilege have been raised in the Parliament of South Australia and how those matters were resolved. These practices and procedures form what is referred to as the common law of parliament.

Origins of privilege: Article 9 of the Bill of Rights

When we talk about parliamentary privilege, we are generally referring to what Enid Campbell describes as the *central parliamentary privilege*, that being the freedom of speech and debate in parliament. This privilege has its origins in Article 9 of the UK Bill of Rights 1689, which provides:

The freedom of speech and debates or proceedings in Parlyament ought not to be impeached or questioned in any court or place out of Parlyament.

It is one of the few privileges that is still in use in parliament today. According to Campbell, the primary role of Article 9 is to:

confer on members of parliament and other participants in parliamentary proceedings (such as those who present petitions and parliamentary witnesses) immunity from liability, civil or criminal, for what they say or do in the course of those proceedings.³

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² United Kingdom Parliament, Joint Committee on Parliamentary Privilege, First Report (HL 43 - I, HC 214 - I Session 1998/99) para 5.

This privilege is preserved in the Parliament of South Australia by section 38 of the *Constitution Act 1934* (SA) which provides:

The privileges, immunities, and powers of the Legislative Council and House of Assembly respectively, and of the committees and members thereof respectively, shall be the same as but no greater than those which on the twenty-fourth day of October, 1856, were held, enjoyed, and exercised by the House of Commons and by the committees and members thereof, whether such privileges, immunities, or powers were so held, possessed, or enjoyed by custom, statute, or otherwise.

So, as of 24 October 1856 Article 9 of the Bill of Rights forms part of the law of South Australia, by virtue of the fact that it was a privilege given to the Commons by Statute.

Section 9 of the *Constitution Act 1934* allows the privileges, immunities and powers of the parliament to be provided for by an Act of parliament, provided that the Act doesn't exceed those referred to in section 38. Unlike the Commonwealth, an Act to regulate parliamentary privileges has not been enacted in South Australia.⁴ Parliamentary privilege is absolute; a member of parliament cannot waive privilege in any circumstances.

What does parliamentary privilege cover?

Parliamentary privilege generally covers all words spoken in either House, documents tabled in the House and petitions presented to the House. The privilege acts to prevent such material being the subject of civil or criminal action.

Member's documents

Documents and correspondence given to a member by a non-member and used for the business of parliament fall within the protection of the privilege; however, that information must be used in the course of parliamentary business. Such correspondence does not attract privilege only because one of the parties to such communication is an MP. What constitutes parliamentary business is not defined, but, for example, would generally include information used as the basis for a question or speech in parliament.

Tabled documents

A person outside the parliament who relies on something said or tabled in the parliament is in breach of privilege. In 1998 Senator Woodley tabled documents he had received from a Dr William de Maria, an employee at the University of Queensland. The documents alleged that Dr de Maria was the victim of harassment and victimisation at his workplace. As a result of the tabling of the documents, Dr de Maria was suspended from his employment and a university committee was established to determine whether he was guilty of misconduct.

A Senate Privileges Committee was formed and advised that the university's actions in suspending Dr de Maria was a contempt of the Senate. The Committee found that on the basis of Article 9 and (in part) section 16(2) of the *Parliamentary Privileges Act 1987* (Cth), the tabled documents attracted parliamentary privilege and the university was in breach of the privilege in using the substance of the documents to suspend Dr de Maria.⁵

The privilege seems to apply by virtue of that member contributing in the House, or by virtue of the particular document or the text of a particular speech being part of the proceedings of the

³ Campbell, Enid, *Parliamentary Privilege*, Federation Press 2003, p. 51.

⁴ See *Parliamentary Privileges Act 1987* (Cth).

⁵ Campbell, p. 22 and 52.

parliament. Legislative provisions are sometimes warranted and required in certain circumstances to put this beyond doubt. For example, the South Australian *Independent Commissioner Against Corruption Act 2012* (the ICAC Act) provides that matters such as the progress of investigations and the identity of a person who is the subject of an ICAC investigation are to be kept confidential. The Act also contains a number of provisions requiring the ICAC to report on investigations to the Minister, and for those reports to be laid before both Houses of parliament. There was a concern at the time the Act was being debated in the parliament that reports tabled in the House under the ICAC Act would somehow be able to be revealed or reported under parliamentary privilege that would otherwise be kept confidential by the operation of the Act.

The Government proposed an amendment to the Bill that would only allow for the inclusion of such sensitive information in the record of parliamentary proceedings if authorised by resolution of both Houses of parliament. The Opposition and cross benchers, however, argued and successfully supported an amendment which now forms section 6 of the Act, which provides:

Nothing in this Act affects the privileges, immunities or powers of the Legislative Council or House of Assembly or their committees or members.

This was a clear indication by the Parliament of South Australia that it is in the best position to manage parliamentary privilege and that matters should be dealt with on a case by case basis as they arise in the House, and not by joint resolution.⁶

Parliamentary committees

Parliamentary privilege extends to the proceedings of parliamentary committees and any document tabled and officially received by the committee. When witnesses appear before a parliamentary committee in South Australia, they are warned that although their evidence during committee proceedings is covered by privilege, anything they say verbally or in writing outside of those proceedings is not covered by that privilege. Parliamentary privilege only applies to a written submission once it had been officially tabled and accepted by the members at a meeting. However, if the content of a submission or of a person's evidence is repeated outside the parliament, there is an argument that a qualified privilege may apply.⁷

Campbell argues that the power of committees to hold some or all of their proceedings in private or in camera and not to publish some or all of their evidence, reports and papers is a form of power of censorship. Witnesses before parliamentary committees are not under oath, however if a witness is suspected of misleading a committee during an inquiry they may be in contempt of the parliament and summoned by the parliament to explain that evidence.⁸

Can members say what they want under parliamentary privilege and get away with it?

It seems that the short answer is 'yes'. Although parliament has the power to punish and censor, an examination of the common law of parliament reveals that it rarely does so in respect of its own members or others. There is no body that the parliament can turn to for an opinion on the operation of Article 9. Carney argues that the privilege should be subject to oversight by the courts, or that the parliament should be empowered to fine or suspend a member for a breach of privilege. He cites the example of the breach of privilege by Senator Heffernan in 2002 in relation to allegations against High Court judge Justice Michael Kirby. Senator Heffernan issued an apology in the Senate to Justice

⁶ For full debate see Parliamentary Debates, Legislative Council, Tuesday 4 September 2012 pp. 1958-1960.

⁷ Zelling ACJ in *ABC v Chatterton* 1986 46 SASR 1 at 18-19.

⁸ Campbell, p. 164.

Kirby; however, there were no other sanctions. It seems that even where there is power under the Commonwealth Act for fines and sanctions against a member, they are not applied.⁹

The Parliament of South Australia has the power to regulate its own proceedings. Specifically, section 40 of the *Constitution Act 1934* allows for an Act of parliament to deal with privilege. However, the parliament has not done so and the failure to rein in abuses of privilege erodes the public interest justification for the privilege. Under the provisions of the Standing Orders of both the Legislative Council and the House of Assembly in South Australia, a member may raise a matter of privilege in the House for determination, or may complain about a statement published in the media that may constitute a breach of privilege.¹⁰

A matter of privilege is defined as a matter genuinely regarded as tending to impede or obstruct the House in the discharge of its duties. The Speaker or President may defer consideration and bring back a decision on the matter of privilege. As it stands, it is up to the presiding officers of the House, on advice of the clerks, to make rulings on parliamentary privilege on a case by case basis.

If the matter needs further investigation, a privileges committee may be set up to call witnesses and hear evidence before ruling on whether there has been a breach of privilege. Only one privileges committee has reported in the history of Parliament of South Australia. In 1998, the then State Treasurer Hon. Graham Ingerson was accused of, and found in contempt of parliament for, misleading the House in an answer to a question put to him by the Opposition Treasurer Hon. Kevin Foley during parliamentary Estimates Committee. The report was tabled and adopted by the House of Assembly.¹¹

Case study: *Wright and Advertiser v Lewis*

The case of *Wright and Advertiser v Lewis* caused the Parliament of South Australia to take some action to address circumstances in which allegations against a member of the public were made by a member in the House of Assembly under the protection of parliamentary privilege.¹² During debate in the House of Assembly in April 1987, the Hon. Peter Lewis, then a Liberal MP, made a number of statements implying that Mr Wright had sought or received favoured treatment in respect of a planning matter because of a close association with a former Labor Government.¹³ In a letter which was published in Adelaide's *The Advertiser* newspaper, Mr Wright sought to refute these claims. Mr Lewis brought an action for libel in respect of the contents of the letter, and sought to rely on parliamentary privilege to preclude Mr Wright from defending these allegations as they were made in parliament. The court, in dismissing Mr Lewis' defamation claim, remarked:

It must be observed at the outset that if the view argued for by counsel for the Attorney-General and the plaintiff [Mr Lewis] is correct, the result is remarkable. A Member of Parliament could sue for defamation in respect of criticism of his statements or conduct in the Parliament. The defendant would be precluded, however, from alleging and proving that what was said by way of criticism was true. This would amount to a gross distortion of the law of defamation in its application to such a situation.¹⁴

⁹ Carney, Gerard "Reform of Parliamentary Privilege" in *Peace, order and good government: State Constitutional and Parliamentary Reform*, eds Clement McIntyre and John Williams, Wakefield press, 2003 p. 295.

¹⁰ Legislative Council Standing Orders No. 200 - 2003, House of Assembly Standing Orders No. 132 - 133.

¹¹ Parliamentary Debates, House of Assembly, 21 July 1998 p. 1449.

¹² *Wright and Advertiser v Lewis* (1990) 53 SASR 416.

¹³ Per King CJ at 418.

¹⁴ Per King CJ at 416-417.

I do not think that a defendant [Mr Wright], so defending himself, can be regarded in any real sense as impeaching or questioning the freedom of speech, debates or proceedings in Parliament as forbidden by Art 9; nor can the courts be fairly regarded as doing so if they permit a defendant to so defend himself...If Parliamentary privilege operated to prevent a person, exposed to an action by a member for defamation, from defending himself by proving the truth of his criticism of the statements or conduct of the member, it would indeed be "turned into an abominable instrument of oppression".¹⁵

Citizens Right of Reply

In response to the court's decision in *Wright*, a joint privileges committee of the parliament was established, but due to prorogation of the parliament it never reported. However, the parliament did respond by introducing the Citizen's Right of Reply. In the Legislative Council, this is a formal motion moved at the beginning of every session of parliament that allows a member of the public to write formally to the President of the Legislative Council to raise a matter if they think they have been wrongly represented by a member during proceedings in the Council.¹⁶ In the House of Assembly, it is a Sessional Order that is renewed at the beginning of every new parliament.¹⁷ The citizen's response is then, if the President or Speaker so decides, incorporated into Hansard.

The general public would not generally know that this remedy is available.¹⁸ Further, even if a member of the public is aware of the opportunity to correct the record, and writes formally to the House, the most publicity the person can expect is to have their response printed in Hansard. Although the motion requires the citizen's right of reply to be read in the House, it rarely makes it to the public sphere either through the media or otherwise. There are neither sanctions nor other adverse consequences for the member who initially made the remarks, nor is the member required to issue an apology or retraction.

Case study: Parliament of South Australia attempts to censor its own members

In 2006, the Parliament of South Australia sought to censure the comments made by a member because of the harm it might cause in the community. Usually the matter of parliamentary privilege is raised in the context of defamatory remarks made by a member in the House, and the privilege is used to shield the member from any adverse consequences. However, this was an instance where the parliament used parliamentary privilege as a sword instead of a shield. In 2006 the Commonwealth passed a law making it an offence to disseminate, publish or distribute material which promotes particular methods of committing suicide or providing particular methods of suicide.¹⁹ On 30 August 2006, Australian Democrats member the Hon. Sandra Kanck, a long-time advocate of voluntary euthanasia, gave a speech in the South Australian Legislative Council which outlined in detail how two people committed suicide, including details of suicide devices, drugs said to be used in connection with suicides and other related matters. On 31 August 2006, the Government introduced a motion in the Legislative Council which provided:

That this council, subject to the qualification to this motion hereinafter appearing, directs the Leader of Hansard not to publish on the parliamentary web site or otherwise electronically those parts of the speech of the Hon. Sandra Kanck that:

¹⁵ Per King CJ at 426.

¹⁶ For the full text of the Citizen's Right of Reply, Parliamentary Debates, Legislative Council, 11 February 2015 pp. 75-77.

¹⁷ Parliamentary Debates, House of Assembly, 6 May 2014, p. 34.

¹⁸ For example, there is no reference to the Citizen's Right of Reply on the SA Parliament website.

¹⁹ *Criminal Code Amendment (Suicide Related Material Offences) Act 2005*.

- a) describe the way in which the persons referred to as Jo, Shirley Nolan and Elizabeth by the honourable member were said to have committed, or to have attempted to commit, suicide;
- b) describe the methods of suicide referred to in the statistics said to have been compiled by the Australian Bureau of Statistics;
- c) describe any other method of suicide;
- d) describe the way in which plastic suffocating devices can be made;
- e) identify the drug said to have been used in connection with suicides assisted by Dr Philip Nitschke in the Northern Territory.
- f) describe any method of suicide involving the use of a motor vehicle and where such material is already published to take all reasonable steps to remove that material from publication.

A copy of the entire speech of the Hon. Sandra Kanck may be provided to the Parliamentary Library where it may be made available to be read by any member of the public on request, subject always to the discretion of the Parliamentary Librarian to refuse that request after consultation with the President of the council where there are reasonable grounds to suspect that acceding to the request would create an unacceptable risk of harm to any person.²⁰

The speech was characterised by one member as:

*use[ing] the parliament...for the purpose of using the [parliamentary] website as a device to get on to the public record something which she was suggesting was prohibited by commonwealth law. In other words, she used the power that she had as a member of this parliament for an ulterior purpose: not to contribute to a debate but rather for another purpose altogether.*²¹

The Government's position in moving the motion was that as much as it is the role of parliament to protect the right of people to say what they believe within the parliament, it is also to take responsibility for what is said in the parliament 'that may have a detrimental effect on the community'.²²

After much debate, the motion was passed in an amended form, which allowed for the publication of the speech in electronic form only.²³ In accepting the motion in this amended form, the Hon. Paul Holloway, on behalf of the Government reflected on the role that parliament has in ensuring that parliamentary privilege is not abused and that the community is protected from what is said in the parliament:

*The right to privilege is a very valuable right that we have, and I will fight like everyone else for the right of people to say whatever they like and for others to recognise that right. However, we have already recognised that abuse of parliamentary privilege can be addressed by the right of reply. We have the right of reply in this place, because we know that sometimes people can be maligned. Similarly, we have a responsibility to ensure that vulnerable people out there are not misled by what is said in this parliament.*²⁴

²⁰ Motion moved by Hon. P Holloway, Minister for Police (ALP), Parliamentary Debates, Legislative Council, Thursday 31 August 2006, pp.592-593.

²¹ Hon. R. Lawson (Liberal) p. 600.

²² Hon. P. Holloway (ALP), p. 593.

²³ Amendment moved by Hon. N. Xenophon (Independent), p. 601.

²⁴ Hon. P. Holloway (ALP) p. 604.

Conclusion

The privileges of the House originate from the House and are ultimately adjudicated by them. The Parliament of South Australia has not attempted to limit or define these privileges since the parliament was established in 1856. The parliament make rulings on matters of privilege as they arise, which are adapted to contemporary community standards; such rulings and adjudications are solely in the hands of the parliament. The principle outlined by Erskine May in his treatise on parliamentary practice, first published in 1844, which defines this common law of parliament is still true of the administration of parliamentary privilege today:

*The two Houses are thus of equal authority in the administration of a common body of privileges. Each House, as a constituent part of Parliament, exercises its own privileges independently of the other. They are enjoyed, however, not by any separate right peculiar to each, but solely by virtue of the law and custom of Parliament. There are rights and powers peculiar to each...but all privileges, properly so called, appertain equally to both Houses. These are declared and expounded by each House; and breaches of privilege are adjudged and censured by each; but still it is the law of Parliament that is thus administered.*²⁵

To have the main arbiters of parliamentary privilege as the very people who stand to benefit from its protection may seem to an outside observer to be unfair and open to abuse. US President Dwight D. Eisenhower once remarked that *'a people that values its privileges above its principles soon loses both'*. I would argue that a parliament that values its privileges above its principles is not only in danger of losing both, but risks damaging the integrity and standing of the parliament established through hundreds of years of history and custom. It is incumbent on the parliament to maintain the highest principles to ensure that this integrity and standing is maintained.

²⁵ Erskine May, *Parliamentary Practice*, 20th ed, Butterworths, p. 75.