

## Chapter 5 Other matters

### 5.1 The serving of legal process upon a member of Parliament when within the parliamentary precincts

Members of Parliament have no explicit immunity against compulsory processes for the disclosure of information such as subpoenae and orders for the discovery of documents. However, traditionally, practice has dictated that legal process should not be served upon any member while they are on the parliamentary premises or within the precincts unless permission has been given. *Erskine May* notes that “serving or executing civil or criminal process within the precincts of either House while the House is sitting without obtaining the leave of the House is a contempt.”<sup>1</sup> As such, the Presiding Officers should be notified of any legal process to be served within the parliamentary precincts such as a subpoena or search warrant. The purpose of this privilege is the paramount right of the Parliament to request the attendance of its members when the House is sitting.<sup>2</sup> However, it has been held by some authorities that this is not required as a matter of law.<sup>3</sup>

The Memorandum of Understanding between the Presiding Officers and the Police Commissioner under section 27 of the *Parliamentary Precincts Act 1997* states that police will not execute any process, such as search warrants, without prior consultation with the Presiding Officers or their delegates. While the Act requires that the memorandum be complied with as far as is practicable, breach of the memorandum does not itself invalidate the action of a police officer.

It should also be noted that given the New South Wales Parliament does not have the power to punish for contempt, it is doubtful whether the service of process on the precincts affects its legal validity as there is little action that can be taken in response to such service.

#### 5.1.1 Subpoenae

A number of instances have occurred in New South Wales regarding the service of a subpoena upon members of Parliament.

On 18 November 1920, a matter of privilege was brought before the House by a member regarding the service of a subpoena upon him to appear as a witness before a Royal Commission into the adequacy of salaries of members and Ministers of the Crown. The subpoena was not served on him within the parliamentary precincts. However, other members had been served with similar subpoenae within the precincts. A motion was moved by the member that the service of the subpoena requiring the compulsory attendance at the Commission under threat of punishment constituted a grave breach of privilege. The motion was negatived on division.<sup>4</sup>

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<sup>1</sup> May, Thomas Erskine, Sir, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 23rd Edition, edited by Sir William McKay, KCB, p. 142.

<sup>2</sup> The precincts of Parliament House are established by law. See section 6 and Schedule 1 of the *Parliamentary Precincts Act 1997*.

<sup>3</sup> See *House of Representatives Practice*, 5th edition, p. 718: eg: *Comalco Limited v Australian Broadcasting Corporation* (1982) 50 ACTR 1.

<sup>4</sup> VP 18/11/1920, p. 141 and PD 18/11/1920, pp. 2567-93.

In 1948, Speaker Lamb received a subpoena at Parliament House to attend Central Police Court to give evidence in a civil case. The subpoena had been transmitted by post but considerable doubt was expressed whether the method of “service” chosen constituted a valid service of the subpoena and consideration was given by the Speaker to whether or not the action amounted to a breach of the privileges of Parliament.

The Crown Solicitor expressed the view that, although the privileges of members of Parliament in relation to the service of legal process was not defined by legislation, there was an undeniable parliamentary tradition in New South Wales which recognised that it would be an unwise proceeding to choose the parliamentary premises as the place for the service upon a member of any legal process.

The Crown Solicitor advised that:

- (1) the attention of the firm of Solicitors should be drawn to the fact that they had purported to serve the subpoena upon the Speaker at Parliament House by transmitting it by post, and that if this action constituted service, it might be necessary to consider whether it amounted to a breach of the privileges of Parliament; and
- (2) the subpoena should be returned to the Solicitors with an intimation that the Speaker was prepared to give an undertaking to attend the Court on the appointed day.<sup>5</sup>

This advice was followed and the subpoena returned.<sup>6</sup>

An example of legal service being served on a member within the parliamentary precincts occurred recently in New Zealand. In this case legal service was served on a member of Parliament within the grounds after he had given his concurrence. The Speaker had also been informed before the legal process was served on the member and had approved it going ahead as the member had agreed to accept it.<sup>7</sup>

### **5.1.2 Search warrants**

Just as there is no immunity for members of Parliament who are served with a subpoena for the production of documents, or to attend court whilst the House is not sitting there is no immunity against an order for the discovery of documents or a search warrant. However, the use of material seized in such a manner before a court or tribunal is limited to those documents to which parliamentary privilege is not attached. A number of incidents in Australian jurisdictions are relevant to this discussion.

In December 1998, the Deputy President of the Senate requested the Senate Committee of Privileges to consider the matter of the execution of search warrants in senators’ offices and a suggestion that the Presiding Officers seek an agreement with the Attorney-General to govern the execution of search warrants. This request stemmed from concerns about the ability of police to execute search warrants in

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<sup>5</sup> Advice received from the Crown Solicitor re: Service of a subpoena upon a member of Parliament when on the Parliamentary premises, dated 28 September 1948. See also PD 20/10/1948, p. 37 where the Speaker made a statement on the service of legal process within the precincts.

<sup>6</sup> See “Service of process within the precincts of Parliament: Answers to questionnaire” in *The Table*, Vol. 32, 1963, pp. 57-8.

<sup>7</sup> See Speaker’s Ruling, *New Zealand Parliamentary Debates*, 27 February 2001, pp. 7912-3.

senators' offices and to seize documents without regard to information that may be protected by parliamentary privilege.<sup>8</sup>

Following receipt of this request the committee asked the Clerk of the Senate to comment on the issue. In doing so, the Clerk drew attention to recent developments in relation to search warrants and parliamentary privilege. In his comments to the committee, the Clerk expressed a number of concerns about the execution of search warrants within the parliamentary precincts and claims for parliamentary privilege. He argued: "The execution of a search warrant means that documents immediately fall into the hands of those seeking them" and that "in the absence of some process whereby the question of parliamentary privilege can be raised, the recipient of a warrant has no opportunity to raise the question of whether material should be produced to those seeking it."<sup>9</sup>

The Clerk referred to a recent case where search warrants had been issued in relation to the home and electorate office of a senator and that the Australian Federal Police "suggested that, as part of the procedure for the search under warrant, any material the senator claimed to be protected by parliamentary privilege should be sealed and delivered to a court until the claim of parliamentary privilege could be determined."<sup>10</sup>

The search warrant referred to by the Clerk was in relation to Senator Crane, whose offices and home were subject to a search under warrant issued under the *Crimes Act 1914* (Cmth). The warrants were executed in relation to an investigation into payments made in respect of charter flights taken by Senator Crane between 1995 and 1998. Initially, Senator Crane challenged the validity of the warrants and claimed parliamentary privilege in respect of the documents seized. The challenge to the validity of the warrants was dropped but Senator Crane continued with his claim for parliamentary privilege and also a declaration as to his entitlement to the payments made in relation to the charter services used.<sup>11</sup>

In the ensuing court case *Crane v Gething*, the Federal Court held that in cases such as this, where the search warrants were used to obtain documents as an "aid of a lawful administrative investigation"<sup>12</sup> and not as evidence in a trial, it was a matter for the Senate, rather than the court, to determine whether certain documents were protected by privilege. Justice French commented:

*While the law of parliamentary privilege may properly be applied by the court in judicial proceedings where the privilege impacts on the exercise of the court's jurisdiction and powers, it is not, in the ordinary course, for the courts to decide questions of privilege as between the executive and parliament in litigation between the subject and the executive.*<sup>13</sup>

The reasoning behind Justice French's thinking was the fact that the execution of the search warrants was an action of the Executive and not an action that had arisen from judicial proceedings. However, if the search warrants had been executed in

<sup>8</sup> The Senate Committee of Privileges, *75th Report: Execution of Search Warrants in Senators' Offices*, March 1999, p. 1.

<sup>9</sup> See Appendix B of the Senate Committee of Privileges, *75th Report: Execution of Search Warrants in Senator's Offices*, March 1999.

<sup>10</sup> *Ibid*, Appendix B, p. 3.

<sup>11</sup> See introductory remarks made by Justice French in *Crane v Gething* (2000) FCA 45.

<sup>12</sup> *Ibid*, at 748.

<sup>13</sup> *Ibid*, at 747.

order to obtain documents which would then be tendered as evidence in trial in relation to a criminal charge it would be a different matter and the courts would sit in judgment as to whether documents were privileged.<sup>14</sup>

The decision of Justice French was contrary to a submission made by the Senate which argued that documents that were considered to be closely connected with the proceedings in the Senate were protected from seizure by virtue of parliamentary privilege and that a court could determine whether particular documents were so protected. In relation to this issue the view has been expressed that Justice French's decision is unlikely to be regarded as authoritative.<sup>15</sup>

Nevertheless, the Senate, following the decision of Justice French, subsequently put in place a special process to determine whether material seized in the search which gave rise to this case was protected by parliamentary privilege and to ensure that such material was returned to the senator without going into the possession of the police.<sup>16</sup>

Enid Campbell notes that the decision of Justice French in *Crane v Gething* leaves open questions regarding "the extent to which statutory powers to grant search and seizure warrants, and authority conferred by such warrants, may be constrained by laws about parliamentary privileges." She argues that recourse needs to be made to the general law regarding powers of search and seizure noting that the High Court has determined that documents, obtained under warrants issued under the *Crimes Act 1914* (Cmth) but protected by professional legal privilege or the public interest immunity cannot be tendered as evidence in court proceedings and that the same should apply to documents to which parliamentary privilege attaches.<sup>17</sup>

In November 2001, the issue again arose following the execution of a search warrant in the Queensland office of One Nation Senator Len Harris. Senator Harris was unable to raise the matter in the Senate at the time due to the November general election. However, the Clerk of the Senate wrote to the Commissioner of the Queensland Police Service raising the issue that some of the material seized from Senator Harris' office may be immune from seizure by virtue of parliamentary privilege and suggested that the Queensland police should seal the material seized under warrant "until such time as the court or the Senate determines the legality of the seizure of the material."<sup>18</sup>

On 14 February 2002, the Senate, on the motion of Senator Harris, referred the matter to the Privileges Committee to determine, amongst other things "whether any breaches of the immunities of the Senate or contempts were involved in the search and seizure, and continued possession, by the Queensland police of material from the office of Senator Harris, and if so what remedies should be applied."<sup>19</sup>

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<sup>14</sup> See Enid Campbell, *Parliamentary Privilege*, 2003, pp. 35-8.

<sup>15</sup> *Odgers' Australian Senate Practice*, 11th edition, 2004, p. 46.

<sup>16</sup> See comments of the President of the Senate on 14/2/2002, pp. 317-9. See also *Odgers' Australian Senate Practice*, 11th edition, 2004, p. 46.

<sup>17</sup> Enid Campbell, *Parliamentary Privilege*, 2003, p. 38.

<sup>18</sup> The Senate Committee of Privileges 105th Report, *Execution of Search Warrants in Senators' Offices – Senator Harris*, June 2002, pp. 1-3.

<sup>19</sup> *Ibid*, p. 1.

The committee came to the conclusion that following the correspondence from the Clerk of the Senate to the Commissioner of the Queensland Police Service about the potential privilege implications of the seizure of material from Senator Harris' office that the Queensland police had fulfilled their obligations in respect of parliamentary privilege by inviting Senator Harris and his solicitors to claim parliamentary privilege in relation to the documents seized and that no breach of privilege or contempt had been committed.<sup>20</sup>

Following this report, Senator Harris continued to maintain that parliamentary privilege was attached to documents contained on computer hard drives that were in the possession of the Queensland Police Service. As such, the Queensland Police Solicitor requested that the Senate Committee of Privileges determine the question of parliamentary privilege claimed by Senator Harris. The committee agreed to undertake this course of action on 12 December 2002 and after obtaining permission from the Senate, appointed an independent counsel to evaluate the material in question.<sup>21</sup> The independent counsel came to the conclusion that all of the documents in question were outside the terms of the warrant and as such the question of whether any were privileged and therefore immune from seizure did not need to be determined.<sup>22</sup>

The committee did, however, express a similar view to that of the submission of the Senate in relation to *Crane v Gething* that the courts are the appropriate body to determine whether parliamentary privilege exists in relation to documents seized, noting that "the Senate is effectively performing a function which should be performed by the courts."<sup>23</sup> The committee went on to argue that:

*The decision in Crane v Gething is not the appropriate response to the issue of determining the application of the law of parliamentary privilege to documents seized by police under warrant...[and that] it should be for the courts to apply the law of parliamentary privilege and to make such determinations, as the courts do with any other law.*<sup>24</sup>

Despite this view, the Senate Committee of Privileges was conscious of the need to introduce procedures in relation to the execution of search warrants in the premises of senators to ensure that material which is covered by parliamentary privilege is appropriately protected. The committee reiterated a previous recommendation that guidelines be established between the Presiding Officers and the Australian Federal Police and that such guidelines also apply to police forces in all the States and Territories in Australia.<sup>25</sup> A Memorandum of Understanding and the Australian Federal Police Guidelines governing the execution of search warrants in the premises of senators and members were tabled and debated in the Senate on 9 March 2005. These documents had been agreed to by the Presiding Officers, the Attorney-General and the Minister for Justice and Customs and "provide that any executions of search warrants in the premises of senators and members are to be carried out in such a way as to allow claims to be made that documents are immune

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<sup>20</sup> *Ibid*, pp. 8-10.

<sup>21</sup> Senate Committee of Privileges 114th Report, *Execution of Search Warrants in Senators' Offices – Senator Harris: Matters Arising from the 105th Report of the Committee of Privileges*, August 2003, pp. 2-4.

<sup>22</sup> *Ibid*, p. 8.

<sup>23</sup> *Ibid*, p. 9.

<sup>24</sup> *Ibid*.

<sup>25</sup> *Ibid*, p. 10.

from seizure by virtue of parliamentary privilege and to allow such claims to be determined by the House concerned...<sup>26</sup>

The execution of search warrants in members' offices and whether this could possibly be a breach of parliamentary privilege has also been an issue in New South Wales. In October 2003, the Independent Commission Against Corruption seized material from the office of a member of the Legislative Council after executing a search warrant. Concerns were raised by the member and also by counsel advising the Clerk that the seizure of certain material, namely the hard drives and laptop computers, may be unlawful and in breach of parliamentary privilege. Following correspondence between the President of the Legislative Council and the Commission on this matter, the ICAC returned the material in question to the Clerk to hold until the matter of whether the seizure was lawful or not was resolved.<sup>27</sup> The matter was then referred to the Legislative Council Standing Committee on Parliamentary Privilege and Ethics for consideration.<sup>28</sup>

The committee concluded that the ICAC had breached the immunities of the House by executing the search warrant on the Parliament House office of the member and recommended that all material seized from the member's office be returned to the President and that once returned they would remain in the possession of the Clerk until the issue of parliamentary privilege was determined.<sup>29</sup> A resolution was subsequently passed by the House to this effect. The resolution specified that the member was to identify what documents were considered to be a "proceeding in Parliament" and set out a number of criteria as to what was considered to be a "proceeding of Parliament" to provide guidance.<sup>30</sup>

The Commissioner of the ICAC in response to this resolution noted that she disagreed with the finding of the committee that the immunities of the Legislative Council were breached by the execution of the search warrant and referred to the opinion of Justice French in *Crane v Gething* "that the issue and execution of a search warrant does not infringe section 16 of the *Parliamentary Privileges Act 1987* (Cmth) which reflects Article 9 of the *Bill of Rights*."<sup>31</sup> The commissioner did, however, agree to abide by the resolution to ensure that the integrity of the investigation was in no way compromised.

There is little doubt that the Legislative Council committee was correct in determining that "Article 9 applies so as to prevent the seizure of a document under search warrant, where, as a natural consequence of the seizure, a questioning or impeaching of proceedings in Parliament within the meaning of Article 9 necessarily results."<sup>32</sup> It should be noted in relation to this incident that, due to the application of section 122 of the *Independent Commission Against Corruption Act 1988* (which provides that "Nothing in this Act shall be taken to affect the rights and privileges of

<sup>26</sup> Department of the Senate Procedural Information Bulletin, No. 189, for the sitting period 7 – 17 March 2005, pp. 1-2. See also the Senate Parliamentary Debates, 9 March 2005, pp. 91 – 92.

<sup>27</sup> See comments by the President of the Legislative Council, PD 14/10/2003, p. 3671.

<sup>28</sup> PD 15/10/2003, pp. 3790-5.

<sup>29</sup> Legislative Council Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary Privilege and the Seizure of Documents by ICAC*, December 2003, pp. x and xi.

<sup>30</sup> See resolution of the Legislative Council, PD 04/12/2003, p. 5853.

<sup>31</sup> See PD 05/12/2003, p. 6020 where the President of the Legislative Council communicated to the House the response of the ICAC to the resolution of the House passed on 04/12/2003.

<sup>32</sup> Legislative Council Standing Committee on Parliamentary Privilege and Ethics, *Parliamentary Privilege and the Seizure of Documents by ICAC*, December 2003, p. 36.

Parliament in relation to the freedom of speech, and debates and proceedings in Parliament”) and the application of Article 9 of the *Bill of Rights* in New South Wales, parliamentary privilege can be claimed for those documents or statements that are integral to transacting business in the House or the “proceedings of Parliament”.

The issue of search warrants was considered more generally by the Legislative Council Privileges Committee in 2005. The Committee’s report tabled in February 2006 recommended protocols and procedures that should be followed by law enforcement agencies and investigative bodies when they are executing search warrants on the offices of members of parliament.<sup>33</sup> The issue was also been referred to the Legislative Assembly Standing Committee on Parliamentary Privilege and Ethics.<sup>34</sup> Guidelines governing the execution of search warrants in members’ offices are yet to be adopted by the Legislative Assembly.

It should be noted, because parliamentary privilege is in place for the benefit of the House as a whole and not for the benefit of any individual member, it is appropriate for the Presiding Officer of the relevant House to uphold the privileges so far as it concerns their House. Given this, the Speaker, as representative of the House, is responsible for ensuring that members, whose offices have been subject to a search warrant, are adequately protected in terms of parliamentary privilege.<sup>35</sup>

## 5.2 Raising matters of privilege in the House

Historically, the Legislative Assembly had dealt with privilege matters on the floor of the House. However, since December 2003 members can only raise in the House a matter of privilege suddenly arising relating to the proceedings then before the House (S.O. 91).<sup>36</sup> Other matters of privilege that members might wish to raise must be so raised in accordance with standing order 92, which provides:

- (1) A member desiring to raise a matter of privilege must inform the Speaker of the details in writing.
- (2) The Speaker must consider the matter within 14 days and decide whether a motion to refer the matter to the Standing Committee on Parliamentary Privilege and Ethics (the committee) is to take precedence under the standing orders. The Speaker must notify his decision in writing to the member.
- (3) While a matter is being considered by the Speaker, a member must not take any action or refer to the matter in the House.
- (4) If the Speaker decides that a motion for referral should take precedence, the member may, at any time when there is no business before the House, give notice of a motion to refer the matter to the committee. The notice must take precedence under standing order 118 on the next sitting day (unless the sitting day is a Friday sitting).
- (5) If the Speaker decides that the matter should not be the subject of a notice of referral, a member is not prevented from giving a notice of motion in relation to the matter. Such notice shall not have precedence.
- (6) If a notice of motion is given under paragraph (4), but the House is not expected to meet on the day following the giving of the notice or the next sitting day is a Friday sitting, with the

<sup>33</sup> NSW Legislative Council Privileges Committee, *Protocol for execution of search warrants on members’ offices*, Report 33, 28 February 2006.

<sup>34</sup> VP 09/06/2005, p. 1464.

<sup>35</sup> The role of the Presiding Officers in relation to the execution of search warrants was recently seen in British Columbia, where the approval of the Speaker was sought prior to the execution of a search warrant on offices located within the Parliament building. See the *Table Review: Newsletter of the Association of Clerks-at-the-Table in Canada*, Winter 2004, pp. 9-10.

<sup>36</sup> This procedure was first adopted by the House as a sessional order in December 2003 and was adopted as a standing order in November 2006.

leave of the House, the motion may be moved at a later hour of the sitting at which the notice is given.

Matters of privilege suddenly arising are also dealt with in accordance with the standing orders. Standing order 79 provides that a member may interrupt another member in order to raise a matter of privilege or contempt “suddenly arising” relating to proceedings then before the House. The member may then, under the provisions of standing order 91 address the House for up to 10 minutes in order to satisfy the Speaker that: the matter is one suddenly arising and should be dealt with at the earliest opportunity; that there is a prima facie case; and that the member has a prepared notice of motion. If so satisfied, the Speaker will rule that the matter should proceed forthwith or have precedence of other business on the next sitting day. Such motions are accorded precedence under standing order 118.

Speakers’ rulings indicate that for a matter to be accorded precedence as one of privilege:

*The Chair must be satisfied that the member’s privilege has been breached by disobedience of general orders or rules of the House, disobedience of particular orders, indignities offered to the character or proceedings of the Parliament, assaults or insults upon members or reflection upon their character, or interference with officers of the House in the discharge of their duties.<sup>37</sup>*

Under the former committee of the whole procedure if a matter of privilege was raised in committee the Chairman left the Chair and informed the Speaker but made no further report. After the matter of privilege was dealt with by the House, proceedings in committee of the whole resumed where they had been interrupted. If a matter of privilege or contempt is raised during the consideration in detail stage the matter must be dealt with by the House before the proceedings in the consideration in detail stage continue.

Matters of privilege not suddenly arising that are not referred by the Speaker to the Standing Committee on Parliamentary Privilege and Ethics for consideration are able to be raised by way of a notice of motion in accordance with standing order 92(5), which provides that “if the Speaker decides that the matter should not be the subject of a notice of referral, a member is not prevented from giving a notice of motion in relation to the matter. Such notice shall not have precedence.”

#### **5.2.1 Contempt and breaches of privilege**

Contempt of the Parliament is ancillary to privilege and to constitute a contempt an act or omission must obstruct or impede the House (or a committee of the House), a member or an officer in the discharge of a duty.

Disrespect to the House collectively has been described as “the original and fundamental form of breach of privilege”. It includes libels on the House at large, upon the Presiding Officers and upon parliamentary committees. Proceedings against a member or officer of either House in the courts for their conduct in obedience to the orders of Parliament are further instances of alleged breaches of privilege.

<sup>37</sup> Ruling given by Speaker Murray 8 April 1998, *Legislative Assembly Parliamentary Debates*, 8 April 1998, p. 3874.

The acts which historically constitute breaches of privilege are many and are dealt with exhaustively in *May*<sup>38</sup>. A breach of privilege has been constituted by such acts as: disrespect to any member of the House, as such, by a person not being a member; disrespect to the House collectively, whether committed by a member or any other person; disobedience to orders of the House; and interference with its procedure, with its officers in the execution of their duty, or with witnesses in respect of evidence given before the House or a committee of the House. Disrespect to a member includes attempts to threaten or intimidate that member, or any libel concerning their conduct in the House.

In 1857, Speaker Cooper, in the course of a ruling on a complaint said, in effect, that parliamentary privilege was not affected unless the matter raised referred to proceedings in the House; to the conduct of any member in the House; or to the conduct of any person, not being a member, in connection with any proceedings in the House.<sup>39</sup>

Members often rise claiming that the privileges of the House have been breached by a member deliberately misleading the House. However, it has become accepted practice in New South Wales that whether something said in the House is misleading or truthful does not establish a matter of privilege.<sup>40</sup> Whilst it is not considered to be a matter of privilege, deliberately misleading the House may be considered to be a contempt of Parliament. *May* notes that the House of Commons in the United Kingdom "...may treat the making of a deliberately misleading statement as a contempt."<sup>41</sup> Reference is made to the Profumo case where a British Cabinet Minister, John Profumo, knowingly made a statement to the House of Commons which was later proved conclusively to be untrue. Profumo admitted to having deliberately set out to mislead the House and he was found guilty of contempt. Given this case, it seems to have become accepted practice in Westminster style parliaments that unless it is proved that a member deliberately misled the House, no action will be taken against the member.<sup>42</sup>

### **5.2.2 Issues raised as a matter of privilege 1991-2006**

The table below lists recent privilege issues raised and the outcome in the House. Entries marked \* indicate that the matter was accepted as one of privilege by the Speaker.

1991

Issue	Outcome
A member rose on a matter of privilege claiming that his privilege had been breached due to the fact that the Premier had been interrupted whilst giving a financial statement pursuant to sessional orders and that information concerning the impact of the statement was heard on the television and radio prior to the Premier concluding the speech in the House. <sup>43</sup>	No prima facie case established – the statement had been interrupted pursuant to sessional orders to enable private members' statements to proceed.

<sup>38</sup> See *May*, 23rd edition, 2004, pp. 75 ff.

<sup>39</sup> VP 30/10/1857, p. 127.

<sup>40</sup> See ruling of Speaker Rozzoli, PD 26/10/1994, p. 4678.

<sup>41</sup> *May*, p. 132.

<sup>42</sup> See Legislative Assembly of Ontario, Votes and Proceedings, No. 21, 17 June 2002 and information concerning the National Assembly of Quebec in *Table Review: Newsletter of the Association of Clerks-at-the-Table in Canada*, Fall 2003, p. 5.

<sup>43</sup> PD 02/07/1991, pp. 58-9.

<p>* Member threatened and assaulted as a result of actions taken by him in regard to information received as a member of Parliament.<sup>44</sup></p>	<p>Speaker ruled that a prima facie case established as the matter concerned the privileges of the Parliament – Question put and passed:</p> <p>“That this House:</p> <ol style="list-style-type: none"> <li>(1) views with grave concern the actions of certain persons in assaulting and threatening the honourable member for Londonderry;</li> <li>(2) reaffirms the principle that any action which attempts to obstruct or impede a member in properly carrying out his or her duties as a member constitutes a contempt of this House; and</li> <li>(3) calls upon the responsible authorities to fully investigate, as a matter of the greatest urgency, the matters raised by the honourable member.”</li> </ol>
<p>* Member alleged fraudulent press releases and a letter circulating in his name and containing views he did not represent.<sup>45</sup></p>	<p>Speaker ruled that a prima facie case established and ordered that the motion be given precedence on the next sitting day. That same day, the member made a personal explanation to the House during which he noted that he could not prove beyond reasonable doubt that the letter in question was a forgery. A censure motion was moved the next sitting day on the member for misleading the House. The motion was negated on division with the Speaker making a casting vote.</p>

## 1992

Issue	Outcome
<p>*Petition requesting that parliamentary privilege be waived to enable solicitors and counsel for the AMA to examine and comment on a PAC report in judicial proceedings.<sup>46</sup></p>	<p>The House declined to waive privilege and passed the following motion:</p> <p>“That in response to the petition of Dr Stuart Boland, President of New South Wales Branch of the AMA, presented to the House on Friday 6 March 1992, this House –</p> <ol style="list-style-type: none"> <li>(1) Declines to waive such Parliamentary Privilege as would preclude the Solicitors and Counsel for the AMA from examining and commenting upon the PAC Report on Payments to Visiting Medical Officers, No. 45 – June 1989, in proceedings currently before the Honourable Justice Hungerford Q.C.</li> <li>(2) Re-affirms article 9 of the <i>Bill of Rights</i> 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’.</li> <li>(3) Re-affirms the Parliamentary Privilege attaching to the reports, minutes of proceedings and evidence of all Committees of this Parliament.”</li> </ol>
<p>Member claimed his privilege had been prejudiced by the Speaker’s decision not to permit television and audio recording of the day’s session.<sup>47</sup></p>	<p>Speaker ruled that the standing orders of the House do not authorise television and audio recording.</p>
<p>Member raised as a matter of privilege the large number of reports tabled together in the House – he argued that his privilege had been infringed as the</p>	<p>No point of privilege. Speaker ruled that the Chair has no authority to direct Ministers when they should table papers and that it is a matter for the substance of the</p>

<sup>44</sup> VP 12/09/1991, pp. 145-7.

<sup>45</sup> PD 24/10/1991, pp. 3356-9; and pp. 3445-7; PD 29/10/1991, pp. 3574-624 and pp. 3630-54

<sup>46</sup> VP 06/03/1992, p. 105 and VP 10/03/1992, p. 122

<sup>47</sup> VP 28/04/1992, p. 243.

reports had not been made available during recent estimates committees hearings. <sup>48</sup>	law rather than a matter of privilege, in that, the law requires certain papers to be tabled by a particular date and that the schedule for tabling of papers would need to be amended to effect any change.
Notice of motion held over pending ruling from the Chair. A member raised a matter of privilege asking the Speaker if he intended to rule out a motion that involved a proposed action by the Government. <sup>49</sup>	No point of privilege – Speaker ruled that such remarks could be construed as intimidatory of the Chair.
Member raised as a matter of privilege that some answers to questions on the joint estimates committees Q & A paper had not been answered by the due date. <sup>50</sup>	No point of privilege. Minister replied that all answers had been submitted but had not been included in the proof copy. The Speaker confirmed that the answers would be in the corrected copy.

## 1993

Issue	Outcome
Member rose on a matter of privilege that his role as an MP had been infringed by a pamphlet being circulated in a Federal electorate. <sup>51</sup>	No prima facie case established. Speaker ruled that the member should have made a personal explanation and thought that he had done so.
Member rose on a matter of privilege claiming an incomplete and incorrect answer was provided by a Minister on the Questions & Answers paper. <sup>52</sup>	No point of privilege. Speaker ruled that the matter was not one of privilege and that there were other procedures of the House available to pursue the matter.
* Member rose on a matter of privilege concerning legal proceedings taken against her in relation to the administration of FANMAC. <sup>53</sup>	Prima facie case of breach of privilege established as the legal proceedings implied a threat to a member in the carrying out of the member's duties. Motion agreed to by the House.
Question on notice not fully answered. <sup>54</sup>	No point of privilege – Speaker ruled that the matter, if anything, is a point of order about the way questions are answered. He also ruled that as the standing orders do not specify the way in which Ministers are required to answer questions and as such any point of order raised would not be upheld.
Questions on the Questions & Answers paper <sup>55</sup>	No point of privilege – Speaker ruled that it is a matter of order not privilege and that the Chair has no power over the way questions are answered.
Member rose on a matter of privilege claiming that a member had accused him of lying. <sup>56</sup>	No point of privilege – the Speaker ruled that the House would accept the Minister's statement as a personal explanation.
* Police intimidation over allegations raised by a member in good faith. <sup>57</sup>	Prima facie case of breach of privilege established. No debate or vote taken on the motion.

## 1994

Issue	Outcome
Member rose on a matter of privilege and quoted from a letter from a firm of lawyers acting on behalf of another member concerning a subpoena for the production of documents. The member claimed that the service of a subpoena was intimidatory, threatening	No prima facie case established. The Speaker considered that the words used in the letter were commonly used by solicitors and were not particularly directed at the member.

<sup>48</sup> PD 17/11/1992, p. 8986.<sup>49</sup> PD 25/11/1992, p. 9896.<sup>50</sup> PD 27/11/1992, p. 10453.<sup>51</sup> PD 04/03/1993, p. 376.<sup>52</sup> PD 31/03/1993, p. 1038.<sup>53</sup> PD 27/04/1993, pp. 1597-1600.<sup>54</sup> PD 12/05/1993, p. 1991.<sup>55</sup> PD 13/05/1993, p. 2076.<sup>56</sup> PD 14/09/1993, p. 3078.<sup>57</sup> PD 11/11/1993, p. 5289.

and attempted to silence him in the continuation of his role as an MP. <sup>58</sup>	
A member of Parliament was being escorted to and from the Chamber by parliamentary security staff. Another member claimed that this was a breach of his privilege as he claimed that security staff were blocking access to the dining room and level 11 offices. The member argued that his privilege had been affected as he felt intimidated and threatened by the posting of a security guard outside the Chamber and the dining room and also impeded his access to certain parts of the parliamentary precincts. <sup>59</sup>	No prima facie case established. Speaker noted that the right of privilege principally attaches to members' right to the freedom of speech – the Speaker commented that he had seen no evidence of any member being inhibited in what he or she wished to say. The Speaker also noted that the role of Parliamentary Security "is to maintain the proper security of the Parliament and to perform certain other duties". The Speaker stated that he would investigate the matter to ensure that the action taken was correct and proper and in accordance with the maintenance of parliamentary security.
Statement in the House was misleading or untrue. <sup>60</sup>	No point of privilege. Speaker stated: "Whether something said in the House is misleading or truthful does not establish a matter of privilege. It should not even be the basis of a point of order. Other forms of the House can be used to make counter allegations."

## 1995

Issue	Outcome
Member precluded from proper carriage of electoral duties through the breakdown of working relationship with electorate office staff and the threats of the union lodging a complaint with the Anti-Discrimination Board. <sup>61</sup>	No prima facie case established. Motion asserting breach of privilege negated on division.

## 1996

Issue	Outcome
Following the removal of a member from the Chamber a matter of privilege was raised that the Speaker had no right to require member to be returned to the House in order to be named. <sup>62</sup>	The Speaker ruled that it is not the practice of the House to compel the return of a member and noted that force was not used. <sup>63</sup>
Need to clarify whether the Opposition parties were in coalition. <sup>64</sup>	Speaker ruled that it was not a matter of privilege. In doing so he referred to a ruling of Speaker Ellis which stated:  "For the Chair to be satisfied that a prima facie case of breach of privilege has been established, one of the following elements should be involved in such a breach: disobedience to general orders or rules of either House; disobedience to particular orders; indignities offered to the character of proceedings of Parliament; assaults or insults upon members or reflections upon their character or conduct in Parliament; or interference with officers of the House in the discharge of their duties. The Chair must

<sup>58</sup> PD 20/04/1994, p. 1448; PD 03/05/1994, p. 1735.

<sup>59</sup> PD 13/05/1994, pp. 2620-1.

<sup>60</sup> PD 26/10/1994, p. 4678.

<sup>61</sup> VP 24/05/95, p. 50; VP 25/05/95, p. 67; VP 01/06/95, pp. 105-6.

<sup>62</sup> PD 22/05/96, p. 1372.

<sup>63</sup> PD 27/06/96, p. 3821.

<sup>64</sup> PD17/09/96, 4155-6; PD 18/09/96, p. 4292.

	<p>determine also whether the matter complained of could be said fairly and reasonably to be capable of interfering with members in the performance of their duties.”</p> <p>He also noted that the matter was based on matters relating to internal party arrangements which do not fully impinge on the privilege of any member of this House.</p>
Speaker failed to protect privileges of members by not requiring Minister to withdraw allegation that two members were "protectors of paedophiles". <sup>65</sup>	Speaker ruled that it was not a matter of privilege but for personal explanation.
Intimidated by another member. <sup>66</sup>	<p>Member raised as a matter of privilege that a member from the opposite side of the Chamber had threatened her in an intimidating manner. The member in question had already been removed from the Chamber on the Speaker's order.</p> <p>A point of order was raised that a matter of privilege must be one suddenly arising, that there be a prima facie case, that the member have a prepared notice of motion, and that the matter proceed forthwith. The Speaker said that the member had 10 minutes in which to establish her case and asked if the member wished to pursue the matter further. The member did not proceed.</p>

## 1997

Issue	Outcome
Threat of defamation proceedings if matter repeated outside the House. <sup>67</sup>	No prima facie case established as the Speaker ruled it did not preclude the member from freedom of speech in raising matters in the House.

## 1998

Issue	Outcome
Use of telephoto lenses in the Chamber. <sup>68</sup>	Speaker said he would discuss the matter privately.
Potential security threat to members and staff of possible union demonstrations at Parliament House. <sup>69</sup>	The Speaker ruled that there was no privilege involved as a claim of privilege must relate to an actual event not one that is foreseen. In this instance no member had been obstructed in their duties when the claim of breach of privilege was made.
Ministers' use of correspondence sent to them by members. <sup>70</sup>	No prima facie case established. The Speaker referred to the report of the Joint Select Committee on Parliamentary Privilege which concluded that members' correspondence was not privileged.

<sup>65</sup> PD 17/10/1996, pp. 5045-6; PD 22/10/1996, pp. 5147-8.

<sup>66</sup> PD 14/11/1996, p. 6057.

<sup>67</sup> VP 20/11/1997, p. 293; VP 25/11/1997, pp. 308-9.

<sup>68</sup> PD 08/04/1998, p. 3874.

<sup>69</sup> VP 08/04/1998, p. 489.

<sup>70</sup> VP 29/04/1998, p. 513.

Alleged error in <i>Hansard</i> proofs. <sup>71</sup>	Speaker referred the matter to the Editor of Debates.
A motion for urgent consideration condemned four members but the standing orders would prevent all those members having an opportunity to speak in response. <sup>72</sup>	Speaker ruled that any vote of the House to proceed with the motion overcame any problem.
Circulation of member's misdirected e-mail. <sup>73</sup>	It was implied that the Speaker had misdirected a member's email that had been received by a member of his staff. Speaker ruled that no prima facie case established and that should a member wish to attack the Chair that they must do so by way of substantive motion.

## 2000

Issue	Outcome
Comments made by the Premier during Question Time concerning an Opposition chat line. <sup>74</sup>	No prima facie case established as the Speaker ruled that the matter complained of did not impair the member's authority or his ability to perform his duties.
Question on notice had not been answered in the time allowed. <sup>75</sup>	No point of privilege – the Speaker undertook to draw the matter to the attention of the relevant Minister.
Inability of the Opposition to respond to significant matters when the Government makes statements during Question Time rather than by making ministerial statements. <sup>76</sup>	No point of privilege - Speaker ruled the matter out of order.
Media release issued by the Premier which distorted the circumstances leading to a member's removal from the Chamber and thereby represented that the removal was orchestrated. <sup>77</sup>	No prima facie case established as the Speaker did not consider that the member's authority, immunity or dignity had been affected.
A Minister had trivialised Question Time by denying members the right to ask questions under standing order 135 in that the Minister had responded with a simple "yes" to a question and provided no details. <sup>78</sup>	No point of privilege involved as the Speaker cannot order a Minister to answer a question without notice in a particular way.

## 2001

Issue	Outcome
Speaker had failed to uphold the standing orders particularly S.O. 105 (consideration of a point of order) and S.O. 138 (answer relevant). <sup>79</sup>	After hearing the member's arguments as to why his privilege had been affected the Speaker ruled that no prima facie case of privilege was established.

<sup>71</sup> PD 28/05/1998, p. 5426.

<sup>72</sup> PD 04/06/1998, p. 5828.

<sup>73</sup> PD 24/09/1998, p. 8035.

<sup>74</sup> VP 06/04/2000, p. 373.

<sup>75</sup> PD 09/06/2000, p. 6990.

<sup>76</sup> PD 29/06/2000, p. 7879.

<sup>77</sup> VP 10/08/2000, p. 709.

<sup>78</sup> VP 30/11/2000, p. 985.

<sup>79</sup> PD 08/03/2001, p. 12493. The Member also foreshadowed a censure motion against the Speaker when raising the point of order.

The failure of the Minister for Health to answer a question on notice satisfactorily. <sup>80</sup>	No prima facie case established. The Speaker ruled:  "Under the standing orders the Chair is entitled to exercise a degree of control over the content of questions that are directed to Ministers. However, the Chair has no control over the content of Ministers' answers. If a printed answer is presented, that is acceptable under the standing orders. If the argument put forward by the honourable member for North Shore was accepted, the Chair would spend all day and all night checking the veracity of every answer provided by Ministers."
Member had been placed on three calls to order by the Speaker which had hampered their ability to take a point of order during Question Time. <sup>81</sup>	No prima facie case established. The Speaker noted that in ruling on a matter of privilege he must decide whether the matter complained of could fairly and reasonably be said to be capable of interfering with the performance of his duty as a member. The Speaker ruled that as the member had been able to address the House that the rulings of the Chair had not interfered with the performance of his duty.
The recording of the attendance of members during the sitting in the <i>Votes and Proceedings</i> . <sup>82</sup>	Speaker did not make a ruling. However, it was agreed that attendance would not be recorded in the <i>Votes and Proceedings</i> .
The presence of a stranger in the House. <sup>83</sup>	The Speaker reserved his decision as to whether a prima facie case had been established and later advised the House that he had accepted the apology of the stranger and that no further action would be taken.
Members of the public had been denied access to the public gallery during Question Time due to the blockade of the Parliament by members of a construction union. <sup>84</sup>	Speaker ruled that there was no point of privilege.
Electorate office security and accessing of computers in the electorate office by an unauthorised person. <sup>85</sup>	Speaker ruled that the matter, although serious, did not satisfy the criteria for a breach of privilege. He undertook to have the matter investigated.
Premier breaching standing orders 104 and 105 (raising points of order) and the Speaker's complicity in the Premier's actions. <sup>86</sup>	Speaker warned the member not to reflect on the Chair and drew the attention of the House to a ruling of Speaker Rozzoli in 1993 that "The content or relevance of a Minister's answer to a question on notice is not a matter of privilege". The Speaker ruled that a prima facie case had not been established.

<sup>80</sup> PD 05/04/2001, p. 13339.

<sup>81</sup> PD 10/04/2001, p. 13459.

<sup>82</sup> PD 01/06/2001, pp. 14243 and 14247.

<sup>83</sup> PD 20/06/2001, p. 14884; PD 25/06/2001, p. 15174.

<sup>84</sup> PD 19/06/2001, pp. 14765-6.

<sup>85</sup> PD 26/06/2001, p. 15351.

<sup>86</sup> PD 08/11/2001, pp. 18294-7.

## 2002

Issue	Outcome
A member rose on a matter of privilege relating to interruptions during debate due to the Leader of the House raising points of order.	Speaker ruled that no prima facie case had been established as the member had not established how his privileges had been breached. <sup>87</sup>
A member rose on a matter of privilege relating to security in Parliament House following an incident in the public gallery which disrupted proceedings.	Speaker did not accept the matter of privilege and outlined recent security initiatives taken at Parliament House. <sup>88</sup>
A member rose on a matter of privilege relating to security in Parliament following an incident where a member of the public gained entry to the Bar and was then escorted from the Chamber.	The Speaker did not rule on the matter but noted that he had received a verbal report of the incident. <sup>89</sup>

## 2003

Issue	Outcome
A member rose on a point of order that his privilege as a member of the House had been affected due to the Liberal/National Coalition members not being given the call during the debate on a matter of public importance.	The Acting Speaker ruled that a matter of privilege could not be raised as a point of order and a matter of privilege could only be raised when there is no other business before the House. The matter was not raised again. <sup>90</sup>
A member raised as a matter of privilege the removal of a member from the Chamber by the Deputy Serjeant-at-Arms arguing that standing order 288 requires the ejection to be carried out by the Serjeant-at-Arms, who was not in the Chamber at the time.	The Acting Speaker ruled that no prima facie case had been established and reminded members that the Serjeant-at-Arms is also the Clerk-Assistant (Procedure) who has duties at the Table. The Acting Speaker also informed the House that the Deputy Serjeant-at-Arms acts under the delegation of the Serjeant-at-Arms and that accordingly he had requested the Deputy to escort the member from the House. <sup>91</sup>
A member rose on a matter of privilege that the Premier had failed to provide an answer to a question without notice which he said he would seek and report back to the House.	The Speaker ruled that no prima facie case had been established and advised the member that whether a Minister chose to respond to a question without notice does not give rise to a breach of privilege. The Speaker also went on to note that the fact a Minister has given an undertaking to provide a response and failed to do so does not infringe in any way on the privileges or rights of the members who asked the question. <sup>92</sup>
A member rose on a matter of privilege that the conduct of a representative of the Department of Local Government prevented her from speaking at a public meeting in her electorate.	The Speaker ruled that no prima facie case of a breach of privilege had been established and noted that he had come to this conclusion on the basis that the actions complained of had not prevented the member from exercising her freedom of speech in the House, had not prevented her from attending the service of the House and were not an impairment of the member in relation to her duties in connection with the proceedings of the House. The Speaker did, however, note that the issues raised by the member were serious and that such actions may even be considered a contempt of the House. <sup>93</sup>
A member rose on a matter of privilege that members have an undoubted right and privilege to receive answers from Ministers for their correspondence on behalf of constituents noting that whilst the constituents in question had received a response that he had not	The Speaker ruled that no prima facies breach of privilege had been established but concurred that it is important for members to be able to obtain answers to correspondence from Ministers but that it is not a breach of privilege for a Minister to respond directly to

<sup>87</sup> PD 11/04/2002, p. 1449.

<sup>88</sup> VP 20/11/2002, p. 637.

<sup>89</sup> VP 21/11/2002, p. 647.

<sup>90</sup> PD 25/06/2003, p. 2149.

<sup>91</sup> PD 03/07/2003, p. 2848.

<sup>92</sup> PD 04/09/2003, pp. 3208-9.

<sup>93</sup> PD 14/10/2003, pp. 3746-7; PD 16/10/2003, p. 4081.

received any. The member argued that both the constituent and the member are entitled to a response from the Executive Government.	a constituent and not through the member who raised the issue. <sup>94</sup>
A member rose on a matter of privilege that it is the fundamental right of members to receive accurate and truthful answers from Ministers to questions on notice and drew the attention of the House to an answer he had received.	The Speaker ruled that no prima facie case of privilege was involved noting that in the past he and his predecessors had ruled that the Chair cannot direct a Minister how to answer a question, whether it be a question on notice or a question without notice. <sup>95</sup>
A member rose on a matter of privilege that he had been advised by a Minister, to which he had asked a question with notice, that another Minister was responsible for the area concerned and that when he had directed the question to the other Minister that he had been informed that the original Minister who was asked the question was in fact the appropriate Minister.	The Speaker reminded the member that the Chair cannot direct a Minister how to answer a question or whether the question should be answered. The Speaker did note that although it was not a matter of privilege that matters relating to the answering of questions can be taken up by members with the Ministers concerned. <sup>96</sup>
A member rose on a matter of privilege that when the Speaker indicated that his motion would be re-worded on the basis that it contained debate he had inferred that the motion was not accurate and as such that his privileges had been abused.	The Speaker did not rule on the matter of privilege but advised the member that he had not intended to imply that the notice of motion given was in any way inaccurate but that as the motion was longwinded and, in the view of the Chair, contained matters of debate the member was to re-word the motion. <sup>97</sup>

## 2004

Issue	Outcome
A member rose on a matter of privilege that the standing orders had been applied to members of the Opposition and members of the Government unequally and accordingly that his privileges had been subjugated.	The Speaker ruled that it was not a matter of privilege and warned the member that he should not reflect on the Chair in the way that he had. <sup>98</sup>
A member rose on a matter of privilege that there was a discrepancy between the video and the <i>Hansard</i> record of an answer given by a Minister to a question without notice given the day before.	The Speaker reserved his ruling until later in the sitting when he stated that he had examined the video and the <i>Hansard</i> report, and directed that, on this occasion, the <i>Hansard</i> report should reflect the video record. <sup>99</sup>
The Leader of the Opposition sought to raise a matter of privilege that the Premier had claimed that Opposition members of a Legislative Council committee had voted against a motion, arguing there had been no vote.  The Leader of the House rose on a point of order arguing that the Leader of the Opposition's privilege as a member of the Legislative Assembly was not affected by a vote by members on a Legislative Council committee.	The Speaker agreed with the Leader of the House and advised that the standing orders provide for members who believe they have been misrepresented in some way to take a point of privilege at the time the matter to which the objection is taken is raised. He also informed the House that should members wish to take issue with the actions of other members, there are other ways under the standing orders in which it can be done. <sup>100</sup>

## 2005

Issue	Outcome
A member rose on a matter of privilege in relation to a notice of motion standing in his name on the business paper. He noted that there was a discrepancy with the numbering of his motion on the business paper as shown on the Parliament's website and on the program for the day. He also noted that a paragraph was missing from his motion. <sup>101</sup>	The Speaker noted that he had referred the matter to the Clerk for investigation and that he did not regard it as a matter of privilege. The Speaker did however note if there had been an error in the recording of the motion, an explanation would be provided to the member and the error corrected.

<sup>94</sup> PD 29/10/2003, pp. 4372-3.<sup>95</sup> PD 13/11/2003, pp. 4988-9.<sup>96</sup> PD 18/11/2003, p. 5133.<sup>97</sup> PD 02/12/2003, p. 5589.<sup>98</sup> PD 26/02/2004, p. 6721.<sup>99</sup> PD 17/03/2004, pp. 7454-5 and pp. 7472-3<sup>100</sup> PD 31/08/2004, p. 10515.<sup>101</sup> PD 30/11/2005, p. 20367.

A member rose on a matter of privilege in relation to a question on notice submitted by him that had been rewritten by the Clerks. <sup>102</sup>	The Speaker noted that questions on notice may be corrected by the Clerks to assist members and that it is often done in consultation with the member who has submitted the question. The Speaker advised the member that if he was unhappy with the way the question had been recorded he should discuss it with the Clerks and arrive at a version with which he is happy and that complies with the standing orders.
A member wrote to the Speaker raising a matter of privilege in relation to attempts by a development group to silence him by prohibiting the use of any part or parts of the contract in any statement made in Parliament and attempts to deny constituents the right to provide information to their local member. <sup>103</sup>	The Speaker advised the member that while the matter raised was serious and may constitute a contempt of the House. However, as the matter had been resolved (with the member making a statement in the House) nothing would be gained from having the Privileges Committee examine the matter.

## 2006

Issue	Outcome
A member rose on a matter of privilege in relation to private members' statements. He noted that sessional orders had been adopted to allow members from either side of the House to make statements on matters affecting their electorates but that that privilege had been taken away that afternoon due to the suspension of standing and sessional orders. <sup>104</sup>	The Speaker ruled that there was no point of privilege.
A member rose on a matter of privilege in relation to threats of violence that had been made against female members of the Liberal Party and The Nationals of the NSW Parliament by a Government member in the Legislative Council and that the Premier had refused to answer a question on the matter. <sup>105</sup>	The Speaker ruled that, whilst the comments made in the other House may have been inappropriate, such remarks do not form the basis for a claim of breach of privilege. The Speaker ruled that a prima facie breach of privilege had not occurred and that to make a privilege issue out of every alleged insult or reflection made about a member in the House or the Legislative Council would arguably in turn threaten a member's right to freedom of speech.
Following the conclusion of questions without notice a member rose on a matter of privilege that the Leader of the House had impugned the reputation of many Opposition members in his response to a question. <sup>106</sup>	The Speaker noted that the Minister's remarks were made in a general sense and that there was no issue of privilege.
A member rose on a matter of privilege that the <i>Hansard</i> record of the previous day's proceedings did not reflect what was said by a Minister. <sup>107</sup>	After consideration of the matter the Speaker ruled that it was not one of privilege noting that in the editing of <i>Hansard</i> obvious mistakes are corrected and redundancies removed and that the matter raised related to an obvious error that had been corrected.

### 5.3 Executive interference in the Parliament

This area of parliamentary privilege has received a fair deal of attention in recent times. Concerns have arisen regarding claims of privilege made by the Executive and in relation to the Executive Government impinging on the work of the Parliament, particularly the work of parliamentary committees. Some of the concerns are in regard to witnesses refusing to answer questions on the basis of statutory secrecy provisions and also when there is alleged interference by the Executive Government with witnesses due to appear before parliamentary committees. Another area of concern is the power of the Parliament to summon ministerial staff before a House or

<sup>102</sup> PD 30/11/2005, p. 20367.

<sup>103</sup> This was the first occasion since the House had passed a resolution in December 2003 that a member had raised a matter of privilege not suddenly arising.

<sup>104</sup> PD 07/03/2006, p. 21118.

<sup>105</sup> PD 03/05/2006, pp. 22522-4 & 22546.

<sup>106</sup> PD 21/09/2006, p. 2123.

<sup>107</sup> PD 18/10/2006, p. 2908 and PD 19/10/2006, pp. 3067-8.

one of its committees. This is an area in which there are few court rulings and legal advice on the matter has been conflicting.

### **5.3.1 Claims of privilege made by the Executive**

Throughout the 1990s there was a long-running dispute in New South Wales between the Executive Government and the Legislative Council revolving around that House's power to order the production of documents. As previously noted, the High Court has held that the Council has the power to order the production of documents and that it also has the capacity to take action against any failure to comply with an order, so long as the action taken is non-punitive in nature. However, the capacity of a House to enforce the production of documents can still be impinged upon when the Executive makes claims of privilege on the documents, which it is entitled to do despite the decision of the Court of Appeal in *Egan v Chadwick*.<sup>108</sup>

As previously noted, in this case the Court of Appeal held that it is reasonably necessary for the performance of the functions of the Legislative Council to compel the Executive to produce documents in respect of which a claim of legal professional privilege or public interest immunity is made. This is because such a power may be reasonably necessary for the exercise of its legislative function and its role in scrutinising the Government of the day. However, the majority of the Court of Appeal held that the power was limited in the case of cabinet documents in that it is not reasonably necessary for the proper functions of the Legislative Council to call for documents the production of which would be inconsistent with responsible government. As such there are still some limitations as to what the Executive has to disclose to the Legislature.

One commentator has noted that it is likely that courts will interpret the restriction on Cabinet documents and the steps that governments may take to claim immunity for sensitive documents on a case by case basis.<sup>109</sup>

### **5.3.2 Statutory secrecy provisions**

Executive privilege issues can also arise during committee inquiries particularly when the Government asserts that certain statutory provisions prohibit the disclosure of information by witnesses giving evidence before a committee. During Legislative Council committee hearings into the budget estimates in August 2000 a number of witnesses from the Casino Control Authority declined to answer certain questions on the basis of advice received from the Crown Solicitor that such disclosure would be in breach of section 148 of the *Casino Control Act 1992* which provides that it is a criminal offence to divulge information acquired in the exercise of functions under the Act.<sup>110</sup>

The committee was able to proceed with the inquiry but the matter was not resolved. As such, advice on the matter was sought by the Council from Mr Bret Walker SC. In his advice he noted that the words of section 148 "are not apt to deprive the Council or the Committee of its pre-existing power, both at common law and under the *Parliamentary Evidence Act 1901*, to enquire into public affairs as Members see fit."

<sup>108</sup> (1999) 46 NSWLR 563.

<sup>109</sup> See Griffith, Gareth, *Egan v Chadwick and Other Recent Developments in the Powers of Elected Upper Houses*, New South Wales Parliamentary Library, Briefing Paper 15/99, August 1999.

<sup>110</sup> General Purpose Standing Committee No. 4, *Budget Estimates 2000-2001*, Vol. 2, Report No. 5, August 2000, pp. 32-3.

Mr Walker argued that for legislation to override the power of a committee to conduct inquiries it must contain an express reference to the Houses including its committees or “a statutory scheme that would be rendered fatally defective unless its application to the Houses were implied.”<sup>111</sup> However, as the matter is yet to be decided in law there is no legal precedent to confirm this view. Similar difficulties have arisen when committees attempt to obtain confidential documents from witnesses<sup>112</sup> as noted in section 2.4 of Part Two.

### **5.3.3 Interference with witnesses appearing before parliamentary inquiries**

Concerns have also arisen around the issue of attempted interference by the Executive Government with witnesses appearing before parliamentary inquiries. In May 2002, the Senate Committee on Privileges received a reference from the Senate to inquire into such an allegation. In particular the committee was asked to investigate “whether there was any attempted or actual interference with a witness before the committee in respect of the witness’ evidence”.<sup>113</sup>

By way of background, in October 2001 the then Minister for Defence, the Hon. Peter Reith MP, asserted that he had documentary proof that asylum seekers were throwing their children overboard in their attempt to reach Australian shores. The following day, major newspapers published photographs purporting to show this. It was subsequently revealed that the photographs published on 11 October related to the rescue of asylum seekers from their sinking vessel on 8 October 2001 rather than to the alleged “children overboard” incident on 7 October 2001. The issue of whether the Government knew at the time that the photographs did not show what they purported to show became the focus of an inquiry by the Select Committee into a Certain Maritime Incident, which was established on 13 February 2002.

The Senate Committee of Privileges heard that the head of the task force set up to coordinate Defence input to the Maritime Incident Inquiry, prepared a minute to the Minister for Defence indicating that there may have been an attempt to influence a member of the Australian Defence Forces who had been invited to appear before the committee. The minute noted that “the extent of the alleged attempt was not to suggest to the Defence Force member that he present evidence untruthfully, but to consider that he omit relevant facts from his evidence.”<sup>114</sup> The committee found that there may have been an improper attempt to influence a witness but it was strenuously denied by the parties concerned. The Privileges Committee reported that it could not proceed any further with the matter as it was not in a position to “second-guess the plain words of these two witnesses, or reach speculative conclusions on the actions or motives of any other person or persons involved.”<sup>115</sup> As such the committee did not find that there was any interference with a witness. However, if it had it would have constituted a contempt of the House.<sup>116</sup>

<sup>111</sup> See paper prepared by John Evans, Clerk of the Parliaments, Parliament of New South Wales, for the Australasian Study of Parliament Group annual conference, October 2002 entitled *Orders for papers and executive privilege: committee inquiries and statutory secrecy provisions*.

<sup>112</sup> The legislation establishing the Public Accounts Committee is silent on the issue of ordering documents and the Audit Office has obtained a Crown Solicitor advising that indicates the Committee does not have the power to require a person to produce a document.

<sup>113</sup> Senate Hansard, 16 May 2002, p. 1695.

<sup>114</sup> Senate Committee of Privileges, *Possible Improper Interference with a Witness before the Senate Select Committee on a Certain Maritime Incident*, 106th Report, August 2002, p. 7.

<sup>115</sup> *Ibid*, p. 13.

<sup>116</sup> *Ibid*, p. 14.

#### **5.3.4 Immunity for former members and ministerial Staff**

Ministerial staff and government advisers have at times claimed they cannot be compelled to give evidence before parliamentary inquiries. A recent case occurred in the Federal Parliament during a Senate committee's consideration of the conduct of a former Minister for Defence in his handling of the "children overboard" affair whilst Minister for Defence. Parliamentary convention and practice prohibits one House or its committees calling a member of the other House as a witness without that member's agreement. In this case the issue was whether a former member of one House could be compelled to give evidence before a committee of the other House. Another issue also arose - the power of parliamentary inquiries to obtain evidence from ministerial staff. These issues have not been tested by a court of law and there are different opinions on the matter.

On the issue of whether the immunity for current members of Houses of Parliament from being compelled to appear before parliamentary inquiries extends to when they are no longer a member of Parliament, Professor Lindell argued in advice given to the Clerk of the House of Representatives that:

*...there are strong and persuasive reasons for recognising that the rationale which supports the probable immunity of current members is wide enough to sustain the continuation of any such immunity after the retirement of the Ministers from Parliament in respect of matters which were relevant to their conduct as Ministers.*<sup>117</sup>

The basis of this advice was that the independence of each House of Parliament to control its own proceedings and to be the sole judge of the conduct of its own members could be undermined if the other House could simply put that principle aside until the retirement of the member in question. In support of this argument, Professor Lindell noted a number of parliamentary conventions of a similar nature, for example, the power and ability of either House to protect witnesses who appear before parliamentary committees does not cease to operate after the examination of the witness has been completed.<sup>118</sup> In the absence of direct judicial or parliamentary authority there can be no certainty that a court will uphold the immunity extending to former members and Ministers.

By extension, it is argued that if former members of Parliament cannot be compelled to provide evidence to a parliamentary committee that such immunity may even extend to both current and former ministerial staff. Professor Lindell argued that a reasonable case could be made that the immunity should extend to ministerial staff and advisers due to the fact that Ministers are unable to conduct their roles in modern government without personal staff and advisers and that the work of the staff is directly related to the role of the member of Parliament. Professor Lindell noted that the issue is a contentious one as the possibility that ministerial staff may be immune from appearing to give evidence before parliamentary committees both whilst working for a Minister and also once they have left that position poses serious implications for the effectiveness of committee inquiries.<sup>119</sup>

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<sup>117</sup> Advice provided by Professor Geoffrey Lindell regarding the obligation of former Ministers (and their ministerial staff) to answer questions at an inquiry conducted by parliamentary committees, p. 6.

<sup>118</sup> *Ibid*, p. 7.

<sup>119</sup> *Ibid*, p. 9.

The alternate view has also been expressed that former members and Ministers can be compelled to give evidence before a parliamentary inquiry and that ministerial staff have no immunity from compulsory attendance to give evidence or produce documents to any such inquiry. This view is based on the argument that members are only exempt from being questioned by a House to which he/she was not a member if the activities in question occurred in the course of parliamentary proceedings. The Clerk of the Senate put it this way:

*There is...no basis for the suggestion recently made that former ministers of the House of Representatives may not be summoned by a Senate committee. The immunities having parliamentary recognition, of proceedings and serving members, simply do not add together to make the different and hitherto unheard-of immunity of former ministers.<sup>120</sup>*

The Clerk of the Senate received advice from Bret Walker SC, who expressed the view that former Ministers, who are no longer members of either House of Parliament, can be subpoenaed to give evidence before a parliamentary inquiry simply because of the fact that they are no longer members and parliamentary convention holds that only members are exempt from being compelled to give evidence. In support of this Mr Walker argues that:

*I have never seen it suggested that former members of the Executive government trail with them, forever, until they die, a personal protective immunity from investigation by the Houses of Parliament of their official conduct, and thus an immunity specifically from compulsory attendance to give evidence in relation to such an investigation.<sup>121</sup>*

This view, however, fails to consider the fact that former Ministers should remain accountable to the House to which they were a member even if the activities in question happened after the Parliament has been dissolved and the Government is in a caretaker position. Nor, as Professor Lindell points out, does it address the functional need for the immunity to continue to operate after a member ceases to be a member if the immunity is to be effective.<sup>122</sup>

In relation to ministerial staff, the Senate Finance and Public Administration References Committee specifically considered this issue in October 2003. Whilst the Committee came to the conclusion that ministerial staff have no immunity from appearing before a parliamentary committee, it was conscious of the fact that this view had developed amongst ministerial staff due to the fact that the Parliament had been reluctant to engage in legal battles to compel ministerial staff to attend.<sup>123</sup> The committee recommended, in the interest of preserving ministerial responsibility and maximising accountability and transparency of Government, that guidelines be developed by the Government in consultation with the Parliament to provide a framework in relation to the appearance of ministerial staff before parliamentary committees and that ministerial staff should appear before parliamentary committees in the following situations:

<sup>120</sup> See paper prepared by Harry Evans, Clerk of the Senate, for the Annual ASPG Conference, October 2002 entitled *The Parliamentary Power of Inquiry: Any Limitations?*

<sup>121</sup> Opinion provided to the Clerk of the Senate by Mr Bret Walker SC.

<sup>122</sup> Advice provided by Professor Geoffrey Lindell regarding the obligation of former Ministers (and their ministerial staff) to answer questions at an inquiry conducted by parliamentary committees, p. 7.

<sup>123</sup> The Senate Finance and Public Administration References Committee, *Staff employed under the Members of Parliament (Staff) Act 1984*, October 2003, pp. 26-7.

- A Minister has renounced, or distanced him or herself from a staff member's action;
- A Minister has refused to appear to answer questions regarding the conduct of a member of their staff;
- Critical or important information or instructions have emanated from a Minister's office but not from the Minister;
- Critical or important information or instructions have been received by a Minister's office but not communicated to the Minister; or
- A Government program is administered to a significant extent by staff of Government members.<sup>124</sup>

Professor Campbell presents a similar view. She argues that under the system of responsible government and ministerial accountability ministerial staff must be accountable to the Parliament. She comments:

*Australian constitutional arrangements are ones under which ministers are expected to be responsible and accountable to parliaments. They are also arrangements under which a certain supremacy is accorded to parliamentary institutions over executive arms of government. Those principles must surely be undermined if the parliamentary arms of government are, effectively, precluded from inquiring into conduct which has preceded ministerial actions.*<sup>125</sup>

The issue of whether ministerial staff can be called before parliamentary committees also arose in Victoria in 2002, when a select committee of the Legislative Council subpoenaed a number of Legislative Assembly Ministers and certain members of their personal staffs. The Legislative Assembly did not grant consent to permit the Ministers to appear before the committee and the Attorney General argued that ministerial advisers are "engaged to advise ministers in their political and not their executive capacity" and that the protection afforded to Ministers "should not be able to be circumvented by the summoning of ministerial advisers".<sup>126</sup> None of the staff gave evidence to the inquiry.<sup>127</sup> In relation to the difficulty of gaining evidence from the Executive Government Dr Ken Coghill, a former Speaker of the Victorian Legislative Assembly, notes that:

*the Victorian Parliament actually denies its committees significant powers to compel the disclosure of information held by the executive. It has issued guidelines that absolve public servants of any obligation to provide certain types of information concerning communications involving members of the executive and other matters, including those "which could give rise to a claim of immunity."*<sup>128</sup>

The issue was also raised in the United Kingdom when the Transport, Local Government and the Regions Committee asserted the power of the House of Commons to compel ministerial advisers to appear before its committees. In this case, the committee wished to examine Lord Brit, an adviser to the Prime Minister, who was also a member of the House of Lords. It was argued by the Prime Minister's office that ministerial advisers should not be compelled to give evidence as it would undermine the system of cabinet government. The committee did not agree but did

<sup>124</sup> *Ibid*, p. 40.

<sup>125</sup> Campbell, *Parliamentary Privilege*, 2003, p. 175.

<sup>126</sup> Victorian Parliament, *Parliamentary Debates*, 20 March 2002, pp. 373-405.

<sup>127</sup> See paper prepared by Ken Coghill, Co-Director, Parliamentary Studies Unit, Monash University and former Speaker of the Legislative Assembly of Victoria, for the Annual ASPG Conference, October 2002 entitled *Privileges Claimed by the Executive: Have We Learned Anything?*

<sup>128</sup> *Ibid*.

not pursue the matter because Lord Brit was a member of the House of Lords. The committee did however, make a number of comments on how this convention could undermine the effectiveness of committee inquires:

*[t]he Prime Minister's advisers should be accountable to departmental select committees...It should be for the House of Commons committees themselves to decide who should or should not give evidence to them, not the Prime Minister, his Department or advisers. Of course, committees in most circumstances can do this by summoning witnesses to appear.*

*Unfortunately, this is not possible because Lord Brit, like so many of the Prime Minister's advisers, is a Member of the other House. He is therefore able to take advantage of the ancient convention established in quite different circumstances, that he will not be summoned to appear before a Commons' Committee. We recommend that this convention be modified to ensure that the Prime Minister's or other Minister's advisers do not abuse it to evade scrutiny.<sup>129</sup>*

On a related note, on 14 January 2003 in a decision brought down by the Supreme Court of Prince Edward Island, Canada, it was held that employees of a Government department are not immune from being compelled to appear before a parliamentary committee to give evidence and to produce documents.<sup>130</sup> By way of background, in April 2001, the Standing Committee on Agriculture of the Legislative Assembly of Prince Edward Island received a reference from the House to examine the outbreak of a fungal disease which affects potatoes and became known as the "potato wart crisis". In the conduct of its investigation, the committee extended an invitation to the Canadian Food Inspection Agency (CFIA) to send representatives before the committee. The invitation was declined and subsequently two summonses were issued requiring employees of CFIA to attend. The employees did not comply and initiated judicial proceedings to have their summonses quashed.<sup>131</sup>

In support of their argument the CFIA employees said that the committee was conducting an inquiry into the operation of a federal agency and that such an inquiry is outside the jurisdiction of the Legislative Assembly of the province. This argument was dismissed by the judge as being premature with the judge arguing that "just because the witnesses sought to be summoned happen to be employees of a federal agency does not necessarily mean the Committee is conducting an inquiry into that federal agency."<sup>132</sup>

The CFIA employees also argued that they were exempt from being summoned to give evidence before a parliamentary committee on the basis of "Crown immunity from discovery". This was also dismissed by the Judge who noted:

*The Committee in the present case is exercising its inherent power to compel the attendance of witnesses which flows from the constitutional authority of the Legislative Assembly itself. I am not so sure the work of the Committee is so much in the nature of a discovery, as it is a response to the resolution of the Legislative Assembly itself to make full inquiry into a crisis in the Prince Edward Island potato industry so as to seek ways in which such a crisis may be*

<sup>129</sup> See the Fourth Report of the Transport, Local Government and the Regions Committee entitled *The attendance of Lord Brit at the Transport, Local Government and the Regions Committee*, March 2002.

<sup>130</sup> See the decision from the Trial Division of the Supreme Court of Prince Edward Island in *AG Canada v MacPhee and Ors*, 2003 PESCOTD 06, 14 January 2003.

<sup>131</sup> *Ibid*, paragraphs 1 to 10.

<sup>132</sup> *Ibid*, paragraph 15 (per Cheverie J).

*averted in future. For these reasons, I conclude the witnesses should not be exempt from the summonses.*<sup>133</sup>

As such, whilst a court of law in New South Wales has not ruled on whether ministerial staff can be compelled to provide evidence before a parliamentary committee, the decision in *AG Canada v McPhee*, that Government employees must comply with a subpoena for their attendance before a parliamentary committee, provides some guidance as to what powers a parliamentary inquiry in the Westminster system has in relation to the calling of departmental and Government witnesses.

#### 5.4 Abrogation or waiver of parliamentary privilege

The accepted position with regard to the waiver of privilege is that neither a member nor a House has the capacity to waive the freedom expressed in Article 9 of the *Bill of Rights* because it is a statutory provision. Privilege can only be waived by express legislation. Enid Campbell notes:

*There is surprisingly little judicial authority on the question whether any of the immunities conferred by Article 9 of the Bill of Rights, or any of its requirements, can be waived. Houses of Parliament have generally taken the view that Article 9 cannot be waived, principally because it is contained in a statute. No one, it has been argued, has authority to dispense with the application of statutes unless there is clear statutory provision to enable dispensations to be granted.*<sup>134</sup>

In New South Wales there have been a number of incidents concerning the waiving of privilege. In 1973, the Clerk of the Legislative Assembly was summoned to produce a number of documents to the Royal Commission appointed to inquire and report on allegations of organised crime in clubs. When the matter was reported to the House, a resolution was passed enabling the Clerk to give papers tabled in the House to the Royal Commission. The resolution also gave the commissioner control over the documents and enabled members to appear as witnesses.<sup>135</sup>

In 1994, the Legislative Assembly agreed to a resolution to release *in camera* evidence taken before the Joint Select Committee upon Police Administration to a Royal Commission inquiring into the New South Wales Police Service. The resolution provided that the evidence was to be released on condition, agreed to in writing to the Presiding Officers, that it be treated as highly confidential and not published. Furthermore, the resolution provided that the *in camera* evidence could only be used for intelligence and investigative purposes, including derivative use.<sup>136</sup>

In 1995, the Legislative Assembly passed a resolution to authorise the release of *in camera* evidence of the Select Committee upon Prostitution following a request from the Royal Commission into the New South Wales Police Service. The resolution provided:

<sup>133</sup> *Ibid*, paragraph 37 (per Cheverie J).

<sup>134</sup> Campbell, Enid, *Parliamentary Privilege*, 2003, p. 125.

<sup>135</sup> VP 21/08/1973, pp. 39-41.

<sup>136</sup> PD 30/11/1994, p. 6039; PD 01/12/1994, p. 6118; PD 02/12/1994, p. 6288.

That this House grants leave to officers assisting the Royal Commission into the New South Wales Police Service to inspect the *in camera* evidence taken before the Select Committee upon Prostitution on condition that –

- (1) the evidence is inspected at Parliament House;
- (2) any information obtained be used by the Royal Commission to pursue appropriate further inquiry without revealing to any other person other than the Royal Commissioner and officers of the Royal Commission, the contents of the *in camera* evidence, and its contents not made public; and
- (3) before adducing into evidence of the Royal Commission any evidence taken before the Select Committee upon Prostitution, the Royal Commissioner, his Honour Justice Wood QC, seek leave of the Legislative Assembly.<sup>137</sup>

In April the following year, a resolution in similar terms was passed by the Legislative Assembly enabling access to *in camera* evidence taken before the Committee on the Independent Commission Against Corruption.<sup>138</sup>

In November 1996, the Speaker informed the House that the Royal Commissioner sought leave to make public the fact that certain evidence was given before the Select Committee upon Prostitution and to tender the transcript of the committee with the exception of certain words. The Speaker subsequently sought the advice of the Crown Solicitor regarding the potential breach of Article 9 of the *Bill of Rights*, whereby evidence taken before the select committee could be brought into question.

The Speaker noted that this matter was of deep concern from the perspective of the operation of committees appointed by the Parliament. He argued that for committees to operate effectively, witnesses who give evidence *in camera* must be assured of continuing confidentiality of that evidence unless the House itself resolves to make it public for its own purposes in special circumstances.

The Speaker advised the House that the Crown Solicitor was of the opinion that from the material available to him and from responses from the Royal Commission, the action proposed by the Commission would breach Article 9 of the *Bill of Rights*. The Speaker also noted that parliamentary convention and law prevented the House from granting a waiver to this privilege other than to adduce the material into evidence purely for the purpose of establishing the fact that the evidence was given. The Speaker also advised the House that it was a matter for the House to determine what action, if any, it wished to take.

The House then passed the following resolution:

*That this House, being of the opinion that to grant leave to the Royal Commission into the New South Wales Police Service for any evidence taken before the Select Committee upon Prostitution to be adduced into evidence before the Royal Commission has real potential to breach Article 9 of the Bill of Rights, and as the House has no authority to waive its privilege in this regard, declines to grant leave as requested.*<sup>139</sup>

As noted, parliamentary privilege can be waived by passing appropriate legislation. In 1997, following allegations made by the Hon. Franca Arena MLC in the Legislative Council an amendment was made to the *Special Commissions of Inquiry Act 1983*

<sup>137</sup> VP 26/10/1995, pp. 361-2.

<sup>138</sup> VP 17/04/1996, p. 32.

<sup>139</sup> PD 27/11/1996, pp. 6738-9.

which provided that a House of Parliament may, by way of resolution, declare that parliamentary privilege is waived in connection with a special commission to an extent declared in the resolution. The Act also empowered each House to waive parliamentary privilege except for privileges enjoyed by the member individually. This provision is no longer in law as the amendment specified it would expire six months after it commenced.

Mrs Arena challenged the validity of this waiver of privilege and commenced legal proceedings to have the legislation declared invalid. She also made claims about the ineffectiveness of the establishment of the inquiry. The Court of Appeal in *Arena v Nader* held that the legislation did not waive the parliamentary privilege of a member but that it authorised the member to give evidence to such an inquiry if the member voluntarily chose to do so. As such, the Act was not invalid. In making its decision the Court of Appeal referred to the decision of the Supreme Court of Western Australia in *Royal Commission into the use of Executive Power; R v Parry, Saxon and Smith*<sup>140</sup> where Chief Justice Malcolm stated:

*It is correct...that the privileges, immunities and powers may be exercised by individual members of the Parliament. The specific privileges conferred by Article 9 of the Bill of Rights are conferred upon the institution of Parliament as a whole and not on the individual members. In my opinion, while it seems to be the case that individual members may invoke privilege, it is wrong to imply that it is a personal privilege, but rather it is an attribute of their office and of the Parliament as a whole to allow them to perform freely the functions expected of them by the electors.*<sup>141</sup>

The Court of Appeal in adopting this approach argued:

*...it seems to us that the parliamentary privilege spoken of in s33D(1) is that of the House as an institution, and that spoken of in s33D(3)(a) is the privilege that a member is entitled to invoke as an attribute of office. We see nothing incongruous in a House of Parliament being able to waive the former privilege, and thus permitting an external inquiry into statements made inside the House while at the same time the statute operates not to waive a member's privilege.*<sup>142</sup>

Legislation was introduced to the South Australian Parliament but not passed, which enabled parliamentary privilege to be waived. The *Parliamentary Privilege (Special Temporary Abrogation) Bill 2005* was introduced following claims by a member of the South Australian Parliament that he and his assistants held documents/evidence of criminal sexual misconduct by another member of Parliament and others. The legislation proposed to temporarily remove the protections afforded to any allegations made in parliamentary proceedings and associated documents that related to criminal sexual misconduct by enabling material to be adduced as evidence in any legal proceedings.<sup>143</sup>

Parliamentary privilege can also be waived under defamation laws in the United Kingdom. In 1996 the United Kingdom Parliament passed legislation to enable a person to “waive the protection of parliamentary privilege in so far as it protected that person.”<sup>144</sup> This essentially means that a member can waive privilege as though it

<sup>140</sup> Supreme Court of Western Australia, Full Court, 1 May 1997, unreported.

<sup>141</sup> *Arena v Nader and Another*, 1997, 42 NSWLR 427 at 437.

<sup>142</sup> *Ibid.*

<sup>143</sup> See the second reading speech on the bill in Hansard, South Australian House of Assembly, Monday 4 April 2005, p. 2061 ff.

<sup>144</sup> See *Odgers*, 11th edition, 2004, p. 72.

was a personal immunity but that the protection of members against legal liability for what they have said in the House remains. In *Hamilton v Al Fayed*<sup>145</sup> it was held on appeal by the House of Lords, that the provision (section 13 of the Defamation Act 1996 (UK)), permitted the questioning in defamation proceedings of evidence given to parliamentary committees without it being regarded as infringing the autonomous jurisdiction of Parliament.

In this case, a former member of the House of Commons waived his parliamentary privilege for what he had said in parliament under section 13 and commenced libel proceedings after the defendant had alleged that the former member had accepted payments as reward for asking questions in Parliament when a member. Mr Al Fayed argued that since both the Committee on Standards and Privileges and the Parliamentary Commissioner for Standards had already investigated the allegations, the trial would breach parliamentary privilege. Lord Browne-Wilkinson argued that “parliamentary privilege prevented the court from entertaining any evidence, cross-examination or submissions which challenged the veracity or propriety of anything done in the course of parliamentary proceedings. If parliamentary privilege had applied in the present case, the evidence produced to the parliamentary committee could not have been challenged, making a fair trial impossible.”<sup>146</sup> The House of Lords dismissed Mr Al Fayed’s appeal.

*Reynolds v Times Newspaper Ltd & others* is a similar case where a member initiated defamation proceedings against the newspaper. Mr Reynolds, who was the Prime Minister of Ireland had resigned and the *Times* newspaper had published comment on the events surrounding his resignation in both the British mainland edition and the Irish edition of the *Sunday Times*. On appeal the Privy Council accepted that by instituting and prosecuting his libel action Mr Reynolds had waived his immunity under the Irish constitution in respect of proceedings in the Dáil. His ability to do so was not questioned.<sup>147</sup>

Section 13 of the *Defamation Act 1996* (UK) has been heavily criticised by the Joint Committee on Parliamentary Privilege in the United Kingdom Parliament. In its 1999 report, the committee argued that the provision is fundamentally flawed in that it undermines the basis of privilege noting that:

*freedom of speech is the privilege of the House as a whole and not of the individual member in his own right, although an individual member can assert and rely on it.*<sup>148</sup>

The committee went on to note that:

*application of the new provision could also be impracticable in complicated cases; for example, where two members, or a member and a non-member, are closely involved in the same action and one waives privilege and the other does not. Section 13 is also anomalous: it is available only in defamation proceedings. No similar waiver is available for any criminal action, or any other form of civil action.*<sup>149</sup>

<sup>145</sup> *Hamilton v Al Fayed* (2000) 2 All ER (House of Lords, 23 March 2000).

<sup>146</sup> *Ibid.*

<sup>147</sup> See House of Lords Judgements, *Reynolds v Times Newspapers Limited and Others*, 28 October 1999, available from <http://www.hrothgar.co.uk/WebCases/hol/reports/01/25.htm>

<sup>148</sup> Joint Committee on Parliamentary Privilege of the UK Parliament, Report Volume 1, dated April 1999, paragraph 68.

<sup>149</sup> *Ibid.*

The committee has recommended that section 13 be repealed and replaced by a provision that empowers “each House to waive article 9 for the purpose of any court proceeding, whether relating to defamation or to any other matter, where the words spoken or the acts done in proceedings in Parliament would not expose the speaker of the words or the doer of the acts to any legal liability.”<sup>150</sup> To date, this has not occurred.

There has also been a proposal in the United Kingdom to provide a statutory basis for allowing parliamentary privilege to be abrogated in corruption cases. In March 2003, a draft Government Corruption Bill was published for pre-legislative scrutiny. The provisions of the proposed legislation specifically provide for the prohibition on the questioning of proceedings in Parliament to be over-riden in corruption cases by permitting anything said in the House or a committee to be tendered as evidence if relevant to a charge of corruption, whether it involves a member of Parliament or not. A joint select committee established to consider the draft bill was highly critical of the over-ride clause and recommended that the proposed legislation be amended to allow the proceedings of Parliament to be questioned in corruption cases only where the member is the defendant. The committee also recommended that those words or actions of a member that are admissible should also be admissible to the same extent for or against all co-defendants in respect of corruption offences based on the same facts.<sup>151</sup> The committee expressed the view that a more appropriate approach would be for a Parliamentary Privilege Bill to be introduced, which would include such matters.<sup>152</sup>

In response to this point, the Government, whilst appreciating the concerns of the committee, noted that “a balance must be found between the desirability of lessening any evidential bar to prosecution which might lead to a guilty person going unpunished, and the need to ensure that there is no impediment to the freedom of speech in Parliament.” The Government expressed the view that there is not necessarily a conflict between these two ends arguing that “in the particular case of corruption, the ability to use parliamentary proceedings in evidence might be a factor which enhances the freedom of speech, by making sure that a person does not speak in Parliament as a result of a corrupt bargain.”<sup>153</sup> The draft bill was never introduced.

In relation to the committee’s recommendation that a Parliamentary Privileges Bill should be introduced which could cover this issue, the Government noted in 2003 that discussions were taking place between officials in the Cabinet Office and the House authorities on the provisions of such a bill.<sup>154</sup> To date, legislation putting parliamentary privilege on a statutory basis is yet to be introduced.

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<sup>150</sup> *Ibid*, paragraph 89.

<sup>151</sup> Report of the House of Lords and House of Commons Joint Committee on the Draft Corruption Bill, Session 2002 – 03, HL Paper 157, HC 705, pp. 37-46.

<sup>152</sup> *Ibid*, p. 40.

<sup>153</sup> The Government Reply to the Report from the Joint Committee on the Draft Corruption Bill, December 2003, p. 8.

<sup>154</sup> *Ibid*, p. 7.