

# Chapter 1 Introduction to Parliamentary Privilege

## 1.1 What is parliamentary privilege?

Parliamentary privilege refers to certain rights, powers and immunities from the law conferred on individual members of Parliament to enable them to fulfil their duties and for the Parliament to collectively perform its constitutional role. These rights, powers and immunities are particular to Parliaments. *May's Parliamentary Practice* describes parliamentary privilege as:

*The sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals.*<sup>1</sup>

Generally, the privileges enjoyed collectively by Houses of Parliament are the right to discipline persons guilty of contempt or breaches of privilege; regulation and control of its internal affairs by making rules for themselves and controlling the Parliamentary precincts. Houses of Parliament also have the authority to maintain the attendance and service of its members and the right to initiate inquiries that may call witnesses and demand documents.<sup>2</sup>

The individual privileges enjoyed by members of Parliament are freedom of speech in parliamentary proceedings; exemption from jury service and, if the House is sitting; exemption from compulsory attendance in court as a witness. The United Kingdom House of Commons affords protection to its members against arrest for civil action. However, that privilege has not been conferred on the New South Wales Parliament as it was not considered reasonably necessary for its operation.<sup>3</sup> In the United Kingdom and elsewhere, there is no immunity from an indictable offence. However, should a member be within the Parliamentary precincts when the police seek to make an arrest, the police should inform the Speaker that they have a warrant for the arrest of a member and gain the Speaker's permission to enter the premises.

It should be noted that parliamentary privilege exists fundamentally to ensure a House of Parliament can perform its functions and as such the individual privileges have only been conferred on members to the extent necessary to achieve this end.

## 1.2 Absolute and qualified privilege

Parliamentary privilege may be absolute or qualified. Essentially, a statement or action is privileged if the person making it is protected from legal action. An absolute privilege is one that does not give way to any other principle or right. For example, statements made by members of Parliament in the House are absolutely privileged and cannot be made the subject of an action for defamation. Qualified privilege is its own body of law which extends beyond the scope of parliamentary privilege. It

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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. 75.

<sup>2</sup> Moore, Terry and James Robertson, *An Introduction to Parliamentary Privilege*, Canadian Parliamentary Review, Volume 24, No. 3, Autumn 2001, pp. 19-25.

<sup>3</sup> *Norton v Crick*, 1894, 15 LR NSW 172.

covers statements made fairly in situations in which there is a legal or moral obligation to give the information and the person to whom it is given has a corresponding duty or interest to receive it and when someone is acting in defence of his or her own property or reputation. Qualified privilege also covers fair and accurate reports of public meetings and various other public proceedings. For example, the reproduction of a speech from *Hansard* in a newspaper would attract qualified privilege.

### 1.3 Breaches of privilege and contempts

Breaches of privilege are at times referred to as contempts. Standing order 91 provides that “a Member may rise on a matter of contempt or a breach of privilege...”. Whilst it has become customary in many Westminster Parliaments to refer to all offences against the House as breaches of privilege, it is those offences that violate the privileges of the House, whether directed at an individual or the House collectively, which are more specifically referred to as breaches of privilege. Certain other offences against the authority and dignity of Parliament are more correctly referred to as contempts.<sup>4</sup>

The Legislative Assembly has found a number of members and private individuals in contempt of the House, The last occasion being in March 1929. The following table sets out the incidents and the action that was taken by the House. Today, many of the incidents listed would not be considered contempts.

Date	Incident	Action taken by the House
20 November 1866	Mr Macpherson, Member for Central Cumberland, made offensive remarks to another member and refused to withdraw them when ordered to by the Speaker. He again refused when the House passed a motion requiring him to withdraw the comments.	He was adjudged guilty of contempt for wilfully disobeying an order of the House and was committed by warrant to the custody of the Serjeant-at-Arms. The motion for the warrant was rescinded after the member apologised to the House. <sup>5</sup>
27 April 1878 (am)	Mr McElhone, Member for Upper Hunter, crossed the Chamber during the committee of the whole stage and in a threatening manner and with clenched fist, assailed Mr Gray, Member for Illawarra.	The Speaker called upon Mr McElhone to explain. Following an explanation the House agreed to a motion finding Mr McElhone guilty of contempt. Mr McElhone then apologised to the House and a further motion was agreed to by the House that Mr McElhone be released from his contempt. <sup>6</sup>
6 October 1886	Mr Wisdom, Member for Morpeth, used disorderly words in committee and refused to comply with the resolution of the House ordering him to withdraw the words.	He was adjudged guilty of contempt and committed to the custody of the Serjeant-at-Arms on the warrant of the Speaker. A motion was moved later in the sitting to discharge the member from the custody of the Serjeant. <sup>7</sup>
30 May 1888	Mr McElhone, Member for the Upper Hunter, used disorderly words in committee. When the Speaker took the Chair the member was asked to attend in his place. However, the Serjeant reported that he had failed to find the member on the premises.	The House committed the member to the custody of the Serjeant-at-Arms for contempt by Speaker’s warrant. Later in the sitting the Serjeant reported that he had the member in custody and Mr McElhone was brought into the House to explain his behaviour and apologise. A motion was then moved discharging the member from the custody of the Serjeant. <sup>8</sup>

<sup>4</sup> Wilding, Norman and Philip Laundy, *An Encyclopaedia of Parliament*, Revised Edition, 1961, p. 499.

<sup>5</sup> VP 20/11/1866, pp. 376-7.

<sup>6</sup> VP 27/04/1878, pp. 267-8.

<sup>7</sup> VP 06/10/1886, pp. 607-9.

<sup>8</sup> VP 30/05/1888, pp. 480-6.

3 October 1889	During a division, Mr Crick, Member for West Macquarie, abused the Colonial Secretary and Government supporters by commenting: "You are a set of robbers and hounds. You ought to be prosecuted for looting the Treasury. You are led by that dirty Orange hound there. You dirty set of robbers".	Crick was found guilty of contempt of the House and was committed to the custody of the Serjeant-at-Arms. He was later brought to the House to explain and apologise and he was discharged from custody. <sup>9</sup>
10 May 1893	Mr Grahame, Member for Newcastle, used threatening and foul language during debate.	The House adjudged him guilty of contempt for wilfully and vexatiously interrupting the orderly conduct of the business of the House. The Speaker issued a warrant for the Serjeant-at-Arms to take the Member into custody for an indefinite period of time. Later in the sitting the Member was admitted to the House to offer his apology and the House agreed to release him from the Serjeant's custody. <sup>10</sup>
16 November 1893	Stranger in the public gallery, Mr Thomas Dodd, interjected during a speech of Mr Andrew Kelly, Member for West Sydney, on distress amongst the labouring classes, yelling out "it is a lie".	Mr Dodd was held to be in contempt. He was arrested by Serjeant-at-Arms by direction of the Speaker and was subsequently discharged from custody. <sup>11</sup>
30 January 1894	Mr John Neild, member for Paddington, rose on a matter of privilege noting that there had been an article published in the <i>Evening News</i> that referred to the refreshment rooms and gambling tables within Parliament House and stated that one member had lost a months salary "during one night's carouse over the gambling table at the Parliamentary Refreshment room". A resolution was agreed to by the House to summon Mr James A. Hogue, editor of the <i>Evening News</i> to answer as to the truthfulness or otherwise of the article. <sup>12</sup>	On 31 January 1894, Mr Hogue was sworn at the Bar of the House and refused to answer certain questions put to him, where upon, the House agreed to a resolution deeming Mr Hogue guilty of a contempt of Parliament.  A motion was moved to commit Mr Hogue to gaol for one calendar month. However, this was not agreed to by the House. A further attempt to place Mr Hogue in the custody of the Serjeant-at-Arms was also defeated and Mr Hogue was discharged from further attendance. <sup>13</sup>
7 February 1894	Mr Schey, Member for Redfern, used disorderly words in committee.	The House adjudged him guilty of contempt and a motion was moved to commit him to the custody of the Serjeant. However, following an apology the motion was withdrawn. <sup>14</sup>
25 June 1903	Mr Norton, Member for Northumberland, committed personal assault on Mr Broughton, Member for Sydney-King. He was named for interrupting the disorderly conduct of business of the House.	He was adjudged to be guilty of contempt. He was suspended for the remainder of the sitting. <sup>15</sup>
25 June 1903	Mr Broughton, Member for Sydney-King, was named for interrupting the disorderly conduct of business of the House by the use of language calculated to provoke a breach of the peace.	He was adjudged to be guilty of contempt. The Member apologised and no action was taken. <sup>16</sup>
3 November 1908	Mr Griffith, Member for Sturt, cast aspersions at the Chair by commenting that the Speaker did not give fair play to his side of the House. He was named for being disorderly and a motion was agreed to ordering him to apologise for his comments and withdraw them. Mr Griffith attended in his place and refused to withdraw the	He was adjudged by the House to be guilty of contempt for disobeying the orders of the House. A motion was agreed to that the member be suspended from the service of the House until he obeyed the order of the House. The Member resigned his seat that same day. He did however, return to the House as

<sup>9</sup> VP 03/10/1889, pp. 442-50.

<sup>10</sup> VP 10/05/1893, pp. 552-3.

<sup>11</sup> VP 16/11/1893, p. 128. See also section 2.6 of Part Two for further information on the power to remove visitors.

<sup>12</sup> VP 30/01/1894, p. 33.

<sup>13</sup> VP 31/01/1894, pp. 45-6.

<sup>14</sup> VP 07/02/1894, pp. 63-4.

<sup>15</sup> VP 25/06/1903, pp. 22-3.

<sup>16</sup> VP 25/06/1903, pp. 22-3.

<sup>17</sup> VP 03/11/1908, p. 214.

	words used.	Member for Sturt 10 days later. <sup>17</sup>
18 October 1911	Mr Wood, Member for Bega, was called to order and left the Chamber on a disorderly manner. He refused to return to the Chamber and was named by the Speaker. <sup>18</sup>	He was adjudged to be guilty of contempt and suspended from the House until he apologised. On 5 December he entered the House and refused to withdraw when ordered to by the Speaker. The Serjeant-at-Arms removed him with the assistance of police. <sup>19</sup> The following day, the Speaker noted that if he wished to apologise he must convey that through the Serjeant and not enter the Chamber himself until asked. <sup>20</sup> On 20 February 1912, Mr Wood apologised without reservation and was allowed to resume his seat in the House. <sup>21</sup>
14 & 18 November 1912	Mr Perry, Member for Richmond, was removed from the Chamber on 14 November 1912 for defying the rulings of the Chair. <sup>22</sup> On 18 November 1912, Speaker Willis noted that it had been reported to him that Perry had returned to the Chamber on the night of his suspension. <sup>23</sup>	The House resolved that Mr Perry had been in contempt of the House and a motion was moved to suspend him for a week. However, an amendment to that motion was successfully moved limiting the suspension to that day's sitting. <sup>24</sup>
2 December 1915 (am)	Mr Stuart-Robertson, Member for Camperdown, used disorderly words in committee. He was ordered to apologise and withdraw the words but refused to do so.	He was adjudged guilty of contempt for failing to obey the orders of the House and a motion was moved to suspend him from the House until an apology was forthcoming. The motion was withdrawn after an apology was made. <sup>25</sup>
11 April 1916	Mr Cochran, Member for Darling Harbour, returned to the Chamber whilst on suspension and refused to apologise when ordered by the Speaker to do so.	He was deemed to be guilty of contempt for a wilful and vexatious breach of the Standing Orders and was subsequently suspended for the remainder of the session. <sup>26</sup>
11 July 1918	Mr Wright, Member for Willyama, Was found to be guilty of obstructing the orderly conduct of business of the House and was removed from the Chamber.	He was declared to be guilty of contempt. He was readmitted to the House to apologise and the House accepted the apology. <sup>27</sup>
12 March 1929	Mr O'Sullivan, Member for Woollahra, refused to act as the teller for the Noes.	The Speaker named Mr O'Sullivan and a motion was agreed to that he was guilty of contempt and he was suspended for a week. A number of other members who refused to act as tellers were also deemed to be guilty of contempt for wilfully and vexatiously obstructing the orderly conduct of the business of the House. <sup>28</sup>
12 March 1929	Mr Lamaro, Member for Enmore and Mr Olde, Member for Leichhardt, declined to act as tellers for a division.	Both members were adjudged to be guilty of contempt and were suspended from the service of the House for a week. <sup>29</sup>

Most Westminster style Parliaments have the power to punish members and individuals for both breaches of privilege and for contempts. The Houses of Parliament in New South Wales do not have a general power to punish for contempt. The Houses can find members and private individuals to be in contempt but can only take action against them in self-defence and not as a punishment. There are

<sup>18</sup> VP 18/10/1911, p. 87.

<sup>19</sup> VP 05/12/1911, p. 151.

<sup>20</sup> VP 06/12/1911, p. 156.

<sup>21</sup> VP 20/02/1912, p. 199.

<sup>22</sup> VP 14/11/1912, p. 211.

<sup>23</sup> VP 18/11/1912, p. 217.

<sup>24</sup> VP 18/11/1912, pp. 219-20.

<sup>25</sup> VP 02/12/1915, p. 262.

<sup>26</sup> VP 11/04/1916, pp. 433-4.

<sup>27</sup> VP 11/07/1918, p. 41.

<sup>28</sup> VP 12/03/1929, pp. 295-6.

<sup>29</sup> VP 12/03/1929, pp. 291-7.

however specific powers under the *Parliamentary Evidence Act 1901* to punish witnesses who act contemptuously by refusing to answer lawful questions during examination (s. 11 of the Act).

#### 1.4 Parliamentary privilege in New South Wales

New South Wales is the only Australian Parliament which has not legislated to define its privileges.<sup>30</sup> As such, the New South Wales Parliament has no privileges except those that are inherent in any legislative body. Unlike other Australian Parliaments, the New South Wales Parliament did not inherit, nor has it ever passed, legislation conferring upon itself the powers, privileges and immunities of the House of Commons.<sup>31</sup> Recourse is therefore made to the common law and certain relevant statutory provisions to determine its privileges. This means that the Parliament's privileges are uncertain and open to adaptation to contemporary conditions by the courts.

It is argued that the New South Wales Parliament, not having legislated generally in respect of privilege, has only the following privileges:

1. Such powers and privileges as are implied by reason of necessity;
2. Such privileges as were imported by the adoption of the *Bill of Rights*;
3. Such privilege as is conferred by the *Defamation Act 2005*; and
4. Such privilege as is conferred by other legislation such as the *Parliamentary Evidence Act 1901*.<sup>32</sup>

The following material is intended to provide an overview of the privileges of the New South Wales Parliament, including qualified privilege as it relates to members of Parliament. It highlights a number of court cases which can provide guidance as to what may be covered by privilege as well as other relevant issues. However, as the High Court noted in *Lange v Australian Broadcasting Corporation* even it is not bound by its previous decisions.<sup>33</sup> As such, this is a guide only.

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<sup>30</sup> It should be noted that in Tasmania the privileges of the Parliament have a somewhat limited definition. See the *Parliamentary Privileges Act 1858* (Tas).

<sup>31</sup> A number of attempts to confer the powers, privileges and immunities of the House of Commons have been made by the Legislative Assembly. See the *Parliamentary Powers and Privileges Bill 1878*; the *Parliamentary Powers and Privileges Bill 1901*; the *Parliamentary Privileges Bill 1912*; and the recommendations made by the Joint Select Committee upon Parliamentary Privilege in 1985.

<sup>32</sup> See the Report of the Joint Select Committee Upon Parliamentary Privilege entitled *Parliamentary Privilege in New South Wales*, 1985 pp. 6-19.

<sup>33</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 554.