

## Chapter 3 Such privileges as were imported by the adoption of the *Bill of Rights*

### 3.1 Statutory recognition of the freedom of speech for members of the Parliament of New South Wales

The most fundamental parliamentary privilege is the privilege of freedom of speech. In Australia, there is no restriction on what may be said by elected representatives speaking in Parliament. Freedom of political speech is considered essential in order to ensure that the Parliament can carry out its role of scrutinising the operation of the government of the day, and inquiring into matters of public concern. The statutory recognition of this privilege is founded in the *Bill of Rights 1688*. Article 9 provides:

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

Apart from the absolute protection afforded to statements made in Parliament, other privileges which flow from the *Bill of Rights* include: the right to exclude strangers or visitors; the right to control publication of debates and proceedings; and the protection of witnesses etc. before the Parliament and its committees.<sup>1</sup>

Article 9 is in force in New South Wales by operation of the *Imperial Acts Application Act 1969*.<sup>2</sup> Members are protected under this Act from prosecution for anything said during debate in the House or its committees. Despite this, in 1980 Justice McLelland expressed doubts about the applicability of Article 9 to the New South Wales Parliament in *Namoi Shire Council v Attorney General*. He stated that “art 9 of the *Bill of Rights* does not purport to apply to any legislature other than the Parliament at Westminster” and therefore, the supposed application of the article, does not extend to the Legislature of New South Wales.<sup>3</sup>

In making this point Justice McLelland argued that:

*the privileges of the respective Houses of the United Kingdom Parliament do not provide a valid measure of the privileges of the Legislative Assembly of New South Wales. The former are derived from (a) the historical status of the Parliament at Westminster as a court; (b) the constitutional foundation of the authority of the United Kingdom Parliament, as being ancient usage and prescription, rather than some definitive instrument; and (c) the constitutional struggles in England culminating in the Revolution Settlement...In the case of a legislature established by statute, as was the legislature of New South Wales, the privileges and immunities of the respective Houses and their members are limited to those either expressly conferred by or pursuant to statute; or necessarily incidental to the existence and status of the body in question, or to the reasonable and proper exercise of the functions vested in it.*<sup>4</sup>

It is unclear whether his Honour’s attention was directed to the adoption of the *Bill of Rights* in New South Wales by the *Imperial Acts Application Act 1969*. Subsequent cases have however held that Article 9 does apply in New South Wales.

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<sup>1</sup> Joint Select Committee upon Parliamentary Privilege, *Parliamentary Privilege in New South Wales*, 1985, p. 10.

<sup>2</sup> See *Imperial Acts Application Act 1969*, second schedule, part 1, sec. 6.

<sup>3</sup> *Namoi Shire Council v Attorney-General for New South Wales*, (1980) 2 NSWLR, 639 at 640.

<sup>4</sup> *Ibid*, at 643.

For example, the effect of Article 9 of the *Bill of Rights* in relation to New South Wales was considered by the High Court in *Egan v Willis*<sup>5</sup> with Justices Gaudron, Gummow and Hayne indicating that the intention of the *Imperial Acts Application Act 1969* was to ensure the constitutional norms prescribed by Article 9 would apply in New South Wales. There was however, some speculation by the judges as to the precise manner in which these norms would apply in New South Wales. They argued:

*...the evident intention was that there should be some limits upon the extent to which events happening in the New South Wales legislature may be considered in the courts. It may very well be that effect is to be given to that intention simply by reading the references in Art 9 to "court" and "parliament" as references to the courts and Parliament of the State. But not all other provisions of the Bill of Rights or other preserved Imperial Acts may admit of so ready a solution to the problems of how they are to be applied and it may be that more radical solutions may be required in such cases. These are questions that need not be addressed in this case.*<sup>6</sup>

Other judges in the case had similar views, with Justice McHugh noting that the *Bill of Rights*, which is in force in New South Wales, by virtue of the *Imperial Acts Application Act 1969*, merely confirms the common law<sup>7</sup> and Justice Callinan noting that Article 9 of the *Bill of Rights* provided "...a clear indication that the proceedings of the Houses in New South Wales should not in general be subject to check or questioning in the Courts."<sup>8</sup>

### **3.2 What constitutes "proceedings in Parliament"?**

Article 9 of the *Bill of Rights* provides protection for speeches, debates and proceedings of Parliament from being questioned in any place outside of the Parliament. Until recently, what constitutes "proceedings in Parliament" had not been defined in legislation in any jurisdiction in Australia or the United Kingdom and it was left to the courts to determine the exact extent of "proceedings". In 1987 the Federal Parliament enacted the *Parliamentary Privileges Act 1987* in order to alleviate some of the confusion as to what constitutes "proceedings in Parliament". This legislation was enacted following controversy about the precise extent of privilege attached to the House of Representatives and the Senate following two cases in the Supreme Court of New South Wales concerning Justice Murphy in 1985 and 1986. These cases interpreted and applied article 9 of the *Bill of Rights* in a manner unacceptable to the Parliament. One commentator noted that:

*the effect of both judgments in R v Murphy was that the prosecution and the defence made free use of the evidence given before the Senate Committees for their respective purposes...the prosecution and the defence made use of evidence given in camera (that is, not in public) before the Senate Committees, evidence which neither the committees nor the Senate had published or disclosed to them, and which, in the view of the Senate, they had no right even to possess.*<sup>9</sup>

The *Parliamentary Privileges Act 1987* does not directly affect the privileges of the New South Wales Parliament. Since the passage of the Act, Justice Loveday of the District Court has ruled that parliamentary privilege did not prevent the subpoenaing of evidence given *in camera* to a select committee of the Legislative Assembly to

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<sup>5</sup> 1998 HCA 71.

<sup>6</sup> *Egan v Willis* (1998) HCA 71, at paragraph 23.

<sup>7</sup> *Ibid*, at paragraph 69.

<sup>8</sup> *Ibid*, at paragraph 180.

<sup>9</sup> *Odgers' Australian Senate Practice*, 11th edition, Edited by Harry Evans, 2004, p. 36.

impeach the credit of a witness at a criminal trial.<sup>10</sup> Nevertheless, a judge of the Federal Court has expressed the view that section 16(3) of the Act is declaratory of the law in Australia before its enactment<sup>11</sup> and such views influence interpretation by the courts.<sup>12</sup> The effect of the Commonwealth Act will be considered in more detail in section 3.4 of Part Two.

Determining the scope of what constitutes “proceedings in Parliament” clearly lies with the courts in the absence of legislation in New South Wales and not with either House. Carney argues that parliamentary proceedings covers:

*...the speeches and debates, as well as the passage of legislation. Also included are the tabling of motions and amendments to motions or bills and the tabling, asking and answering of questions to Ministers and other members. A register of members’ pecuniary interests might also attract privilege.<sup>13</sup> The proceedings of parliamentary committees including the evidence given by any person to those committees are also covered as are those who present petitions to parliament.<sup>14</sup>*

Carney also notes that it is clear that members of Parliament are not protected by privilege for actions performed outside of Parliamentary proceedings, regardless of whether the action is conducted pursuant to the member’s position as an elected representative. Of course the closer the activity is connected to “proceedings in Parliament” the more likely it is to be covered by parliamentary privilege. Reference is made to  *Holding v Jennings*<sup>15</sup> where it was held that the typing of a statement to be made by a member in Parliament is considered to be a “proceeding in Parliament”.<sup>16</sup>

On the issue of whether a tabled paper necessarily constitutes a “proceeding in Parliament”, a recent case in Australia held that such documents could be tendered in evidence as they are not considered to fall within the ambit of what constitutes a “proceeding in Parliament” and hence do not automatically attract parliamentary privilege. In April 2002, the Australian Capital Territory Supreme Court considered whether a report prepared pursuant to the *Inquiries Act 1991 (ACT)* and submitted to the Chief Minister for tabling could be tendered as evidence in an action for defamation. In determining the issue Justice Crispin noted that:

*The decisive question is...whether the copy of the report...falls within the description “proceedings in Parliament” as defined in subs 16(2) [of the Parliamentary Privileges Act 1987 (Cmth)] and that concept plainly extends to acts done for purposes of transacting the business of the Parliament including the preparation of documents for such purposes. However, the evidence does not establish that the report of the first defendant was prepared for any such purpose. On the contrary, it seems clear that the report was prepared in fulfilment of a statutory duty which the first defendant acquired upon accepting the appointment by the Executive pursuant to s. 5 of the Act.<sup>17</sup>*

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<sup>10</sup> *Regina v Abraham Gilbert Saffron* unreported, District Court of New South Wales, 21 August 1987.

<sup>11</sup> *Amann Aviation Pty Ltd v Commonwealth of Australia* (1988) 19 FCR 223 at 231.

<sup>12</sup> See for instance, *NSW Australian Medical Association v Minister for Health and Community Services* (1992) 26 NSWLR 114 at 126.

<sup>13</sup> In New South Wales Section 14A(7) of the *Constitution Act 1902* expressly confers parliamentary privilege to the Register of Pecuniary Interests.

<sup>14</sup> Carney, Gerard, *Members of Parliament: Law and Ethics*, 2000, pp. 210-11.

<sup>15</sup> (1979) VR 289.

<sup>16</sup> *Ibid.*

<sup>17</sup> *In the matter of the Board of Inquiry into Disability Services* (2002) ACTSC 28, 10 April 2002 at paragraph 21.

Justice Crispin went on to state that the handing of a report to a Minister who has a statutory requirement to table it in Parliament is not enough to make the actual report a “proceeding in Parliament”. He noted:

*Privilege may be attracted by the retention of a document for a relevant purpose, but that is because the retention for such a purpose is itself an act forming part of the proceedings. The privilege thereby created does not attach to the document and any copies for all purposes. It applies only to the words used and acts done in the course of, or for the purposes of or incidental to, the transaction of business of the Assembly including the retention of a document for a purpose of that kind....Furthermore, privilege may not prevent even documents that have been tabled from being admitted into evidence if they were not prepared for purposes of or incidental to business of the Parliament and their subsequent production would not reveal words used or acts done that might fairly be regarded as falling within the concept of “proceedings in Parliament”.*<sup>18</sup>

Documents tabled in Parliament may receive qualified privilege in accordance with section 28 of the *Defamation Act 2005* if they are not considered to be a “proceeding in Parliament”. Section 28 provides a defence to the publication of a defamatory matter if the defendant proves that the matter was contained in a public document or a fair summary or extract from a public document. A public document includes any document published by a parliamentary body. In addition clause 8 of schedule 2 of the *Defamation Act 2005* includes in the definition of public documents, documents produced to certain parliamentary committees conducted in private. Further information on the privilege attached to tabled papers is discussed in section 4.2.2 of Part Two.

With regard to the publication outside the Chamber, of statements already made within the Chamber, a number of members have claimed that such statements are subject to parliamentary privilege. However, the courts in a number of Australian jurisdictions have not agreed. For instance in *Australian Broadcasting Corporation v Chatterton* a member of the House of Assembly of South Australia gave a television interview on the subject of a question that he had asked of the Premier in the House. Justice Prior held that the interview was not considered to be a “proceeding in Parliament”, although Justice Zelling AC left the question open in this case.<sup>19</sup> Similarly, in Victoria the Supreme Court held that statements made by a Minister at a press conference regarding allegations made by him earlier in the House were not protected.<sup>20</sup> The repetition of statements already made in the House by members will be discussed further in section 3.10 of Part Two.

There have been a number of cases in which absolute privilege has been claimed in relation to proceedings in a Party caucus. In *Della Bosca v Arena*<sup>21</sup> Justice Levine expressed the view that it was “arguable” whether the doctrine of absolute privilege in relation to proceedings in Parliament extended to proceedings of caucus.<sup>22</sup> In doing so he noted that the law provides no binding authority in this area but referred to a number of cases which had considered the issue including *Rata v The Attorney-General* where it was held “that the Caucus as it had developed in New Zealand is

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<sup>18</sup> *Ibid*, at paragraph 22 and 23.

<sup>19</sup> *Australian Broadcasting Corporation v Chatterton* (1986) 46 SASR 1 as taken from Michael Sexton SC, “Parliamentary Privilege, Defamation and Public Interest”, in *Law Society Journal*, June 2002, pp. 62-4.

<sup>20</sup> *Beitzel v Crabb* (1992) 2 VR 121 (per Hampel J) as taken from Michael Sexton SC, “Parliamentary Privilege, Defamation and Public Interest”, in *Law Society Journal*, June 2002, pp. 62-4.

<sup>21</sup> (1999) NSWSC 1057, 27 October 1999.

<sup>22</sup> *Ibid*, at paragraph 24.

an integral part of the Parliamentary process and that all matters transacted in caucus are inexplicably (sic – query *'inextricably'*) linked to Parliament and thus attracts the privilege."<sup>23</sup> The Supreme Court of New South Wales was not required to rule on the matter as the issue was settled out of court. In contrast to the decision reached in New Zealand in *Rata v The Attorney-General* the Tasmanian Supreme Court has held that such meetings do not attract privilege.<sup>24</sup>

It should be noted that parliamentary proceedings need to be valid in order to be protected by privilege. For instance, committee proceedings would only be considered to be a valid proceeding in Parliament if the committee has a quorum when meeting and was acting within its jurisdiction.<sup>25</sup> This was evident in *Criminal Justice Commission v Parliamentary Criminal Justice Commissioner*<sup>26</sup> where McPherson JA expressed the view that a committee inquiry may not be privileged if the inquiry is contrary to legislative provision as it may not be considered a valid proceeding in Parliament. He stated:

*The possibility that the court might one day have to pass judgment on the legitimacy of an inquiry or report by the Parliamentary Commissioner cannot be altogether discounted, if, for example, the Parliamentary Criminal Justice Committee purported under s. 118R(2)(c) to authorise the Parliamentary Commissioner to investigate an allegation of disclosure of information that was not "under the Act" to be treated as confidential, it would or might call for a decision whether or not the ensuing investigation constituted "proceedings in Parliament" that were insulated by art 9 of the Bill of Rights from being "questioned" in a court of law. Intrusion into a field of federal law that is subject to the Commonwealth Constitution may be another area in which such questions could arise. But none of these problems exist in the present case. The submission advanced by the applicants is that the Parliamentary Committee could not lawfully authorise, and the Commissioner could not lawfully act, in defiance of the common law requirement, said to be implicit in s. 118R, that the principles of procedural fairness must be observed. The short answer to that contention is that neither the Parliamentary Committee nor the Commissioner herself did or attempted any such thing. The requirements of procedural fairness were not contravened, and the applicants have no valid ground for complaining that they were. It follows that this Court, like others in Queensland, is precluded by art 9 of the Bill of Rights from questioning the validity or propriety of the Commissioner's investigation and report.*<sup>27</sup>

On a related note the New South Wales Crown Solicitor is of the opinion that any proceeding where members meet as a committee are considered to be proceedings of the committee regardless of whether statutory requirements such as a quorum or otherwise are met. The Crown Solicitor noted that whilst a lack of quorum may affect the validity of any decisions taken by a committee it does not mean that there are no proceedings and that such proceedings, given that they are proceedings of the committee, would attract parliamentary privilege.<sup>28</sup> Of course, this is a view that needs to be tested in court, particularly given the view expressed in *Criminal Justice Commission v Parliamentary Criminal Justice Commissioner* noted above.

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<sup>23</sup> *Ibid*, at paragraph 23.

<sup>24</sup> See *R v Turnbull* (1958) Tas SR 80 (per Gibson J at 84).

<sup>25</sup> See *House of Representatives Practice*, 5th edition, p. 693.

<sup>26</sup> (2001) QCA 218.

<sup>27</sup> *Criminal Justice Commission v Parliamentary Criminal Justice Commissioner* (2001) QCA 218 at paragraph 25 (per McPherson JA).

<sup>28</sup> Advice received from the Crown Solicitor re: Private Briefings for Parliamentary Committees with Supervisory Role, dated 1 October 1998.

### 3.3 Judicial interpretation of “proceedings in Parliament”

The meaning of the phrase “proceedings in Parliament” has seldom been directly considered by the courts. However, the issue has arisen in a number of contexts.

The first time that the issue of what constitutes “proceedings in Parliament” was considered by a court of law was during the 1830s when, in the United Kingdom, the firm of Hansard was sued for defamation. Hansard, as printers of the House of Commons, had by order of the House printed a report that had been laid on the Table by the Inspector of prisons. The House of Commons contended that such publications would be protected under article 9. The court did not consider the authorisation of the House as a sufficient defence. Chief Justice Lord Denman observed “that the House’s direction to publish all parliamentary reports was no justification for Hansard or anyone else.”<sup>29</sup> In this instance Hansard was successful in pleading justification however, as the court had ruled that the authorised publishers of reports of Parliamentary proceedings were not protected by article 9, the issue of what was considered to be “proceedings in Parliament” was left open to debate.

In response to this judgment and following a committee inquiry regarding the publication of papers printed under an order of the House, the House of Commons in 1837 passed a number of resolutions which collectively declared that:

*the publication of parliamentary reports, votes and proceedings was an essential incident to the constitutional functions of Parliament; that the House had sole and exclusive jurisdiction to determine upon the existence and extent of its privileges; that to dispute those privileges by legal proceedings was a breach of privilege; and that for any court to presume to decide upon matters of privilege inconsistent with the determination of either House was contrary to the law of Parliament.*<sup>30</sup>

Despite these resolutions another action in defamation was taken against Hansard in 1839. When the matter came before court in *Stockdale v Hansard*<sup>31</sup> the court assumed the jurisdiction to determine to what extent parliamentary privilege existed and its scope. The court considered that an action of defamation could be pursued even in cases where the defamatory material was contained in documents that had been published pursuant to an order of the House or under the authority of the House.

Following this judgment the Sheriff of Middlesex executed the judgement against the firm of Hansard and in response to this action the House of Commons issued a warrant to arrest the Sheriff of Middlesex. The warrant, rather than specify what actions the Sheriff of Middlesex had made, only cited that the House had found the position holders guilty of contempt. In the *Case of the Sheriff of Middlesex*<sup>32</sup> the Court of the Queen’s Bench, following the decision in *Stockdale v Hansard*, argued that judicial review was effectively prevented as the issue of whether a parliamentary

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<sup>29</sup> *Stockdale v Hansard* (1836-37) 173 ER 322 as taken from *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 23rd edition, edited by Sir W R McKay KCB, pp. 184-5.

<sup>30</sup> See *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 23rd edition, edited by Sir W R McKay KCB, pp. 184-7.

<sup>31</sup> (1839) 112 ER 1118.

<sup>32</sup> *Sheriff of Middlesex* (1840) 113 ER 419.

privilege existed did not arise as it was considered to be within the power of the House to arrest a person adjudged by it to be guilty of contempt.<sup>33</sup>

From these cases the principle emerged that a court only has the power to consider whether the House possesses the power to make an order (such as for an arrest warrant), not the desirability or merits of the order being given. This principle is explicit in Article 9 of the *Bill of Rights* in that the “proceedings in Parliament”, of which parliamentary privilege is just one aspect, cannot be impeached or questioned outside of the Parliament.

In 1957, the House of Commons made an important ruling on what it considered to be a “proceeding in Parliament” in relation to a defamation case brought against one of its members. It ruled that a letter from a member of Parliament to a Minister did not constitute a “proceeding in Parliament” and hence was not absolutely privileged. In 1957, Mr Strauss, a member of the House of Commons, wrote a letter of complaint regarding the London Electricity Board to the responsible Minister. The Minister informed Mr Strauss that as the matter complained of was one of day-to-day administration it was a matter for the board and that he would bring it to the chairman of the board’s attention. Correspondence then ensued between the board and Mr Strauss culminating in the board initiating defamation proceedings against the member. Mr Strauss informed the House of Commons that the actions taken by the board were calculated to impede him in the performance of his Parliamentary duties and constituted a breach of the privileges of the House. The matter was referred to the Privileges Committee which reported that the letter from Mr Strauss to the Minister fell within the ambit of “proceedings of Parliament” within the meaning of the *Bill of Rights 1688*. However, the House did not agree and in a narrow vote of 218 to 213 it resolved that the letter did not constitute a proceeding in Parliament. The matter was not considered in a court of law as the board decided not to proceed with its libel action against Mr Strauss.<sup>34</sup>

The courts in Australia have, however, considered a similar issue. In November 1997, the majority of the Queensland Court of Appeal held in *O’Chee v Rowley* that “all those documents written by the Senator, comprising diary notes, file notes of attendances and conversations and letters, were documents within the ‘proceedings of Parliament’...having been prepared for the purpose of or incidental to the transaction of Senate business.”<sup>35</sup>

On the issue of what constitutes “proceedings in Parliament” McPherson JA made the following remarks in relation to the *Parliamentary Privileges Act 1987* (Cmth):

*By s 16(2) of the 1987 Act proceedings in Parliament include the preparation of a document for the purposes of or incidental to the transacting of any business of a House. More generally, such proceedings include all acts done for such purposes, together with any acts that are incidental to them. Bringing documents into existence for such purposes; or, for those purposes, collecting or assembling them; or coming into possession of them, are therefore capable of amounting to “proceedings in Parliament.”*<sup>36</sup>

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<sup>33</sup> *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 23rd edition, edited by Sir W R McKay KCB, pp. 184-7.

<sup>34</sup> See S.A. De Smith, “Parliamentary Privilege and the Bill of Rights”, in *The Modern Law Review*, Volume 21, September 1958, No. 5, pp. 465-83.

<sup>35</sup> *O’Chee v Rowley* (1997) 150 ALR 199 at 208-9.

<sup>36</sup> *Ibid*, at 215.

In a related case,<sup>37</sup> in April 2000 the Supreme Court of Queensland held that privilege is not automatically attached to correspondence received by a member of Parliament on matters of interest to the member and which the member had debated in the House.

Justice Jones concluded “that an informant in making a communication to a parliamentary representative is not regarded as participating in “proceedings in Parliament” and therefore the provisions of the *Parliamentary Privileges Act* do not apply.”<sup>38</sup> This is in contradiction to the Senate Committee of Privileges 67th Report which concluded that the *Parliamentary Privileges Act 1987* rendered the protection of parliamentary privilege available for some categories of “communications of information to senators by other persons.” This Report found that the communications by Mr Armstrong, a constituent, to Senator O’Chee, for which he (Mr Armstrong) is now being sued in defamation, were made for the purpose of Senator O’Chee using that information “in Senate proceedings”. The proceedings in question included a question asked in the Senate, a speech on the adjournment and a further question.<sup>39</sup>

Legal advice on the judgment obtained by the Senate Committee of Privileges concluded that there were profound weaknesses in the judge’s reasoning and that His Honour’s conclusion on the ambit of parliamentary privilege under the Act was fatally flawed, and of no weight whatever as an authority. Further, it must be noted that the issue before the Supreme Court of Queensland was whether the proceedings should be stopped in their tracks as an abuse of process. Therefore, matters of parliamentary privilege were not determined. The advices were published as part of the 92nd Report of the Senate Committee of Privileges.

The committee sought the views of the Clerk of the Senate as to whether any further steps could be taken in relation to Mr Rowley’s action against Mr Armstrong, and also a new action against former Senator O’Chee, who, as a Senator, originally raised Mr Armstrong’s difficulties as a matter of privilege. In response the Clerk suggested that “the only feasible step” for the Senate to take in the matter would be if either of the actions actually came to trial. He observed:

*In that event counsel instructed for the Senate could seek leave to appear as amicus curiae to assist the court on the parliamentary privilege question and to make submissions on the appropriate application of parliamentary privilege principles and the relevant statutory provisions to the particular actions. This may result in appropriate findings by the court and reversal of Jones J’s unsatisfactory judgment.*<sup>40</sup>

### **3.4 Admissibility of parliamentary proceedings in court**

The purpose of Article 9 of the *Bill of Rights* is to ensure that members of Parliament are not liable for what they say in Parliament. However, it does not prohibit the use of *Hansard* or committee proceedings in court to establish something as fact, as an aid in the interpretation of statutes, or in determining whether legislation has been validly enacted.

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<sup>37</sup> *Rowley v Armstrong* (2000) QSC 88.

<sup>38</sup> *Rowley v Armstrong* (2000) QSC 88 at paragraph 34.

<sup>39</sup> The Senate Standing Committee of Privileges, *92nd Report: Matters Arising from 67th Report of the Committee of Privileges*, June 2000, pp. 10 and 14.

<sup>40</sup> The Senate Committee of Privileges, *Matters arising from 67th Report of the Committee of Privileges (2)*, 94th Report, September 2000. The matter has not come to trial.

In the United Kingdom, it is clearly accepted that the proceedings of Parliament may be referred to for the purpose of proving, as a fact, that certain events occurred in the course of those proceedings. In *Church of Scientology of California v Johnston-Smith* Justice Browne held that extracts from *Hansard* could be read without infringing the privileges of the Parliament. The Attorney-General was invited to help the court in considering whether parliamentary privilege had been infringed. He submitted that “A reference could be made to the making of a speech as a matter of history such as the date on which it was made and who made it, but there could be no impeachment of the speech.”<sup>41</sup>

Justice Browne referred to the submission made by the Attorney-General, that *Hansard* could only be used for a limited purpose of proving fact and not for drawing inferences from it and noted that:

*...the general principle is quite clear...extracts from Hansard ...must not be used in any way which might involve questioning, in a wide sense, what was said in the House of Commons as recorded in Hansard.*<sup>42</sup>

A similar approach has been taken in subsequent cases in Australian jurisdictions. In *Finnane v Australian Consolidated Press Ltd* Justice Needham noted that:

*The rationale of the rule...was that it was not open to the courts to question the conduct of any member of Parliament; certainly it was not open in the courts to make a member of Parliament in any way liable at law for what had been said in the House.*<sup>43</sup>

He went on to argue that if however, “anything further were to be adventured, for example, comments on the material by counsel or, no doubt, by the court, that would be a matter in which it would be likely that the House would exercise its privileges and, if necessary, enforce the prohibition on breach of them.”<sup>44</sup>

Justice Needham referred to the decision of Justice Browne in the *Scientology* case noting his conclusion that a court cannot use *Hansard* even for minimal use unless the consent of the House has been given. He also referred to the House of Representatives standing order which “prohibits any officer of the House, or shorthand writer employed to take minutes of evidence before it or at any committee, from giving evidence elsewhere in respect of any proceedings or examination of any witness, without special leave of the House.” He argued that although the standing order does not specifically cover the use of *Hansard* in court “...it certainly indicates an intention on the part of the Parliament to maintain its privilege of publication of its own debates.”<sup>45</sup> In the absence of a similar standing order in the New South Wales Legislative Assembly courts may take a different view in cases involving members of the Assembly.

In *Uren v John Fairfax & Sons Ltd* it was held by the New South Wales Supreme Court that the Commonwealth Parliament had waived its privileges in relation to the mere proof of *Hansard* in court given that the proceedings of the Parliament were

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<sup>41</sup> *Church of Scientology v Johnston-Smith* (1972) 1 QB 522, at 525.

<sup>42</sup> *Church of Scientology v Johnston-Smith* (1972) 1 QB 522, at 531. See also *Munday v Askin* (1982) 2 NSWLR 369 at 373 (CA); and *Rost v Edwards* (1990) 2 WLR 1280.

<sup>43</sup> *Finnane v Australian Consolidated Press Ltd and others* (1978) 2 NSWLR 435 at 438.

<sup>44</sup> *Ibid*, at 438-9.

<sup>45</sup> *Ibid*, at 439.

broadcast and that copies of *Hansard* were sold freely. Justice Begg in accepting the submission of the defendant argued that the privileges of a House of Parliament are not infringed by seeking to prove that certain speeches had been made in the House so long as the proceedings were not used "...in any way to criticise them, nor to call them in question in these proceedings, but to prove them as facts upon which the defendant allege comments were made in the publication now sued upon by the plaintiff."<sup>46</sup>

In *Munday v Askin* objection was taken to the admission of *Hansard* in court proceedings. However, the Court of Appeal permitted *Hansard* to be tendered as evidence arguing that in this case "*Hansard* was tendered to prove, as a fact, that certain things had been said in the course of a debate in the Legislative Assembly. There was no question of any further examination of the circumstances in which the debate had taken place or the motives of the participants, or of anything else which might infringe the privilege of Parliament."<sup>47</sup>

This view that *Hansard* could be tendered in court proceedings for the purposes of proving fact was expanded on by Justice Hunt in *Henning v Australian Consolidated Press Ltd* where he ruled that *Hansard* could be used in court so long as the motives and intentions of members of Parliament were not questioned stating:

*Parliamentary privilege is properly invoked to prevent any inquiry into the motives and intentions of Members of Parliament in relation to anything they said or did in Parliament. But that principle, as the Court of Appeal said in Munday v Askin, has nothing to do with the case where all that the copy of Hansard was tendered to prove was the very fact which it proclaimed to the world, namely that a particular statement had been made by a particular Member in the House.*<sup>48</sup>

The notion that proceedings in Parliament can be admitted into evidence so long as the motives, intentions and reasoning behind the proceedings are not questioned, was followed by Justice Hungerford in *New South Wales Branch of the Australian Medical Association v Minister for Health and Community Services*. In this case the Minister for Health tendered a Public Accounts Committee report to support and corroborate his evidence. The Australian Medical Association sought to attack the report so as to weaken and rebut the Minister's case. Justice Hungerford declared:

*...the tender of the PAC Report would inevitably result in a direct and critical challenge to the material contained in it as finalised by the committee. That would represent a challenge to the functions of the committee and the way in which it has performed those functions. Such a process would strike...at the whole basis for Parliamentary privilege as it has evolved, and would result in the Public Accounts Committee report being impeached and questioned contrary to article 9 of the Bill of Rights.*<sup>49</sup>

This view was also expressed by the Privy Council in *Prebble v Television NZ Ltd* where it was held:

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<sup>46</sup> *Uren v John Fairfax & Sons Ltd* (1979) 2 NSWLR 287, p. 289.

<sup>47</sup> *Munday v Askin* (1982) 2 NSWLR 369, p. 373. See also *Comalco Limited v ABC* (1982) 50 ACTR 1 at p. 5, where Blackburn CJ permitted the tender of *Hansard* into evidence.

<sup>48</sup> *Henning v Australian Consolidated Press Ltd* (1982) 2 NSWLR 374, p. 375.

<sup>49</sup> *New South Wales Branch of the Australian Medical Association v Minister for Health and Community Services* (1992) 26 NSWLR 114, p. 128.

*...that parties to litigation, by whomsoever commenced, cannot bring into question anything said or done in the House by suggesting (whether by direct evidence, cross-examination, inference or submission) that the actions or words were inspired by improper motives or were untrue or misleading. Such matters lie entirely within the jurisdiction of the House...*<sup>50</sup>

In this case a former New Zealand Minister brought proceedings in defamation against a television station for airing a program which contained allegations about the Minister's conduct whilst in office. In defence the television station relied on the statements made by the Minister in the House of Representatives (NZ) in order to prove that his statements to the House were inconsistent with his conduct whilst Minister.

The Privy Council said that, in particular circumstances, the interests of justice would be served by requiring parliamentary privilege to be waived by a House or through a stay of proceedings, if the exclusion of evidence by reason of parliamentary privilege made it impossible for there to be a fair trial between the parties. It has been argued by one commentator that the approach of the Privy Council would be inconsistent with the implied freedom of political communication under the Constitution as determined by the High Court of Australia.<sup>51</sup> (See section 3.11.1 of Part Two for further information on the implied freedom of political communication).

The New South Wales Supreme Court, in two judgments in relation to Justice Murphy in 1985 and 1986, took a somewhat different approach. In the first judgment, Justice Cantor proposed that the rationale of article 9 was to prevent harm being done to Parliament and its proceedings and to ensure that the substance of what a member said or did in the House would not be questioned or impeached outside of the Parliament. Justice Cantor agreed with the view expressed by Chief Justice Blackburn in *Comalco Ltd v ABC* stating that:

*...there is no rule of evidence that evidence of the proceedings in a Parliament is not admissible except with the consent of Parliament. The privilege of Parliament is upheld by a Court when it refuses to allow the substance of what was said in Parliament to be the subject of any submission or inference.*<sup>52</sup>

He also considered the importance of the evidence to the court proceedings should be weighed against the privilege of freedom of speech. He argued that parliamentary privilege would not be breached by admitting into evidence what was said in a House of Parliament in order to establish what was said and that the requirements of the court for a full and fair trial need to be weighed against any claims for such privilege.<sup>53</sup>

In the second judgment, Justice Hunt held that article 9 was restricted to preventing Parliamentary proceedings being the actual cause of a court action, but did not prevent evidence of those proceedings being used to support an action. He considered that article 9 of the *Bill of Rights* meant that:

*...no court proceedings (or proceedings of a similar nature) having legal consequences against a member of parliament (or a witness before a parliamentary committee) are permitted which*

<sup>50</sup> *Prebble v Television NZ Ltd* (1994) 3 NZLR 1 at 10.

<sup>51</sup> *Prebble v Television New Zealand Ltd* (1995) 1 AC 321, as taken from Michael Sexton SC, "Parliamentary Privilege, Defamation and Public Interest", in *Law Society Journal*, June 2002, pp. 62-4.

<sup>52</sup> See the unreported judgment of Cantor J. in *R v Murphy* delivered 5 June 1985, p. 5.

<sup>53</sup> See *Odgers' Australian Senate Practice*, 11th Edition, edited by Harry Evans, 2004, p. 37.

*by those legal consequences have the effect of preventing that member (or committee witness) exercising his freedom of speech in parliament (or before a committee) or of punishing him for having done so.*<sup>54</sup>

Furthermore, Justice Hunt held that such evidence could be used, either in providing primary evidence of an offence or a civil wrong, or in providing a basis for attacking the evidence of a witness or a defendant in the court proceedings.

Carney argues that the approach adopted in the *Murphy* cases depends on a distinction being drawn between using Parliamentary statements to base a legal action and using them merely to support such an action. He goes on to argue that although maintaining this distinction appears feasible, this option subjects the motives of members to judicial scrutiny.<sup>55</sup> The Senate expressed similar concerns in that the judgment of Justice Hunt would permit the calling of members of Parliament, as well as other witnesses, to account in court for things said or done in parliamentary proceedings. Members of Parliament and/or witnesses would then be subject to attack and damage for their participation in Parliamentary proceedings, provided that such proceedings were not the formal cause of action.<sup>56</sup> As such, the *Parliamentary Privileges Act 1987* was introduced for the express purpose of ensuring that a similar judgment would not be delivered again.

Section 16 of the *Parliamentary Privileges Act 1987* (Cmth) deals with parliamentary privilege in court proceedings. It provides:

**16. (1)** For the avoidance of doubt, it is hereby declared and enacted that the provisions of article 9 of the Bill of Rights, 1688 apply in relation to the Parliament of the Commonwealth and, so as applying, are to be taken to have, in addition to any other operation, the effect of the subsequent provisions of this section.

**(2)** For the purposes of the provisions of article 9 of the Bill of Rights, 1688 applying in relation to the Parliament, and for the purposes of this section, "proceedings in Parliament" means all words spoken and acts done in the course of, or for the purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes:

- (a)** the giving of evidence before a House or a committee, and evidence so given;
  - (b)** the presentation or submission of a document to a House or a committee;
  - (c)** the preparation of a document for purposes of or incidental to the transacting of any such business; and
  - (d)** the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.
- (3)** In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purposes of:
- (a)** questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
  - (b)** otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
  - (c)** drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

<sup>54</sup> *R v Murphy* (1986) 5 NSWLR 18 at 38.

<sup>55</sup> Carney, Gerard, *Members of Parliament: Law and Ethics*, 2000, p. 237.

<sup>56</sup> *Odgers' Australian Senate Practice*, 11th edition, edited by Harry Evans, 2004, pp. 34-8.

(4) A court or tribunal shall not:

- (a) require to be produced, or admit to evidence, a document that has been prepared for the purpose of submission, and submitted, to a House or a committee and has been directed by a House or committee to be treated as evidence taken *in camera*, or admit evidence relating to such a document; or
- (b) admit evidence concerning any oral evidence taken by a House or a committee *in camera* or require to be produced or admit into evidence a document recording or reporting any such oral evidence, unless a House or a committee has published or authorised the publication of, that document or a report of that oral evidence.

(5) In relation to proceedings in a court or tribunal so far as they relate to:

- (a) a question arising under section 57 of the Constitution; or
- (b) the interpretation of an Act;

neither this section nor the Bill of Rights, 1688 shall be taken to prevent or restrict the admission in evidence of a record of proceedings in Parliament published by or with the authority of a House or a committee or the making of statements, submissions or comments based on that record.

(6) In relation to a prosecution for an offence against this Act or an Act establishing a committee, neither this section nor the Bill of Rights, 1688 shall be taken to prevent or restrict the admission of evidence, the asking of questions, or the making of statements, submissions or comments, in relation to proceedings in Parliament to which the offence relates.

(7) Without prejudice to the effect that article 9 of the Bill of Rights, 1688 had, on its true construction, before the commencement of this Act, this section does not affect proceedings in a court or a tribunal that commenced before the commencement of the Act.

Whilst, the *Parliamentary Privileges Act 1987* endeavours to resolve the position at the Commonwealth level, it of course does not do so at the State level.<sup>57</sup>

The Supreme Court of South Australia in *Wright and Advertiser Newspapers Ltd v Lewis*<sup>58</sup> in 1990 followed the decision of Justice Hunt in *R v Murphy*. In this case a member of the South Australian House of Assembly initiated an action in defamation against the newspaper and also the author of a letter written to the editor of the newspaper and subsequently published by it. The letter in question was highly critical of the member for statements made in the House concerning the author of the letter (Mr Wright). Mr Wright argued that a defence of qualified privilege applied as he was responding to an attack made upon him by Mr Lewis. Mr Wright also accused Mr Lewis of making unfounded accusations and abusing his parliamentary privilege. Mr Lewis sought to have these particulars of the defence struck out on the basis that they required an examination of the statements made by him in parliament in order to determine the truthfulness or otherwise of these statements and would involve questioning the motives or intentions of him in making those statements.

The South Australian Full Court unanimously rejected the argument of Mr Lewis. Justice Olsson observed:

*The express purpose of the Bill of Rights was to erect a protective shield of defence for Members of Parliament, so that they may discharge their duties without constant fear of action being taken against them. It was not enacted for the purpose of forging a sword of oppression, whereby individual members of Parliament could, at their initiative, prosecute proceedings for*

<sup>57</sup> Legislation defining "proceedings of Parliament" has also been enacted in the Queensland, the Australian Capital Territory and the Northern Territory.

<sup>58</sup> *Wright and Advertiser Newspapers Ltd v Lewis* (1990) 53 SASR 416

*civil relief against citizens in a manner which denies those citizens access to the normal defences made available to them by the law.*<sup>59</sup>

Despite the decision in *Wright and Advertiser Newspapers Ltd v Lewis*, the narrow interpretation of Article 9 by Justice Hunt in *R v Murphy* has been rejected by subsequent cases. For example, in *R v Jackson* Justice Carruthers, following the English authorities, disagreed with Justice Hunt by rejecting the tender of *Hansard* by the prosecution in a criminal trial. Following an attempt by the prosecution to inquire into the motives of a member of Parliament for having said certain things in Parliament, Justice Carruthers noted:

*[T]he prosecution sought to do far more than merely prove what Jackson said in the House. It sought in support of its case to establish that Jackson told lies in the House in relation to matters which were material issues in the trial....The prosecution sought to prove...that the sole motive for such alleged lies was a realisation of guilt by Jackson and a fear of the truth. If I were to have allowed the tender of Hansard for these purposes against Jackson this would necessarily have involved an inquiry into his motives and intentions in that which he said in the House. Such an inquiry would, in my view, contravene art 9.*<sup>60</sup>

Given that the New South Wales Parliament has not enacted legislation defining its privileges, the current position in New South Wales arguably rests between the narrow interpretation of Article 9 by Justice Hunt in *R v Murphy* and the broad interpretation by Justice Carruthers in *R v Jackson*.

The scope of Article 9 has been the subject of recent developments in the United Kingdom courts. In 1993 in *Pepper v Hart* the House of Lords held that it may look at ministerial statements made in Parliament during the passage of a bill through Parliament when interpreting ambiguous statutes. In this case, it was held that *Hansard* could be used in order to understand the meaning behind certain provisions in legislation. The House of Lords said that:

*...having regard to the purposive approach to construction of legislation the courts had adopted in order to give effect to the true intention of the legislature, the rule prohibiting courts from referring to parliamentary material as an aid to statutory construction should, subject to any question of parliamentary privilege, be relaxed so as to permit reference to parliamentary materials where (a) the legislation was ambiguous or obscure or the literal meaning led to an absurdity, (b) the material relied on consisted of a statement by a minister or other promoter of the Bill which led to the enactment of the legislation together if necessary with such other parliamentary material as was necessary to understand such statements and their effect and (c) the statements relied on were clear.*<sup>61</sup>

With regard to parliamentary privilege the House of Lords argued that *Hansard* could be referred to in order to draw the meaning of the legislation without affecting parliamentary privilege so long as its use did not question what occurred in the House:

*...the use of parliamentary material as a guide to the construction of ambiguous legislation would not amount to a 'questioning' of the freedom of speech or parliamentary debate provided counsel and the judge refrained from impugning or criticising the minister's statements or his reasoning, since the purpose of the courts in referring to parliamentary material would be to give effect to, rather than thwart through ignorance, the intentions of Parliament and not to*

<sup>59</sup> *Wright and Advertiser Newspapers Ltd v Lewis* (1990) 53 SASR 416 at 448.

<sup>60</sup> *R v Jackson* (1987) 8 NSWLR 116, at 120.

<sup>61</sup> *Pepper v Hart* (1993) 1 All ER 42 at 64-5. As taken from J. P. Joseph Maingot, QC, *Parliamentary Privilege in Canada*, Second Edition, 1997, p. 136.

question the processes by which such legislation was enacted or to criticise anything said by anyone in Parliament in the course of enacting it.<sup>62</sup>

Whilst the House of Lords held in *Pepper v Hart* that *Hansard* could be referred to as an aid in the interpretation of ambiguous statutes a subsequent case, *Wilson and Others v Secretary of State for Trade and Industry*, is authority for the proposition that *Hansard* cannot be used to discover the reason why Parliament thought it necessary to enact a certain piece of legislation arguing that “the policy and objects of a statute must be determined by interpreting its language which alone represents Parliament’s intention.”<sup>63</sup> The reasoning behind this was that to delve into why a piece of legislation was enacted could result in questioning the proceedings of Parliament.<sup>64</sup>

### 3.4.1. Judicial review of the legislative process

With regard to the passage of legislation by the Parliament, courts will intervene only in exceptional circumstances. This stance taken by the courts was evident in *Eastgate v Rozzoli* where it was held that “the power to issue injunctions and to make declarations in relation to the deliberative stages of proceedings in Parliament will virtually always be refused out of the necessity to permit Parliament to conclude its deliberations.”<sup>65</sup> A similar stance was taken by the High Court in *Clayton v Heffron*<sup>66</sup> where the court suggested that interfering with the legislative process, apart from declaring the validity of Acts resulting from that process, is outside its jurisdiction. The majority noted that, whilst concession was made to enable the validity of the law to be questioned, the court would have to inquire “into the lawfulness and regularity of the course pursued within the Parliament itself in the process of legislation and before its completion. It is an inquiry which according to the traditional view courts do not undertake. The process of law-making is one thing: the power to make the law as it has emerged from the process is another. It is the latter which the court must always have jurisdiction to examine and pronounce upon.”<sup>67</sup>

Courts will however, intrude upon the law-making procedure if it can be shown that there will be no avenue available to challenge the bill once the law-making process has been completed and the bill enacted into law<sup>68</sup> or when a bill fails to comply with a mandatory manner and form of procedure. For example, in 1929 the New South Wales Parliament passed an amendment to the *Constitution Act 1902* which provided that any changes to the powers of the Legislative Council, including its abolition or dissolution, must be approved by the electors prior to receiving assent. In 1930 a bill was passed by both Houses to repeal this new section and, in addition, a bill to abolish the Council had also passed the Parliament. Neither bill was submitted

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<sup>62</sup> *Pepper v Hart* (1993) 1 All ER 42 at 67-9. As taken from J. P. Joseph Maingot, QC, *Parliamentary Privilege in Canada*, Second Edition, 1997, p. 136.

<sup>63</sup> See comments of Lord Nicholls of Birkenhead in *Wilson and Others v Secretary of State for Trade and Industry* (2003) UKHL 40 at paragraphs 51-4.

<sup>64</sup> See comments by Lord Hope of Craighead in *Wilson and Others v Secretary of State for Trade and Industry* (2003) UKHL 40 at paragraph 117.

<sup>65</sup> *Eastgate v Rozzoli* (1990) 20 NSWLR 188 at 199. See also *Bignold v Dickson & Ors* (1991) 23 NSWLR 683 at 703-4 where Kirby P noted that courts restrained from permitting injunctions in relation to preventing laws from receiving enactment due to the fact that the Legislature “...is entitled to complete the law-making process without unnecessary or premature intervention by a court.”

<sup>66</sup> (1960) 105 CLR 279.

<sup>67</sup> *Ibid.*, at 234-5.

<sup>68</sup> See comments by Priestley and Handley JJA in *Eastgate v Rozzoli* (1990) 20 NSWLR 188 at 204.

to the electors for their approval as required by the 1929 amendment. As such two members of the Legislative Council, on behalf of themselves and all other members of the Council, sought to prevent any steps by the President of the Council or the Ministers of the Crown to present the bill to the Governor for assent prior to the will of the electors being ascertained.<sup>69</sup> In this case, Justice Ferguson considered that the legislation at issue was invalid, stating:

*When the Legislature of 1929, by a Bill passed through both Houses and assented to by His Majesty, enacted that a Bill for the repeal of s. 7A should not be presented to the Governor for His Majesty's assent until it had been approved by the electors, it intended to alter, and did alter the Constitution in that respect. It did what the Colonial Laws Validity Act expressly authorised it to do. It altered the powers or the procedure of the Legislature. It did it in the manner and form required by the law for the time being in force in the State. From that moment that provision has been part of the Constitution, and is the law of New South Wales to-day.*

*It may be altered, the Legislature has full power to alter it by repealing sub-s. (6). But that repeal to be effective, can, in my opinion, be brought about only in the manner prescribed by the law in force to-day, that is, by a bill which, after passing through both Houses, is approved by the electors before being presented for the Royal assent.<sup>70</sup>*

Similarly, in *Attorney General (WA) v Marquet*<sup>71</sup> the High Court ruled that legislation which had not been passed by the Parliament of Western Australia in accordance with statutory provisions was invalid and could not receive assent. In this case, the Clerk of the Parliaments had withheld a bill in relation to the electoral laws in Western Australia as the bill had not been passed in accordance with statutory provisions which require such legislation to be passed by both Houses by an absolute majority of members.

Once it has been enacted courts have declared legislation invalid for non-compliance with House procedures. In *Victoria v The Commonwealth (Petroleum and Minerals Authority Case)*,<sup>72</sup> the High Court ruled that an Act was invalid as it had not passed through the Commonwealth Parliament in accordance with the rules and procedures.<sup>73</sup>

Given that there are times when parliamentary proceedings will be tendered as evidence in court proceedings, it is important to understand that the fact that a court of law is determining a matter which may have already been determined by the House does not undermine the House's authority so long as the matter is not related to the procedures of the House themselves, which is solely a matter for the House itself. In *Hamilton v Al Fayed* it was held that the authority of Parliament is not undermined by a court of law which covers the same ground that has been investigated by a parliamentary inquiry. Lord Woolf MR stated:

*If a Parliamentary committee – or either House itself – reaches a distinct conclusion as to the merits of a question which does not itself touch Parliament's procedures, the courts in a later claim based on a common law cause of action arising out of the same facts may arrive at a*

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<sup>69</sup> *Trethowan and Anor. v Peden and Ors.* (1930) 31 SR (NSW) 183.

<sup>70</sup> *Trethowan and Anor. v Peden and Ors.* (1930) 31 SR (NSW) 183 at 211.

<sup>71</sup> (2003) HCA 67.

<sup>72</sup> *Victoria v The Commonwealth (PMA Case)* (1975) 134 CLR 81. See also *Cormack v Cope* (1974) 131 CLR 432.

<sup>73</sup> The High Court ruled that the passage of the *Petroleum and Minerals Authority Bill* through Parliament had not satisfied the provisions of section 57 of the Australian Constitution and accordingly was not a bill that could be voted on at the joint sitting held in 1974 and was not a valid law passed by the Parliament. See *House of Representatives Practice*, 5th edition, 2005, pp. 475-6 for further information.

*result wholly at variance with the judgment of Parliament...It is not suggested that these circumstances undermine Parliament's authority.*<sup>74</sup>

### 3.5 Judicial review of parliamentary privilege

As has been previously noted, two seminal cases in the United Kingdom<sup>75</sup> during the 19th century set the standards regarding the judicial review of parliamentary privilege. They considered that the courts have jurisdiction to decide whether a particular parliamentary privilege exists at common law and its scope but that they cannot question or review the exercise of a privilege if it occurred within its scope.<sup>76</sup>

The High Court in *R v Richards; Ex parte Fitzpatrick and Browne* in 1955 applied these principles in Australia. In this case the power of the Houses of the Federal Parliament to commit for contempt was considered. It was put that the power to punish for contempt was a judicial power and therefore could not be exercised by the Houses of the Federal Parliament. Justice Dixon, whilst noting that the power to punish for contempts was judicial in nature, argued that section 49 of the Australian Constitution was clear and unambiguous conferring all powers, privileges and immunities of the House of Commons both judicial and non-judicial on both Houses of the Federal Parliament and therefore such power could be exercised by the Houses of the Federal Parliament.<sup>77</sup> Justice Dixon also referred to the position established by the courts in the United Kingdom in relation to whether privileges adopted by the House could be questioned by the courts given the fact that they are considered to be a "proceeding in Parliament". He expressed the position thus:

*...it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise. The judgment of the House is expressed by its resolution and by the warrant of the Speaker. If the warrant specifies the ground of the commitment the court may, it would seem, determine whether it is sufficient in law as a ground to amount to a breach of privilege, but if the warrant is upon its face consistent with a breach of an acknowledged privilege it is conclusive and it is no objection that the breach of privilege is stated in general terms.*<sup>78</sup>

Generally, parliamentary privilege becomes subject to judicial review on occasion such as when a House has made an order in relation to one of its members such as an order for the production of documents or an order suspending a member from the House. As the cases above show, a court may decide whether the House possesses the power to make that order by virtue of the fact that courts may determine whether a certain privilege exists and provided such orders fall within the privileges or powers of the House, a court may not inquire further.<sup>79</sup>

Carney notes that the more specifically a House's privileges and powers are defined, the more intrusive judicial review becomes. For example, in *Egan v Willis*, where a member of the Legislative Council was suspended from the service of the House for failing to comply with an order for the production of papers, a number of different approaches were taken by the High Court depending on how the powers of the House were described. The majority (Gaudron, Gummow and Hayne) argued that

<sup>74</sup> *Hamilton v Al Fayed*, UK Court of Appeal, March 1999, paragraph 42.

<sup>75</sup> *Stockdale v Hansard* (1839) 112 ER 1118, and the *Case of the Sheriff of Middlesex* (1840) 113 ER 419.

<sup>76</sup> See Carney, Gerard, *Members of Parliament: Law and Ethics*, 2000, p. 170.

<sup>77</sup> *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 162.

<sup>78</sup> *Ibid.*

<sup>79</sup> See Carney, Gerard, *Members of Parliament: Law and Ethics*, 2000, pp. 171-2.

the House had the power to order the production of Executive documents in a member's possession and that the member was liable to suspension from the House for non-compliance with any such order. However, Justice McHugh, dissenting, confined the scope of judicial review to the issue of whether the Legislative Council had the power to suspend a member for obstructing the business of the House. Justice McHugh was of the view that, given it was clear that the House had the power to suspend a member from its service, the resolution to suspend Mr Egan from the Legislative Council was beyond further judicial review.<sup>80</sup> He argued that:

*[i]t was for the Council, and the Council alone, to determine the facts of the case and whether they fell within the privilege or power to suspend for obstruction. Upon those questions, the resolution of the House was conclusive. There was no need, therefore, for the Court of Appeal to determine whether the functions of the Council were such that reasonable necessity entitled it to demand the production of papers. Indeed, I have real difficulty in seeing how the Court of Appeal had jurisdiction to determine the issue, an issue which after all concerns only the relationship between the House and one of its members and the internal administration of the business of the House.<sup>81</sup>*

Justice Kirby, in a separate judgment, arrived at the novel conclusion that:

*Notions of unreviewable parliamentary privilege and unaccountable determination of the boundaries of that privilege which may have been apt for the sovereign British Parliament must, in the Australian context, be adapted to the entitlement to constitutional review.<sup>82</sup>*

One commentator has argued that this view:

*[C]ontended that overseas and colonial decisions alike must be adapted to the 'modern Australian context'. This was based on the federal character of the Australian polity and introduced the consideration that the British formulation of the relationship between the Parliament and the courts must be adapted to local conditions where there is an established 'entitlement to constitutional review'. The crux of this contention would seem to be that, just as such notions as parliamentary supremacy cannot survive in an unmodified state in a federation established under a written constitution, nor can the law of unreviewable parliamentary privilege.<sup>83</sup>*

Essentially if this kind of approach is taken, it means that the balance of powers between the Parliament and the courts is weighted in favour of judicial review and that any perceived contest between parliamentary supremacy and the principle of the rule of law must be decided by judicial review.<sup>84</sup>

Another matter that needs consideration is whether judicial review is dependent on the extent to which the House cites grounds or reasons for its action. The principle has developed that courts can determine to what extent a House of Parliament has the power to issue a particular order if the House cites the grounds on which it was based. A number of judicial decisions in the early 19th century highlight the reasoning behind this principle.

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<sup>80</sup> *Ibid*, p. 174.

<sup>81</sup> *Willis v Egan* (1998) 73 ALJR 75 at 93.

<sup>82</sup> *Ibid*, at 109.

<sup>83</sup> Griffith, Gareth, *Egan v Willis & Cahill: The High Court Decision*, NSW Parliamentary Library Research Service, Briefing Paper No 1/99, pp. 7-8.

<sup>84</sup> *Ibid*, p. 8.

In 1810 a member of the House of Commons was adjudged guilty of contempt for the publication of a “libellous and scandalous paper”. Speaker Abbott issued a warrant and in its execution the member’s house was entered by force. The member then initiated proceedings against the Speaker for trespass.<sup>85</sup> In the ensuing court case, *Burdett v Abbott*, it was held by Lord Ellenborough that if there was any reason to believe that the House of Commons had acted in excess of its jurisdiction in committing a person for contempt then the courts should inquire into the matter. He noted that if the House of Commons:

*...did not profess to commit for contempt, but for some matter appearing on the return, which could by no reasonable intendment be considered as a contempt of the Court [meaning the House of Commons] committing, but a ground of commitment palpably and evidently arbitrary, unjust, and contrary to every principle of positive law, or national justice; I say, that in the case of such a commitment...we must look at it and act upon it as justice may require from whatever Court it may profess to have proceeded.*<sup>86</sup>

This view was expressed again in 1840 by Lord Denman in the *Case of the Sheriff of Middlesex* where he argued “if the particular facts are stated in the warrant and do not bear out the committal, the court should inquire into the warrant: if the warrant states a contempt in general terms, the court is bound by it.”<sup>87</sup>

Given this principle, Professor Campbell argues that:

*[i]t must surely follow that if a member expelled from Parliament sues for trespass for any action taken to exclude him from the House, and if the resolution for his expulsion states the cause of expulsion, the court may determine whether or not the House has power to expel for that cause. On the other hand, if the court finds that the power to expel for that cause exists, it would probably decline to determine whether or not in the particular instance the member had given grounds for his expulsion.*<sup>88</sup>

Whilst the New South Wales Legislative Assembly does not possess a general power to punish contempts, it can take action against its members of a non-punitive nature. If the House passes a resolution to take an action against a member, the court may consider whether the House has the power to take such action in the situation at hand.

It should be noted that any actions of a House of Parliament which fall outside its “proceedings” remain liable to judicial review. Carney notes that:

*While the preparation of draft bills or other documentation for tabling in a House may fall within that exception, the same cannot be said of the sale of liquor in the members’ refreshment bar, nor even the assault of a member by another member either inside or outside the chamber.*<sup>89</sup>

Of course, all members of Parliament are liable for any criminal offence committed whether within the parliamentary precincts or otherwise.

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<sup>85</sup> See *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 23rd edition, edited by Sir W R McKay KCB, p. 184.

<sup>86</sup> *Burdett v Abbott* (1811) 14 East 1 at 150, as taken from Campbell, Enid, *Parliamentary Privilege in Australia*, 1966, pp. 103-4. See also Carney, Gerard, *Members of Parliament: law and ethics*, 2000, pp. 175-6.

<sup>87</sup> *Sheriff of Middlesex* (1840) 113 ER 424-26 as taken from *Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 22nd edition, edited by Sir Donald Limon KCB and W R McKay CB, p. 136.

<sup>88</sup> Campbell, Enid, *Parliamentary Privilege in Australia*, 1966, pp. 104.

<sup>89</sup> Carney, Gerard, *Members of Parliament: Law and Ethics*, 2000, p. 176.

### 3.6 Use of proceedings in “any other place out of Parliament”

Article 9 of the *Bill of Rights* precludes the questioning of parliamentary proceedings by courts or other bodies. As such, the immunity extends to any tribunal, including Royal Commissions, with the power to summon witnesses.<sup>90</sup> However, it has been argued that Article 9 should not be confined to just those persons or bodies having the power to examine witnesses on oath or it will enable executive interrogation by investigators such as police.<sup>91</sup> On a related note advice given by a former British Attorney General in 1998 to the Chair of the Joint Committee on Parliamentary Privilege of the UK Parliament suggested that a non-statutory inquiry (i.e. one that is not established under statute such as the *Tribunals of Inquiry (Evidence) Act 1921* (UK) or the *Royal Commissions Act 1923* (NSW)) could include parliamentary proceedings in its investigations.<sup>92</sup>

The actual meaning of what is considered to be a “place out of Parliament” has never been subject to a judicial interpretation despite the fact that most of Article 9 has been considered by courts throughout the past two centuries.<sup>93</sup>

Allegations made in Parliament may be subject to official investigations. However, any such investigation is unable to refer to the statements made in the House as Article 9 prevents particular statements made in Parliament from being examined, including any inquiry as to their undisclosed sources of information. For example, allegations were made in the Senate regarding Crown leaseholds and a Royal Commission was established to inquire into the allegations. The Royal Commissioner observed that whilst an inquiry could be set up to inquire into any allegations made in the Parliament, members could not be compelled to answer any questions about it. He stated:

*Whatever a member's constituents may do or say to him for what he has said in Parliament it seems to me that he may not be compulsorily examined as to it by the Executive Government or by the Courts.*<sup>94</sup>

In New South Wales concerns have arisen about parliamentary proceedings being questioned by the agencies conducting investigations regarding members. For instance, the Independent Commission Against Corruption (ICAC) may investigate members of Parliament for any alleged involvement in corrupt activities. Such investigative powers are conferred under legislation and include the power to obtain information, the power to obtain documents and the power to enter public premises.<sup>95</sup> The legislation provides the Commissioner of the ICAC or an authorised officer with the discretion as to whether they should exercise the powers conferred under the Act in the face of claims of privilege. The Act also ensures that where documents or statements made by persons are deemed to be privileged the ICAC can continue to conduct its investigations.<sup>96</sup> With regard to parliamentary privilege,

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<sup>90</sup> The *Parliamentary Privileges Act 1987* (Cmth) applies the prohibition expressed in Article 9 to any court or tribunal (s.16(3)) and tribunal is defined as any person or body having power to examine witnesses on oath (s.3).

<sup>91</sup> See Carney, Gerard, *Members of Parliament; Law and Ethics*, 2000, pp. 225-7.

<sup>92</sup> Joint Committee on Parliamentary Privilege (UK Parliament), *Parliamentary Privilege*, Volume 3, p. 178, April 1999.

<sup>93</sup> See comments made by the Clerk of the House of Commons (UK) in his newsletter dated 16 December 2003, p. 2.

<sup>94</sup> As taken from Carney, Gerard, *Members of Parliament: Law and Ethics*, 2000, p. 226.

<sup>95</sup> See sections 21, 22 and 23 of the *Independent Commission Against Corruption Act 1988*.

<sup>96</sup> See sections 24 and 25 of the *Independent Commission Against Corruption Act 1988*.

section 122 of the Act confirms that the rights and privileges of Parliament are not affected by the legislation. It states:

*Nothing in this Act shall be taken to affect the rights and privileges of Parliament in relation to the freedom of speech, and debates and proceedings, in Parliament.*

The Crown Solicitor has argued that two matters are implied by section 122. First, that the Independent Commission Against Corruption was seen to be a “place out of Parliament” for purposes of Article 9, and second, that the prohibition referred to in Article 9 does not come into operation for the benefit of any individual member of a House of Parliament, but rather for the benefit of that House as a whole.<sup>97</sup> One consequence of the privilege being of the House as a whole rather than attached to individual members is that it is appropriate for the Speaker to vindicate that privilege so far as it concerns the Legislative Assembly, the Speaker being the representative of the House.

By virtue of the application of section 122 of the *Independent Commission Against Corruption Act 1988* and Article 9 of the *Bill of Rights* in New South Wales, parliamentary privilege could be claimed for those documents and statements in the possession of the ICAC which are integral to transacting business in the House or the “proceedings in Parliament.” See section 5.1.2 of Part Two for further information on the ICAC and the privilege attached to members’ documents.

A number of incidents are pertinent to the issue of “place out of Parliament”, particularly with regard to investigators such as police. In the United Kingdom in 1938 Mr Sandys, a member of the House of Commons, wrote a letter to the Secretary of State for War advising that he had received information relating to British defence preparations. Mr Sandys was questioned by the Attorney-General who threatened him with prosecution unless he revealed his sources of information. He was also summoned to appear before a military court of inquiry. Such actions were found to be a clear breach of privilege by the Select Committee on the *Official Secrets Act*.<sup>98</sup>

In Australia, a similar incident arose in 1948 when Mr Fadden, a member of the House of Representatives and Leader of the Country Party, was interrogated by security officers in his Parliament House office as to his informants for a statement he had made in Parliament. Mr Fadden had quoted to the House what were supposedly confidential records of statements made by the Labor Prime Minister to the British Cabinet and to the executive committee of the Council for Scientific and Industrial Research. Following this disclosure, Commonwealth officers were directed to investigate the apparent leakage. In the course of their inquiries security officers called on Mr Fadden whilst in his office at Parliament House where he refused to answer questions unless in the presence of his secretary and representatives of the press. No questions were asked. Later Mr Fadden moved in the House that it was a breach of privilege for him to be “interrogated or sought to be interrogated by security police at the instigation of the Prime Minister and the Government in the precincts of Parliament and in his official room in respect of matters occurring in and arising out

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<sup>97</sup> Crown Solicitor’s Advice re: Outline of submissions on behalf of the Speaker of the Legislative Assembly concerning the Assembly’s privileges, dated 2 July 1996.

<sup>98</sup> Carney, Gerard, *Members of Parliament: Law and Ethics*, 2000, pp. 226-7.

of the discharge of his public duties in the Federal Parliament". The motion was defeated along party lines.<sup>99</sup>

An incident in the Senate in 2002 also touched on this issue when it was reported that the Government had requested the Communications Authority to inquire into whether Telstra had misled a Senate committee. The issue of whether the "proceedings of Parliament" could be questioned or impugned in any place outside of Parliament as prohibited by the *Bill of Rights* was considered. The Senate concluded that the issue of parliamentary privilege did not come into play as the Communications Authority was to inquire into whether particular claims made by witnesses appearing before a Senate committee had any foundation given that such claims were in contradiction to those previously given by Telstra to the committee. Accordingly, had the inquiry found that the claims were true the issue of whether Telstra had misled a Senate committee would have become a matter for the Senate.<sup>100</sup> This incident highlights the fact that investigative agencies such as police or crime agencies are able to cover the same ground as parliamentary inquiries so long as they do not question the "proceedings of Parliament".

It should be noted that the Senate Committee of Privileges has considered the issue of whether any place "out of Parliament" includes a committee inquiry being conducted by another Parliament. The committee had received a reference from the Senate to inquire into the unauthorised disclosure by members of the South Australian Parliament of a submission to the Joint Committee on the National Crime Authority. The committee noted that it could not compel members of another legislature to appear before it to answer questions and concluded that:

*It is clear that the disclosure of the document in the South Australian Parliament, protected as it was by parliamentary privilege, cannot be dealt with as either a contempt of the Senate or a criminal offence.*<sup>101</sup>

Accordingly, it is arguable that any disclosure in a House of Parliament of a document submitted in confidence to a committee of another Parliament cannot be punished.

### **3.7 The House's control over what a member says under parliamentary privilege**

If a member abuses the privilege of free speech the only remedy is an action by the House. As Carney notes the absolute privilege afforded to statements made by members in the Parliament implies that "members remain accountable to their own House and hence to the electorate for what they say and do within the protection of this privilege."<sup>102</sup> A recent example of a member being called to account in New South Wales occurred in 1997 when the Hon. Franca Arena MLC made certain allegations in the Legislative Council which involved imputations against the Premier, the Leader of the Opposition and others. Shortly after the making of these allegations the Legislative Council Standing Committee on Parliamentary Privilege

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<sup>99</sup> See Campbell, Enid, *Parliamentary Privilege in Australia*, 1966, p. 43.

<sup>100</sup> Australian Senate, *Procedural Information Bulletin*, No. 165 for the sitting period 11-19 November 2002, 21 November 2002.

<sup>101</sup> Senate Committee of Privileges, *Possible unauthorised disclosure of a submission to the Joint Committee on the National Crime Authority*, 54th Report, June 1995, p. 15.

<sup>102</sup> Carney, Gerard, *Members of Parliament: Law and Ethics*, 2000, p. 207.

and Ethics received a reference to investigate matters relating to parliamentary freedom of speech and allegations made by the member.

The committee concluded that the conduct of the member, in the making of allegations in her speech, was conduct which fell below the standard the House is entitled to expect of a member, and brought the House into disrepute. The committee recommended that Mrs Arena be called on to withdraw the allegations made in her speech involving imputations and that she submit a written apology to the House.<sup>103</sup> On 1 July 1998 the Legislative Council passed a motion calling on Mrs Arena to provide a written apology to the House within 5 sitting days. The motion also provided that in the event she did not, she was to be suspended from the service of the House until she did so. The motion also specified how the apology was to be termed. It stated:

*That the apology be in the following terms:*

*I hereby withdraw the allegations made in my speech to the House on 17 September 1997, which involved imputations against Mr Carr, Mr Collins, and Mr Justice Wood, of a criminal conspiracy to ensure that people in high places would not be named in the paedophile segment of the Report of the Royal Commission into the Police Service.*

*I also hereby apologise to the House and to those people for making those imputations.*<sup>104</sup>

On 16 September 1998 Mrs Arena made a statement of regret to the House which was not in the terms specified by the motion passed by the House. She argued that she could not make apologies for imputations of criminal conspiracy as she had never made such imputations and that such an apology would be misleading the House. Further, she argued that there is doubt over whether the House has the implied power to suspend a member from the service of the House until the tendering of an apology in terms specified by the House.<sup>105</sup> This was accepted by the House.

On 12 March 2002, Senator Heffernan, in a speech in the Senate during the Address in Reply debate, spoke of a High Court judge, and referred to the judge's alleged sexual activities and inappropriate use of Commonwealth cars. The Senator identified the judge by name in the closing remarks of his speech.<sup>106</sup> The following day, the Deputy President of the Senate made a statement concerning Senator Heffernan's remarks in which she said that she considered his remarks constituted references to a judicial officer, contrary to the Senate standing orders.<sup>107</sup> A motion was subsequently agreed to calling on the Senator to apologise to the Senate, the judge and the Chief Justice of the High Court of Australia for breaching the standing orders.<sup>108</sup> The President of the Senate reported a statement from the judge the following week which noted the wrong done to Parliament, the High Court and the people and that he accepted Senator Heffernan's apology.<sup>109</sup>

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<sup>103</sup> Legislative Council Standing Committee on Parliamentary Privilege and Ethics, *Report on Inquiry into the Conduct of the Honourable Franca Arena MLC*, June 1998, p. 86.

<sup>104</sup> Legislative Council of New South Wales, *Minutes of Proceedings*, 1 July 1998, entry no. 18.

<sup>105</sup> Legislative Council of New South Wales, *Parliamentary Debates*, 16 September 1998.

<sup>106</sup> Commonwealth of Australia, *Parliamentary Debates – Senate*, 12 March 2002, pp. 573-7.

<sup>107</sup> Commonwealth of Australia, *Parliamentary Debates – Senate*, 13 March 2002, pp. 664-5.

<sup>108</sup> Commonwealth of Australia, *Parliamentary Debates – Senate*, 14 March 2002, pp. 738-43.

<sup>109</sup> Commonwealth of Australia, *Parliamentary Debates – Senate*, 19 March 2002, pp. 967-8.

A similar incident occurred in the Legislative Assembly in 1994 when a member made allegations regarding people outside of Parliament that were unsubstantiated. In a ministerial statement made the following day both the Premier and Leader of the Opposition indicated that members must not abuse their freedom of speech and should only make damning allegations against people if such claims are able to be substantiated.<sup>110</sup>

The standing rules and orders also ensure that members exercise their freedom of speech in the House responsibly by restricting to some extent what members are able to say and the way they say it. In the Legislative Assembly members shall not:

- use offensive words against the Sovereign or the Governor, either House or its members, a member of the judiciary or a statute unless moving for its repeal (S.O. 72); or
- make imputations of improper motives and personal reflections on members of either House unless by substantive motion (S.O. 73).

Another general “rule” of debate, known as the “sub judice” doctrine, is that matters under adjudication by the courts should not be brought forward in debate in such a way as to prejudice court proceedings. However, the public interest may be held to prevail over this doctrine. Because the sub judice convention in New South Wales is not contained in a statute, standing orders or rule, the practice and precedents of the House, act as a guide to how the convention will be applied. (See section 11.12 of Part One for further information on the sub judice convention).

The final decision on whether an issue can be referred to in debate is at the discretion of the Chair, which is subject to the will of the House exercised through a motion of dissent. One example of how the matter may be approached occurred in 1997 when the Speaker read a letter from the then Attorney General advising that civil proceedings had been commenced on a subject and that to debate that matter would infringe the sub judice rule. The Speaker advised that he was obliged to read the advice but that it was for the House to make its own decisions and no ruling of sub judice was made.<sup>111</sup>

Generally, the Chair, when deciding on whether a matter is “sub judice” takes into consideration the fact that the Parliament has the right to debate any matter and therefore restricting such debate must be done voluntarily. Furthermore, the Chair must be realistic and not automatically exclude discussion in the House on matters of public interest which have already been freely aired in the media, although a tougher line tends to be taken in relation to criminal matters before the courts. Some examples of sub judice decisions made by former Speaker Murray include:

- allowing a debate to continue because the subject matter was before a judge instead of a jury and therefore the likelihood of prejudice was little if any;<sup>112</sup> and
- a member was directed not to continue with a certain line of debate relating to a murder case.<sup>113</sup>

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<sup>110</sup> PD 02/12/1994, p. 6232.

<sup>111</sup> PD 16/04/1997, p. 7631.

<sup>112</sup> PD 16/05/1996, p. 1153.

<sup>113</sup> PD 19/11/1997, p. 2139.

Whilst members' freedom of speech is guaranteed in the Chamber and in a committee hearing, if a member repeats a speech, which is defamatory in content, outside the House or committee, that member is liable for its content. In New South Wales some protection is afforded to reports of parliamentary proceedings under the *Defamation Act 2005*, but absolute protection applies only in restricted circumstances. For example, absolute protection does not attach to the publication of a speech otherwise than as part of the whole debate or proceedings of the House. (See section 3.10 of Part Two for more detailed consideration of the privilege attached to *Hansard* and the repetition of statements made in the House.)

As previously noted, a breach of privilege does not occur when courts admit *Hansard* into evidence for the purpose of proving facts but a breach may occur when an outside inquiry is established to inquire into the truth of allegations made by a member in the House. In cases where the truth of what a member has said in the House is questioned, parliamentary privilege may be waived by legislation, such as in the Franca Arena case. In this instance, the *Special Commissions of Inquiry Amendment Act 1997* was passed by the Parliament to enable an inquiry to be held into matters relating to parliamentary proceedings, but only when a House resolves by a majority of two-thirds to permit such inquiry. The legislation also provided that in passing a resolution to authorise the conduct of such an inquiry a House may also waive privilege to the extent specified. This did not prevent members of Parliament from being able to claim parliamentary privilege before a special commission. The bill expired six months after its enactment and new legislation waiving parliamentary privilege would need to be introduced should a House wish to establish an inquiry into certain proceedings in parliament.

### **3.8 Communications between members and Ministers**

The reference to "proceedings in Parliament" in Article 9 necessarily implies that only those communications between members and Ministers which are closely related to parliamentary business are protected. Such communications include discussions relating to draft oral questions, motions etc. and any discussion on draft speeches to be made in the House. However, discussions between members in party or caucus meetings are unlikely to be protected.<sup>114</sup>

With regard to correspondence between members and Ministers on constituency matters, it has been argued that absolute privilege does not attach to such communications. In the United Kingdom, the House of Commons refused by a narrow vote of 218 to 213 to accept the report of its Privileges Committee that a letter written by a member to a Minister, which was critical of the London Electricity Board, was protected by parliamentary privilege.<sup>115</sup>

Carney notes that in 1984 the Commonwealth Joint Committee on Parliamentary Privilege suggested that absolute privilege should attach to any communication between a member and Minister given "the efficiency, discreteness and utility of such a communication when parliament is not sitting."<sup>116</sup> However, no recommendation to this effect was eventually made by the Committee.

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<sup>114</sup> Carney, Gerard, *Members of Parliament: law and ethics*, 2000, p. 211.

<sup>115</sup> *Ibid.*, p. 212.

<sup>116</sup> *Ibid.*

The Joint Select Committee upon Parliamentary Privilege in New South Wales also attempted to resolve this issue by recommending that absolute privilege should attach to communications between a member and a Minister and vice versa. The committee concluded that all other distributional circulation of such correspondence should be covered only by qualified privilege.<sup>117</sup> These recommendations have not been adopted. It should be noted that in contrast, the Joint Committee on Parliamentary Privilege of the UK Parliament has recommended that communications between members and Ministers should not attract absolute privilege. In coming to this conclusion, the committee noted that extending absolute privilege to cover correspondence between members and Ministers would raise problems of principle and that common law provisions relating to qualified privilege in practice appear to enable members to carry out their functions effectively.<sup>118</sup>

With respect to the defence of qualified privilege, in cases where members communicate with Ministers on constituency matters, and the communication is for the purpose of enabling a member to carry out the member's duties, a defence of "qualified privilege" can be made so long as the communication was made in the absence of malice.<sup>119</sup>

It should also be noted that communications between members and Ministers within the parliamentary precincts are no different to other communications in that they are not privileged unless they are related to the "proceedings of the House". Privilege does not extend to activities merely because they occur within the precincts of the Parliament. This has been clearly established with the "Zircon affair" in the United Kingdom where a number of members claimed that their privilege of freedom of speech had been breached due to an order issued by the Speaker which prohibited the screening of a film because its screening was considered to be a threat to national security. The House of Commons Privileges Committee found that no breach of privilege had occurred. It also noted that the privilege of freedom of speech only applies to debates and proceedings in Parliament and not to activities occurring in the precincts.<sup>120</sup>

### 3.9 Communications between constituents and members

It is argued that the parliamentary privilege afforded by Article 9 of the *Bill of Rights* should not extend to communications by correspondence with constituents and others as they are not "proceedings in Parliament". Carney notes that:

*[w]hile it may not seem unreasonable to regard the provision of information for the purpose of a parliamentary speech or debate to be incidental to the Parliamentary functions of a member, the wide ranging circumstances in which such information may be provided preclude absolute immunity attaching to such communications as a general rule. Distinctions might otherwise have to be drawn between information supplied to a member voluntarily or at the member's request, information which is relevant or irrelevant, and information which is actually used or not by the member.*<sup>121</sup>

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<sup>117</sup> Report of the Joint Select Committee upon Parliamentary Privilege entitled *Parliamentary Privilege in New South Wales*, 1985, pp. 109-10.

<sup>118</sup> Joint Committee on Parliamentary Privilege UK Parliament, Volume 1, dated April 1999, paragraphs 107-9.

<sup>119</sup> See the Joint Select Committee upon Parliamentary Privilege, *Parliamentary Privilege in New South Wales*, 1985 pp. 107-8.

<sup>120</sup> See Carney, Gerard, *Members of Parliament: Law and Ethics*, 2000, p. 213.

<sup>121</sup> *Ibid*, p. 214.

Such communications may be covered by qualified privilege. Over recent years members have argued that they do not have to produce documents, records or correspondence subpoenaed by a court if those documents, records or correspondence in their possession were provided to them in their capacity as a member of Parliament. In support of this claim members have noted that:

- the New South Wales Joint Select Committee upon Parliamentary Privilege endorsed the conclusion of the House of Commons Select Committee on Parliamentary Privilege that letters from members to constituents enjoy qualified privilege; and
- there has been judicial recognition of qualified privilege in relation to a letter from a member of parliament on behalf of a constituent.<sup>122</sup> This is despite the fact that nothing has been expressly enacted to define the extent of parliamentary privilege.

Whilst qualified privilege has been recognised for letters written by members in their capacity as a member of Parliament the status of correspondence from constituents to members is unclear. In the United Kingdom the House of Commons Select Committee on Parliamentary Privilege (1967) noted that letters from constituents to members or Ministers which are directly related to their parliamentary functions are afforded qualified privilege. The committee reported that:

*A wide field of communications connected with a Member's parliamentary functions, including letters written by electors to Members or Ministers about matters falling within the parliamentary functions of a member or the ministerial functions of a Minister already enjoy qualified privilege.*<sup>123</sup>

However, in contrast, the New South Wales Joint Select Committee did not agree. It concluded that the correspondence between a member and a constituent attracted qualified privilege but that correspondence from a constituent to a member did not attract privilege. The committee also commented that problems associated with privilege can only be overcome by express enactment.<sup>124</sup>

The extent of these problems is best illustrated by a number of examples. For instance, in 1987 a member of the Legislative Assembly was served with a subpoena on behalf of a firm of solicitors to produce documents, notes and records of discussions between himself, members of his staff and certain constituents, relating to a dispute between a firm of solicitors and the constituents. The member's response was to telephone the solicitors indicating that due to parliamentary privilege he was unable to hand over the file. The member also wrote to the presiding magistrate indicating that he believed that providing the documents would be a breach of privilege of the New South Wales Parliament.

In support of his argument, the member noted that the New South Wales Joint Select Committee upon Parliamentary Privilege had concluded that letters from members to constituents enjoy qualified privilege. On this point the member stated that:

*...it is important to remember...that communications between a party and their solicitor or between the solicitor or counsel, whether oral or in writing, made during and with reference to judicial proceedings or in anticipation of such proceedings are confidential communications and*

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<sup>122</sup> See comments made by Mr John Fahey MP, PD 03/03/1987, pp. 8952-4 and 8973-4 where it was noted that the courts in the UK have recognised qualified privilege in relation to a letter of a member of parliament on behalf of a constituent to the Law Society and to the Lord Chancellor complaining of a solicitor's conduct.

<sup>123</sup> As taken from paper prepared by G. H. Cooksley, Clerk of the Legislative Assembly 1984 to 1990, dated April 1987, p. 14.

<sup>124</sup> Joint Select Committee upon Parliamentary Privilege, *Parliamentary Privilege in New South Wales*, 1985, pp. 105-10.

*thus privileged. The privilege extends to documents which, without contemplation of litigation, come into existence in order to enable a person to obtain legal advice. The Courts<sup>125</sup> have recognised qualified privilege in relation to a letter of a member of Parliament on behalf of a constituent to the Law Society and to the Lord Chancellor complaining of a solicitor's conduct.*<sup>126</sup>

The member went on to argue that the privileges of the New South Wales Legislative Assembly include the right of confidentiality of communication between member and constituent. The Solicitor General when approached for advice<sup>127</sup> indicated that no such privilege exists in New South Wales, as the mere fact that a constituent communicates confidentially with his or her local member does not make that communication a "proceeding in Parliament." The Solicitor General further argued that even if information were intended for use in Parliament that would not be sufficient to warrant privilege.

The Solicitor General conceded that "the communication is privileged for the law of defamation, thereby protecting the parties in the absence of malice, but it is not subject to parliamentary privilege...this means that notes of a communication between a constituent and a member can generally be subpoenaed." The Solicitor General did however note that "it might be otherwise if that communication related to a specific matter under consideration in Parliament."

The Solicitor General also advised that "public interest immunity" or "Crown Privilege" could apply to particular types of communications in exceptional cases. The argument for a parliamentary privilege based on public interest immunity is based on Article 9 of the *Bill of Rights* and rests on the assumption that "there is a high public interest in Members of Parliament having a full and free right to raise in Parliament any matters of public concern." The point here is that such a right can only be effective if there is a free flow of information to members. Constituents should not have to fear legal action against them for making comments in good faith about local issues, including comments on individuals, to their local member of Parliament.

In response to the member's claim the Speaker stated that "while he accepted the utmost need for confidentiality between members and constituent, he was not sure that privilege applied to representations made by members on behalf of constituents". However, the Speaker allowed the member to move a motion at the conclusion of formal business:

*That this House reasserts its privileges of representation of constituents by members, including the right of confidentiality of communication between member and constituent, as propounded in the Report of the Select Committee on Parliamentary Privilege of the House of Commons.*<sup>128</sup>

The motion was negatived and the House did not therefore view the issue of the subpoena as a breach of privilege.<sup>129</sup>

<sup>125</sup> It was held in *Beach and anor. v Freeson*, (1972) 2 All ER 854, that qualified privilege is attached to communications between a member of Parliament and a person or body that has an interest in receiving that information so long as the communication is not actuated by malice. See *May*, p. 153.

<sup>126</sup> PD 03/03/1987, pp. 8952-4 and 8973-4.

<sup>127</sup> Advice received from the Solicitor General re: Matter of parliamentary privilege raised by Mr Fahey MP, dated 25 March 1987.

<sup>128</sup> VP 03/03/1987, p. 583-4.

<sup>129</sup> VP 03/03/1987, p. 587; VP 26/03/1987, p. 626; and VP 3/03/1987, p. 635.

In another instance in 1994 a member of the Legislative Assembly raised a question of privilege in the House, arising from a subpoena for the production of documents issued to him out of the Supreme Court in defamation proceedings. The Speaker reserved his ruling and advice was sought from the Crown Solicitor as to:

*Whether the issue of a subpoena for production received by a Member of the New South Wales Parliament which asks for documents etc. relating to questions raised in Parliament by that Member and also for documents provided to State and Federal Police by that Member constitutes a breach of the Member's privilege in that:*

*(1) the material, received from the public (not necessarily a constituent), is privileged in the manner of legal professional privilege; and/or*

*(2) public knowledge that a Member can be forced to deliver up such documents will undermine public faith in bringing such material to the notice of Members of Parliament thus creating an impediment to Members in the carriage of their duties.*

The Crown Solicitor advised<sup>130</sup> that this case was very similar to the one noted above and thus that the documents which were being subpoenaed did not enjoy absolute privilege but rather qualified privilege. The Crown Solicitor also advised that the material received from a member of the public is not privileged in the manner of legal professional privilege, as the relevant privilege in focus here is the qualified privilege afforded by defamation law to a person supplying information to a member in connection with the member's role as a parliamentarian.

The second issue raised in this case is whether public knowledge that a member could be forced to deliver up documents supplied to the member from an informant would undermine public faith in bringing the material to the notice of members, thus creating an impediment to members in the carriage of their duties. This argument had been raised in *R v Grassby*<sup>131</sup> where it was rejected by the presiding judge.

The Crown Solicitor also noted that "there may be an issue as to whether the enforcement against a Member of an obligation to part with material supplied to the Member by an informant infringes parliamentary privilege where the member has used or intends to use the material in debate." The Crown Solicitor's view was "that it is perhaps conceivable that circumstances could arise where the Member needed to retain the originals of the material in order to make some point in debate, but it would seem likely that in most cases both the Member's needs and those of the administration of justice in the courts could be served by the member retaining copies."

Following consideration of the matter of privilege raised by the member, the Speaker ruled "that the wording of the subpoena was commonly used by solicitors and not especially directed to the honourable member" and therefore there was no prima facie breach of parliamentary privilege. The Speaker also informed the House that the subpoena in question had been withdrawn.<sup>132</sup>

The matter was re-visited again in October 1994 when documents held by a member of the Legislative Council were proposed to be given to the defence in *Police v*

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<sup>130</sup> Advice received from the Crown Solicitor re: Claim by Mr P. Whelan MP of breach of privilege, dated 29 April 1994.

<sup>131</sup> (1991) 55 A Crim R 419

<sup>132</sup> VP 20/04/1994, p. 183; and VP 03/05/1994, p. 206.

*Dyers*.<sup>133</sup> In this case the magistrate examined certain documents held by the member and it was held that such material attracted the protection of both parliamentary privilege and public interest immunity and need not be disclosed to the defence. In coming to this decision the magistrate commented that there were competing claims – the rights of the defence to inspect all relevant material balanced by the need to protect the names and addresses of persons providing information to parliamentarians in order to promote free speech in Parliament. The documents were released to the Crown Solicitor who was acting on the member's behalf.

Despite the decision of the magistrate in *Police v Dyers*, there have been a number of court cases in Australia which have held that communications between constituents and members are not afforded protection.<sup>134</sup> Of note is the case of Senator O'Chee who claimed that communications made to members by a constituent should be regarded as "proceedings in Parliament" if they are integral to business in the House. Senator O'Chee was sued for defamation in respect of a radio interview he gave on the subject of commercial fishing of marlin in protected fields in North Queensland.

The Senator had asked a question in the Senate on the issue prior to the interview and following the interview made a speech in the House. The majority of the Queensland Court of Appeal held the traditional view that "no parliamentary privilege attaches to communications between informants and members in circumstances where the member is asked to raise a matter in Parliament. No privilege arose whether the member actively sought the document to raise in Parliament or whether it was simply provided in the hope that it would be raised there."<sup>135</sup> One commentator has noted that the decision brought down in this case offers a solution as to what type of communications between members and constituents should be afforded privilege by providing that only those communications which are acted on by the member for the purpose of transacting business in the House are afforded privilege<sup>136</sup> and that such protection may even extend to all communications with members until the member makes a decision on what action to take.<sup>137</sup> In this case, McPherson JA argued that:

*It is not, I think, possible for an outsider to manufacture Parliamentary privilege for a document by the artifice of planting the document upon a Parliamentarian. The privilege is not attracted to a document by s. 16(2) until at earliest the Parliamentary member or his or her agent does some act with respect to it for purposes of transacting business in the House. Junk mail does not, merely by its being delivered, attract privilege of Parliament. That being so, the question again is whether it can properly be said that creating, preparing or bringing those documents into existence were "acts" done for purposes of or incidental to the transacting of Senate business.*<sup>138</sup>

However, despite this view, in April 2000 the Queensland Supreme Court held in *Rowley v Armstrong* that privilege is not automatically attached to correspondence received by a member of Parliament on matters of interest to the member and which

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<sup>133</sup> Bankstown Local Court, 24 and 25 October 1994.

<sup>134</sup> See *R v Rule* (1937) 2 KB 375; *Rivlin v Bilainkin* (1935) 1 QB 485; *R v Grassby* (1992) 55 A Crim R 419 at 428-9.

<sup>135</sup> See Carney, Gerard, *Members of Parliament: Law and Ethics*, 2000, pp. 215-7.

<sup>136</sup> *Ibid*, pp. 218-9.

<sup>137</sup> Carney, Gerard, "The Power of Privilege" in *About the House*, June 2004, pp. 28-30.

<sup>138</sup> *O'Chee v Rowley* (1997) 150 ALR 199 at 209. See also *Erglis v Buckley & Ors* (2005) QSC 25 where it was held that parliamentary privilege attached from the time a letter had been solicited from a Minister to when it was received, but that any subsequent publication was not protected.

the member had debated in the House.<sup>139</sup> As previously mentioned, the decision in *Rowley v Armstrong* was at odds with the view expressed by the Senate Committee of Privileges which argued that the decision was flawed and should hold no weight as an authority. However, it does throw doubt as to whether in future courts will agree with the opinion expressed by McPherson JA in *O'Chee v Rowley*.

### 3.10 Repetition of statements made in the House by members outside of the House

If a member makes a speech in the House which is defamatory in content and then repeats that statement outside the House such statements are unlikely to attract privilege and would leave the member open to libel action. A number of cases in the United Kingdom during the 18th and 19th centuries determined that parliamentary privilege did not attach to statements made in the House which were then repeated or republished outside the House. In 1794 it was held in *R v Lord Abingdon* that Lord Abingdon, in circulating a full copy of a speech he had already delivered in the House of Lords to the press, was liable when charged with criminal libel. The fact he had already made those remarks in the House was not considered to be a defence as it was republished in a medium that did not attract absolute privilege. It was determined in this case that privilege attached only for publication of the whole of the debate and not just a particular member's speech.<sup>140</sup> Similarly, in 1813, in *R v Creevey*, a member of the House of Commons, Mr Creevey, was found guilty of libel for sending a corrected version of a speech he had made in the House to the editor of a newspaper for publication. The corrected speech was not subject to parliamentary privilege.<sup>141</sup>

#### 3.10.1 Privilege attaching to the republication of Hansard

Today, in New South Wales, a defence of qualified privilege attaches to any republication of a speech made in Parliament so long as there is no improper motive or malice involved. The republication of parliamentary proceedings receives qualified privilege under section 29 of the *Defamation Act 2005*, which provides:

- (1) It is a defence to the publication of defamatory matter if the defendant proves that the matter was, or was contained in, a fair report of any proceedings of public concern.<sup>142</sup>
- (2) It is a defence to the publication of defamatory matter if the defendant proves that:
  - (a) the matter was, or was contained in, an earlier published report of proceedings of public concern, and
  - (b) the matter was, or was contained in, a fair copy of, a fair summary of, or a fair extract from, the earlier published report, and
  - (c) the defendant had no knowledge that would reasonably make the defendant aware that the earlier published report was not fair.
- (3) A defence established under subsection (1) or (2) is defeated if, and only if, the plaintiff proves that the defamatory matters was not published honestly for the information of the public or the advancement of education.

This means that there is a defence against any claim of defamation arising from the publication of a *Hansard* extract if it is a fair extract made in good faith for public information or the advancement of education. To be fair, an extract or summary

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<sup>139</sup> *Rowley v Armstrong* (2000) QSC 88.

<sup>140</sup> Joint Select Committee on Parliamentary Privilege, *Parliamentary Privilege in New South Wales*, 1985, pp. 83-5.

<sup>141</sup> See also May, Thomas Erskine, Sir, *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 23rd Edition, edited by Sir W.R. McKay, KCB, p. 99 footnote 2.

<sup>142</sup> Proceedings of public concern includes any proceedings in public of a parliamentary body.

should properly reflect the proceeding. It is possible that an extract of a complete speech which did not include a reply that was made or was otherwise out of context might not be considered fair. There is also a body of law in relation to what constitutes “good faith” and its defeat by malice. Members have been advised to seek legal advice in relation to the publication of truncated extracts of debates.

Speakers’ rulings have suggested that proof copies of *Hansard* may not be considered to be protected by absolute privilege.<sup>143</sup> However, amendments made to the defamation laws with the enactment of the *Defamation Act 2005* have made it clear that any publication of the debates and proceedings of the House, whether proof copies or not, are absolutely privileged.<sup>144</sup> Furthermore, any statement made in the House by members which is then republished on the Internet should also attract qualified privilege.

Of course, privilege is only qualified for the publication by members or other persons of the proceedings of Parliament. The proceedings themselves and their official publications receive absolute privilege.

The qualified privilege attaching to the republication of *Hansard* or reports of parliamentary proceedings was clearly illustrated by the judgment in *Commonwealth Bank v Malouf*<sup>145</sup> in 1996. On 12 November 1996 a member made a private members’ statement which detailed a long running dispute between Mr Malouf and the Commonwealth Bank. The statement also contained allegations against the bank and a former bank officer. The Commonwealth Bank sought an order preventing Mr Malouf from carrying out his intention to republish, in whole or in part, the extract of *Hansard*.

The Commonwealth Bank successfully obtained the order it was seeking. In granting its application the New South Wales Supreme Court made a clear distinction between the absolute privilege attached to statements made by members of Parliament within the House and the qualified privilege available to a publisher of a report of the proceedings of Parliament under common law and the Defamation Act. Justice Levine noted that a defence of qualified privilege could attach to the publication of a report of proceedings of Parliament but that such a defence would be lost if it was shown that the publication was not in good faith for public information or the advancement of education.<sup>146</sup>

The court found that during the course of the proceedings, counsel for Mr Malouf had withdrawn the allegations of fraud and misconduct against the Bank. Consequently, Mr Malouf’s proposed republication of *Hansard* was intended to put improper pressure on the Bank and would be “actuated by malice, improper motive and lack of good faith.”<sup>147</sup> As such, the Commonwealth Bank was entitled to the protection of the order restraining Mr Malouf from publishing the extract of *Hansard*.

### **3.10.2 Parliamentary privilege and affirmation of statements made in the House**

Whilst qualified privilege attaches to the publication of *Hansard* in certain situations, it has been held that the adoption by a member outside the House of statements made in the House constitutes a publication of the statements made in the House for

<sup>143</sup> See rulings of Speaker Kelly, PD 17/11/1976, p. 3054 and PD 08/03/1978, pp. 12626 and 12628.

<sup>144</sup> See section 27 of the *Defamation Act 2005*.

<sup>145</sup> *Commonwealth Bank of Australia v Gregory John Malouf & Davridge Pty Ltd*, Supreme Court of New South Wales, No. 21362 of 1996, 10 December 1996.

<sup>146</sup> *Ibid*, at p. 12.

<sup>147</sup> *Ibid*, at p. 10.

the purposes of the law of defamation even if the actual statement is not repeated.<sup>148</sup> Qualified privilege may still apply in such cases if it can be proved that the repetition of comments made in the House were justified and fair and were not made with malicious intent.<sup>149</sup>

Generally, whether or not what a member says is privileged will depend on what the member has said outside of the House. This will involve determining what constitutes “repetition” and also the extent to which reference may be made to a protected statement to establish the meaning of an unprotected statement.

With regard to what is considered to be a repetition of statements made in the House, advice received from the Crown Solicitor has indicated that members who are asked whether they used specific words in the House and say that they did and no more, are said to have not adopted the words said in the House. However, should a member reiterate their position by using words such as “I stand by what I said in the House” or “I do not resile from what I said in the House”, the member will be said to have adopted those words.<sup>150</sup>

Along similar lines, should a member use words outside the Parliament to the effect that the statements he or she made in the House are supported by evidence, the member could be said to have adopted the statements and can be held liable for them. In such cases, the remarks which are made outside the House may, on their own, be meaningless and it is only when reference is made to the preceding parliamentary remarks that a member can be held liable for defamation.<sup>151</sup>

This issue of whether a member had adopted statements made in the House was considered in *Australian Broadcasting Corporation v Chatterton*.<sup>152</sup> In this case, Mr Chatterton, a Government member in the Legislative Council of South Australia took libel action against the Australian Broadcasting Commission (ABC) and an Opposition member of the Council, Mr Chapman, for comments made by Mr Chapman inside the House and repeated outside and for the televising of the comments on the ABC. The statements related to an application to the South Australian Department of Agriculture for drought relief by a company in which Mr Chatterton was financially involved at the time when he was also the Minister for Agriculture.

Mr Chapman in his defence denied the words were defamatory, and claimed absolute privilege, fair comment and qualified privilege. He also argued that the words spoken in Parliament could not be used to support a cause of action in respect of something said outside Parliament. The ABC denied the words were defamatory and claimed qualified privilege and fair comment. In coming to a decision the judges could not agree as to whether words spoken in Parliament may be used to explain and construe words spoken outside Parliament. Zelling ACJ argued that:

*First, what was said by the appellant Chapman in Parliament was absolutely privileged and could not be a ground for proceedings in court....Further what was said in the House could not*

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<sup>148</sup> See *Beitzel v Crabb* (1992) 2 VR 121 at 128; and *Buchanan v Jennings* (2001) 3 NZLR 71.

<sup>149</sup> See *Jennings v Buchanan* (New Zealand) [2004] UKPC 36 (14 July 2004) at paragraph 20.

<sup>150</sup> Advice received from the Crown Solicitor re: Repetition by members of statements made by them in the House, dated 10 September 2001.

<sup>151</sup> See comments of Davies J in *Laurence v Katter* (1996) 141 ALR 447 at 490.

<sup>152</sup> (1986) 46 SASR 1.

*be used for the purpose of supporting a cause of action for something done outside the House.*<sup>153</sup>

In contrast, Justice Prior argued that legal consequences could only arise from comments made outside of Parliament even if what was said in Parliament itself was used as evidence to explain what was said outside. He noted:

*What was said in Parliament was repeated, expanded upon, and sought to be justified in an arena not enjoying Parliament's privileges. I would not uphold the absolute privilege claimed nor would I prevent what was said in Parliament being used to explain what was said outside.*<sup>154</sup>

In this case, the privilege matter was not required to be determined by the court. However, since then, courts have overwhelmingly held that statements made in Parliament can be submitted as evidence in libel action for comments made outside of the House. For instance, in 1992 in *Beitzel v Crabb*<sup>155</sup>, Mr Crabb, a member of the Victorian Legislative Assembly was sued for defamation in relation to comments made in the House and subsequently repeated. Mr Crabb had insinuated in a speech to the House that Mr Beitzel was dishonest in his business dealings. Mr Crabb stated later during a radio interview and also at a press conference held the same day that he stood by what he had said in Parliament. The Victorian Supreme Court held that the member's speech in Parliament could be used to demonstrate the libel, as it was held that Mr Crabb, having indicated in the radio interview and at the press conference that he stood by what he said in Parliament, could be taken to have repeated and adopted his parliamentary speech. The court did not reach a decision as the action was settled following the court's decision to permit *Hansard* into evidence.

Similarly, in *Laurence v Katter* a member of the Commonwealth Parliament was sued in defamation for saying outside Parliament (on national radio and television) that his allegedly defamatory statements made in Parliament were "backed up with the hardest of hard evidence." The case proceeded on the basis that what is impeached or questioned in such an action are not the statements made in the House but the statements made out of the House, which incorporate those made in the House. Justice Davies observed:

*No impropriety is alleged against the first defendant in respect of what he said in parliament. What is alleged against him in the statement of claim is that what he said outside parliament was false and defamatory of the plaintiff. It is true that proof that what the first defendant said outside parliament was false will also prove that what he said in parliament was false. But that is because he incorporated the latter in his statements outside parliament. The privilege of Art 9 applies to the statements in parliament but not to the statements made out of parliament even though they incorporated by reference the statements made in parliament.*<sup>156</sup>

One commentator has noted that in this instance two of the judges on the Queensland Court of Appeal appear to have concluded that section 16 of the *Parliamentary Privileges Act 1987* (Cmth) should be either read down or found invalid in order to allow a statement in the House of Representatives to be used to

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<sup>153</sup> *Ibid*, at 18 (per Zelling ACJ).

<sup>154</sup> *Ibid*, at 35-6 (per Prior J).

<sup>155</sup> (1992) 2 VR 121.

<sup>156</sup> *Laurence v Katter* (1996) 141 ALR 447 at 490.

support an action for defamation. It is argued that the judgment is somewhat incoherent and should not be followed.<sup>157</sup> It should be noted that the case was settled on appeal.

Another instance of a member being held liable for comments related to parliamentary proceedings occurred recently in New Zealand when a chair of a subcommittee established by a select committee of the House of Representatives made remarks regarding a witness following the tabling of a report of the committee. The chair claimed that the witness had made conflicting statements during the committee's inquiry and the witness initiated defamation proceedings.

The defamation action was settled. However, a number of the issues, which were considered by the New Zealand Privileges Committee are important for future cases regarding privilege in Westminster systems of government.

Ms Mackey, the chair of the subcommittee, claimed that "in making the statements she was acting pursuant to standing order 238 (which permits the chairperson of a subcommittee, with the agreement of the subcommittee, to make a public statement to inform the public of the nature of the subcommittee's consideration)."<sup>158</sup> The Privileges Committee did not accept this view as it argued that at the time Ms Mackey made the statement the subcommittee no longer existed. The Privileges Committee also considered that as Ms Mackey was not the chair of the committee under which the subcommittee was established, she could not make a statement under standing order 238 and that "as her statement was made *after* the committee had reported to the House, standing order 238 would not have applied to a chairperson's statement in any event." The Privileges Committee went on to argue:

*...the standing order is an exception to the rule that the proceedings of a select committee are confidential to the committee until it reports to the House. It permits the chairperson (with the committee's agreement) to inform the public of the nature of the committee's consideration of a matter. But after the committee has reported back to the House every member is free to comment on the nature of the committee's consideration of the matter (except for secret evidence); the chairperson is in no special position. Consequently, a statement made after a committee has reported is not made under standing order 238.*<sup>159</sup>

The Privileges Committee also noted that:

*...Mr Stonhill did acknowledge...that if Janet Mackey sought to defend the action on the ground that what she had said outside the House was true – that is, that Mr Stonhill's written and oral evidence to the subcommittee was contradictory – the subcommittee proceedings would become relevant. It seems to us that in those circumstances the court would inevitably have been invited to compare two parliamentary statements and to draw an inference that they were compatible or incompatible. We do not consider that it is permissible for any court to make such a judgment on parliamentary statements. That is a matter for the sole judgment of the House itself.*<sup>160</sup>

Another New Zealand case is relevant to this discussion. In *Buchanan v Jennings*<sup>161</sup> the New Zealand High Court found that impugned remarks made outside the House

<sup>157</sup> See *Odgers' Australian Senate Practice*, 11th Edition, edited by Harry Evans, 2004, p. 43.

<sup>158</sup> See the New Zealand House of Representatives, *Report of the Privileges Committee on the Question of Privilege referred on 14 February 2001 relating to Stonhill v Mackey*, 2001, p. 3.

<sup>159</sup> *Ibid.*

<sup>160</sup> *Ibid.*, pp. 5-6.

<sup>161</sup> *Buchanan v Jennings* (2001) 3 NZLR 71.

were not protected by parliamentary privilege and were defamatory. The matter was appealed to the Court of Appeal and subsequently the Privy Council<sup>162</sup> where the decision of the High Court was upheld.

The case arose from a speech made in Parliament by Mr Jennings, a member of Parliament, which attacked an employee of a public entity (Mr Buchanan), for alleged improper conduct. In a subsequent interview with a newspaper, Mr Jennings said that he did not resile from his claim about the official. The member also wrote to the newspaper correcting a report on the matter. Mr Buchanan issued proceedings in defamation claiming that by his statement and letter to the newspaper Mr Jennings had adopted and repeated outside the House the attack he had made inside the House.

In coming to a decision the High Court accepted that a line must be crossed before remarks made outside the House can import previous parliamentary statements. The court was of the view that in this case the member had crossed that line arguing that “the exchanges outside the House in which the member engaged were largely initiated by the member himself and that he had ‘effectively’ repeated outside the House what he had said in the House.” Mr Jennings was held liable and \$50,000 in damages was awarded against him.<sup>163</sup>

The concern in regard to cases such as *Buchanan v Jennings* is where courts are drawing the line as to when a parliamentary remark has been repeated and adopted. Courts have held that by saying “I stand by what I said in Parliament” or “I do not resile from what I said in Parliament” etc. members have imported or adopted what was said in Parliament.

In the New Zealand cases it has been argued that what is being sued upon is what was said outside the House. What was said inside the House is being used only as purely factual material to demonstrate what it was that the member was actually saying in the remarks made to the newspaper reporter or radio interviewer.

Whilst, it is clear that *Hansard* can be tendered as evidence to prove facts, the judgment in *Buchanan v Jennings* has been heavily criticised for contravening Article 9 of the *Bill of Rights* by allowing the *Hansard* record to be admissible in court proceedings and then impeaching it. It has been argued that “parliamentary material cannot be used in a way that will cause a court to make a judgment on the conduct of Parliament or of individuals involved in the parliamentary process. The parliamentary material that is sought to introduce must speak for itself otherwise it is inadmissible.”<sup>164</sup> As such it is put that “the Courts should acknowledge that an action such as Buchanan grounded on a parliamentary statement is a direct attack (an impeachment) of Parliamentary proceedings and thus members’ freedom of speech.”<sup>165</sup>

It has also been argued that the decision in *Buchanan v Jennings* erodes the freedom of speech provided by Article 9 by suggesting that its operation depends upon a judicial determination that freedom of speech may be impaired in particular

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<sup>162</sup> *Jennings v Buchanan* (New Zealand) [2004] UKPC 36 (14 July 2004).

<sup>163</sup> See paper prepared by David McGee QC, Clerk of the House of Representatives, New Zealand for the 32nd Conference of Presiding Officers and Clerks entitled *Members of Parliament and Defamation*, July 2001.

<sup>164</sup> See comments by David McGee, Clerk of the New Zealand House of Representatives, in “The scope of parliamentary privilege”, *The New Zealand Law Journal*, March 2004, pp. 84-8.

<sup>165</sup> *Ibid*, p. 87.

instances.<sup>166</sup>

Interestingly, the Court of Appeal and the Privy Council judgments both noted the importance of the fact that the statement made by Mr Jennings outside the House occurred after the one made in the Parliament. This is because it has been held that if comments made in the House had followed comments made outside the House then comments made in the House under parliamentary privilege would be inadmissible. This principle stems from the decision in *Peters v Cushing*<sup>167</sup> where a member of the New Zealand House of Representatives made comments in a television interview about a person without naming or identifying the person. The person was subsequently named in the House of Representatives following considerable public interest. In this case it was held that the cause of action could not succeed without relying on the naming of the person in the House which was deemed impermissible.

This view has also been criticised for being “much too formulaic a view of article 9 and reduces the relationship between Parliament and Courts to mechanical application of the supposed rule...If proceedings in Parliament are questioned or impeached then that is contrary to article 9 regardless of the sequence in which linked events occur.”<sup>168</sup> The New Zealand Privileges Committee has recommended that the laws in relation to defamation and members of parliament be amended to ensure that no liability (civil or criminal) can be incurred by merely affirming or endorsing words written or spoken in Parliament if it is necessary to use the parliamentary statement to establish such liability.<sup>169</sup> As of May 2007 legislation has not been introduced to give effect to this recommendation.<sup>170</sup>

### 3.11 Effect of the freedom of speech in defamation proceedings

Whilst legal consequences often flow from comments made by members outside of Parliament a defence of qualified privilege could be argued by members in certain situations where they have repeated defamatory comments outside of the House. First, there are a number of statutory provisions which could be used as a defence. Section 25 of the *Defamation Act 2005* can be drawn on as a defence in defamation if any imputation complained of is a matter of substantial truth.

Section 24 of the Act provides a common law defence whereby publications are protected if made on occasions of qualified privilege – i.e. an occasion where the person who makes the communication has an interest or a duty, legal, social or moral, to make it to the person to whom it is made, and the person to whom it is made has a corresponding interest or duty to receive it.<sup>171</sup> The publication must serve the legitimate purpose of the privileged occasion and not some ulterior motive.

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<sup>166</sup> *Ibid*, p. 88 where McGee argues that the decision in *Buchanan v Jennings* means that “...article 9 [is] dependent on a case by case judicial assessment of the impact of the use of parliamentary material on freedom of speech” and that “for Courts to substitute their own assessment would be destructive of freedom of speech in Parliament, for one could never know in advance if it would apply.”

<sup>167</sup> [1999] NZAR 241.

<sup>168</sup> McGee, David, “The scope of parliamentary privilege”, *The New Zealand Law Journal*, March 2004, pp. 87-8.

<sup>169</sup> See the Report of the Privileges Committee, *Question of privilege referred 21 July 1998 concerning Buchanan v Jennings*, May 2005.

<sup>170</sup> Other jurisdictions have also recommended that privileges legislation be amended to ensure that parliamentary proceedings cannot be used to establish what was “effectively” but not actually said outside of Parliament. See the Western Australia Legislative Assembly Procedure and Privileges Committee, *Effective Repetition: Decision in Buchanan v Jennings*, Report No. 3, April 2006.

<sup>171</sup> For example, see *Adam v Ward* (1917) AC 309 at 334 per Lord Atkinson.

Section 30(1) of the *Defamation Act 2005* provides a statutory defence of qualified privilege. It states:

- (1) There is a defence of qualified privilege for the publication of defamatory matter to a person (the recipient) if the defendant proves that:
  - (a) the recipient has an interest or apparent interest in having information on some subject, and
  - (b) the matter is published to the recipient in the course of giving to the recipient information on that subject, and
  - (c) the conduct of the defendant in publishing that matter is reasonable in the circumstances.

Section 30(3) of the Act defines what is considered reasonable in the circumstances. It sets out the factors that a court may take into account when determining whether a publisher has acted reasonably. It provides:

In determining for the purposes of subsection (1) whether the conduct of the defendant in publishing matter about a person is reasonable in the circumstances, a court may take into account:

- (a) the extent to which the matter published is of public interest, and,
- (b) the extent to which the matter published relates to the performance of the public functions or activities of the person, and
- (c) the seriousness of any defamatory imputation carried by the matter published, and
- (d) the extent to which the matter published distinguishes between suspicions, allegations and proven facts, and
- (e) whether it was in the public interest in the circumstances for the matter published to be published expeditiously, and
- (f) the nature of the business environment in which the defendant operates, and (g) the sources of the information in the matter published and the integrity of those sources, and
- (h) whether the matter published contained the substance of the person's side of the story and, if not, whether a reasonable attempt was made by the defendant to obtain and publish a response from the person, and
- (i) any other steps taken to verify the information in the matter published, and
- (j) any other circumstances that the court considers relevant.

Advice received from the Crown Solicitor also indicates that whether material was “reasonably” published or not will depend on such things as:

- the manner and extent of the publication;
- the extent of the inquiry made as to the truth of the facts;
- the degree of care exercised; and
- any knowledge that a misleading impression was likely to be conveyed.<sup>172</sup>

Section 30 overcomes the restrictions of the duty/interest requirement at common law and focuses attention on reasonableness in all the circumstances. It has been argued by the New South Wales Law Reform Commission that the meaning of “reasonableness” in this context was authoritatively established by the Court of Appeal in *Morgan v John Fairfax & Sons Ltd.*<sup>173</sup> where the court said that:

*...in circumstances where a publisher intends to convey an imputation that is found to be conveyed, the defendant must establish that it believed in the truth of that imputation; but where a defendant did not intend to convey any imputation which was in fact so conveyed, the defendant must establish that its conduct was nevertheless reasonable in relation to each imputation it did not intend to convey but which was in fact conveyed. Reasonableness in the*

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<sup>172</sup> Advice received from the Crown Solicitor re: Repetition by members of statements made by them in the House, dated 10 September 2001.

<sup>173</sup> (1991) 23 NSWLR 374.

*latter case requires the court to take into account whether the defendant held a belief in the truth of the matter published, but it is not the sole factor considered by the court.*<sup>174</sup>

There is also a common law and statutory defence for a fair report. *Wason v Walter* provided for a common law defence for reports of parliamentary proceedings so long as the reports were fair and the publication had not been actuated by malice. Section 29 of the *Defamation Act 2005* provides a defence for the publication of defamatory matter if the defendant proves that the matter was or was contained in, a fair report of any proceedings of public concern, which includes any proceedings in public of a parliamentary body. This defence is defeated if it is shown that the publication complained of was not published honestly for public information or the advancement of education (s. 29(3)).

Second, there are a number of precedents set by cases such as *Theophanous v Herald & Weekly Times Ltd*<sup>175</sup> and, *Lange v Australian Broadcasting Corporation*<sup>176</sup> which have widened the extent of communications which are protected by qualified privilege based on the freedom of political communication implied in the Australian Constitution.

### **3.11.1 Implied freedom of political communication and parliamentary privilege**

The High Court of Australia first recognised an implied guarantee of communication on political matters in the Constitution in the early 1990s.<sup>177</sup> With regard to defamation, it has been established that the implied freedom of political communication in the Australian Constitution covers discussion of the conduct, policies or fitness for office of government members, political parties, public bodies, public officers and those seeking public office. In *Theophanous v Herald & Weekly Times Ltd* it was held by the majority that:

*There is implied in the Commonwealth Constitution a freedom to publish material:*

*(a) discussing government and political matters;*

*(b) of and concerning members of the Parliament of the Commonwealth of Australia which relates to the performance of their duties as members of the Parliament or parliamentary committees; and*

*(c) in relation to the suitability of persons for office as members of the Parliament.*<sup>178</sup>

The majority (Mason CJ, Toohey and Gaudron JJ.) also argued that any defence to an action in defamation based on the implied freedom of communication in the Constitution was subject to certain conditions. They held that such a defence was available even if the material published was proved to be false so long as the material was published in the course of political discussion, that the defendant was unaware of the falsity and did not publish recklessly, and that the publication was reasonable in the circumstances. They said:

*...if a defendant publishes false and defamatory matter about a plaintiff, the defendant should be liable in damages unless it can establish that it was unaware of the falsity, that it did not publish recklessly (i.e. not caring whether the matter was true or false), and that the publication was reasonable in the sense described. These requirements will redress the balance and give*

<sup>174</sup> New South Wales Law Reform Commission, *Report 75: Defamation*, September 1995, p. 159.

<sup>175</sup> (1994) 182 CLR 104.

<sup>176</sup> (1997) 189 CLR 520.

<sup>177</sup> The High Court first recognised a constitutional freedom of political communication in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 and *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

<sup>178</sup> *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 at 140.

*the publisher protection, consistently with the implied freedom, whether or not the material is accurate.*<sup>179</sup>

The case of *Stephens v West Australian Newspapers Ltd* related the freedom of communication defence to members of State parliaments. In this case, Thomas Stephens and five other members of the Legislative Council of Western Australia, who were members of the Standing Committee on Government Agencies, took an action in defamation against West Australian Newspapers Ltd for publishing assertions made by another member of the Council that the members had gone on an overseas trip without the knowledge of Parliament and that the trip was a “junket of mammoth proportions.”<sup>180</sup>

In *Lange v Australian Broadcasting Corporation* the High Court revisited its decision in *Theophanous* and *Stephens* and held that qualified privilege attaches to statements made to the general public about matters of government, and specifically to political discussion which is discussion that, by developing and encouraging views upon government, bears upon the function of electors in a representative democracy.<sup>181</sup> The High Court held that:

*...the Commonwealth Constitution protects that freedom of communication between the people concerning political or government matters which enables the people to exercise a free and informed choice as electors.*<sup>182</sup>

As with *Stephens* the High Court considered that the extended category of qualified privilege embraced discussion of government or politics not only at a Federal level but also at a State or Territory level, and even at a local government level, whether or not it bore directly on matters at a Federal level. The judgment also recognised that the extension of qualified privilege could go beyond what was required for the law of defamation to be compatible with the freedom of communication required by the Constitution. It was held in this case that “by reason of matters of geography, history and constitutional and trading arrangements, the discussion of matters concerning New Zealand may often affect or throw light on government or political matters in Australia.”<sup>183</sup>

When considering the case the High Court made it clear that it was only examining the defamation law in New South Wales, arguing that even without the common law extension of the implied freedom of political speech in the Australian Constitution that:

*...[the provisions] of the Defamation Act ensures that the New South Wales law of defamation does not place an undue burden on communications falling within the protection of the Constitution. That is because [it] protects matter published to any person where the recipient had an interest or apparent interest in having information on a subject, the matter was*

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<sup>179</sup> *Ibid*, at 137 (per Mason CJ, Toohey and Gaudron JJ).

<sup>180</sup> *Stephens v West Australian Newspapers Limited* (1994) 182 CLR 211 at 212-3.

<sup>181</sup> See also *Roberts v Bass* (2002) HCA 57 for further discussion on qualified privilege and the implied freedom of political communication. In particular, see comments by Gaudron, McHugh and Gummow JJ at paragraphs 107 and 110 where it is noted that publishing material which is liable to do damage to a political candidate is protected by the Constitution’s freedom of political communication so long as the purpose of publishing the material is not foreign to the occasion that gives qualified privilege to such publications (i.e. expressing views about a candidate for election) regardless of how irrational the reasoning might be.

<sup>182</sup> *Lange v Australian Broadcasting Corporation* (1997) CLR 520 at 520.

<sup>183</sup> Butler, Dr Des, “Constitutional protection for defamatory communications concerning government and political matters”, in *The Queensland Lawyer*, Volume 18, October 1997, pp. 39-42.

*published in the course of giving information on that subject to the recipient, and the conduct of the publisher in publishing the matter was reasonable in the circumstances.*<sup>184</sup>

In 2005 the Australian States and Territories enacted uniform defamation legislation aimed at ensuring that defamation law is applied consistently in Australian jurisdictions. This uniform legislation removed the codified provisions in place in Queensland and Tasmania and accordingly the comments made by the High Court in *Lange* are arguably applicable to all Australian jurisdictions.

It was also held in *Lange* that “a publisher relying on that category of qualified privilege to protect a publication that would otherwise have been held to have been made to too wide an audience must establish that its conduct in making the publication was reasonable in all the circumstances.”<sup>185</sup>

In regard to what is considered to be “reasonable” the High Court argued that the making of a publication is only considered to be reasonable if it fulfils certain conditions stating:

*...as a general rule, a defendant’s conduct in publishing material giving rise to defamatory imputation will not be reasonable unless the defendant had reasonable grounds for believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue. Furthermore, the defendant’s conduct will not be reasonable unless the defendant has sought a response from the person defamed and published the response made (if any) except in cases where the seeking or publication of a response was not practicable or it was unnecessary to give the plaintiff an opportunity to respond.*<sup>186</sup>

In *Lange v Australian Broadcasting Corporation* the High Court also rejected the proposition that a right to free speech could be implied in the Constitution. It was held that the relevant sections of the Constitution do not confer personal rights on individuals but that it precludes the curtailment of the freedom of communication between the people of the Commonwealth concerning political or government matters, which enables the people to exercise a free and informed choice as electors.<sup>187</sup> In other words, the freedom of political communication is not absolute but limited to what is necessary for the effective operation of representative and responsible government provided for by the Federal Constitution.

The idea that “communications” which are defamatory in nature can only be published in “reasonable circumstances” was also considered by the New Zealand Court of Appeal in *Lange v Atkinson*. In this case, the former Prime Minister of New Zealand (Mr Lange) sued the author and publisher of a magazine article which discussed his performance as a politician and Prime Minister. The New Zealand Court of Appeal concluded:

(1) The defence of qualified privilege may be available in respect of a statement which is published generally.

(2) The nature of New Zealand’s democracy means that the wider public may have a

<sup>184</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 575. The High Court was referring to s.22 of the *Defamation Act 1974* that was replaced by s.30 of the *Defamation Act 2005* as of 1 January 2006.

<sup>185</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 521.

<sup>186</sup> *Ibid*, at 574.

<sup>187</sup> See comment by Butler, Dr Des, “Constitutional protection for defamatory communications concerning government and political matters” in *The Queensland Lawyer*, Volume 18, October 1997, pp. 39-42.

proper interest in respect of generally published statements which directly concern the functioning of representative and responsible government, including statements about the performance or possible future performance of specific individuals in elected public office.

(3) In particular, a proper interest does not exist in respect of statements made about the actions and qualities of those currently or formerly elected to Parliament and those with immediate aspirations to such office, so far as those actions and qualities directly affect or affected their capacity (including their personal ability and willingness) to meet their public responsibilities.

(4) The determination of the matters which bear on that capacity will depend on a consideration of what is properly a matter of public concern rather than of private concern.

(5) The width of the identified public concern justifies the extent of the publication.

(As appears from para (3) above this judgment is limited to those elected or seeking election to Parliament.)<sup>188</sup>

Concerns about this judgment have been widely expressed. In particular, it is argued that the decision condones careless inaccuracy as it “left it open to journalists to publish untrue ‘facts’ about politicians, provided they have no ill will, and provided they have not taken ‘improper advantage of the occasion of publication.’”<sup>189</sup> Justice Tipping whilst agreeing with this view, expressed his concern about publishing untrue facts without some sort of reasonableness requirement. He noted:

*It could be seen as rather ironical that whereas almost all sectors of society, and all other occupations and professions, have duties to take reasonable care, and are accountable in one form or another if they are careless, the news media whose power is not responsibly used, are not liable in negligence, and what is more, can claim qualified privilege even if they are negligent. (at 477)*<sup>190</sup>

The result of the decision in *Lange v Atkinson* was a significant change in the common law defamation in New Zealand and a reduction in the protection available to members under defamation law.<sup>191</sup>

It should be noted that since *Lange v Australian Broadcasting Corporation* there has been a clear trend towards narrowing the coverage of the freedom of political communication defence in Australia. For example, in *Levy v Victoria* the finding of the High Court departed from an earlier majority position that the defence would generally cover discussion of State political matters.<sup>192</sup> Furthermore, the House of Lords has been critical of *Lange v Australian Broadcasting Corporation* decision. For instance, in the case of *Reynolds v Times Newspaper Ltd & others* Lord Cooke commented that he could see “no good reason why politicians should be subjected to a greater risk than other leading citizens, or for that matter any other persons, of

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<sup>188</sup> Burrows, John F, *Defamation and Politicians*, in Tort Law Review, March 1999, pp. 8-13.

<sup>189</sup> *Ibid.*

<sup>190</sup> As taken from Burrows, John F, *Defamation and Politicians*, in Tort Law Review, March 1999, pp. 8-13.

<sup>191</sup> See the paper prepared by Allan Bracegirdle, Office of the Clerk of the House of Representatives, New Zealand entitled *Members of Parliament and Defamation: The Courts Raise the Bar*, for the Australasian Study of Parliament Group Annual Conference, October 2002.

<sup>192</sup> For further examples see article by Stone, Adrienne, entitled “Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication”, in Melbourne University Law Review, Vol. 13 2001, available from <http://www.austlii.edu.au/au/journals/MULR/2001/13.html> accessed 24 January 2003.

false allegations of fact in the media”<sup>193</sup> just because they have been published “reasonably”. In coming to this conclusion Lord Cooke noted that:

*The whole purpose of defamation law is to enable a plaintiff to clear his or her name. The privilege required for reasonable freedom of speech does run counter to that purpose in some cases. A major expansion of the privilege, such as may have been achieved in Australia, shifts the focus of political defamation to the conduct of the defendant. In practice it may leave a politician plaintiff without redress. His or her private life may be immune from the extended privilege, but otherwise the opportunity of a public clearing of name may be virtually gone. If the Australian solution has disadvantages, they may lie in this change of focus and in the singling out of politicians as acceptable targets of falsehood.*<sup>194</sup>

In this case, Mr Reynolds, the former Prime Minister of Ireland, initiated an action in defamation against a newspaper which had published comment on the events surrounding his resignation.

There is no clear precedent in relation to the extent to which the implied freedom of political communication operates as a restriction on the scope and exercise of parliamentary privilege and as such is subject to judicial review on a case by case basis.<sup>195</sup> For instance, in *Laurence v Katter*, when a member of the Commonwealth Parliament was sued for defamation in respect of what he had said on radio and television, which it was alleged adopted and reaffirmed what the member had said in the House, the majority of the Supreme Court of Queensland – Court of Appeal (Pincus and Davies JJA) were of the opinion that s. 16(3) of the *Parliamentary Privileges Act 1987* (Cmth), which prohibits the use of proceedings in Parliament in court for the purpose of questioning or drawing inferences from them and so on, did not infringe upon the freedom of political communication. Pincus JA argued that s. 16(3) was invalid in relation to defamation suits noting that s. 16(3) of the Act “can interfere with the freedom to attack or analyse what happens in Parliament by distorting, to the point of absurdity, the way in which defamation suits relating to that subject must be conducted.” He went on to add that if s. 16(3) of the Act was valid it “would prevent examination in court of the truth or fairness of most criticism of activity in Parliament.”<sup>196</sup>

Davies JA was of a similar view but argued that s. 16(3) was valid but only in those cases where the court concludes that the freedom of proceedings in Parliament would in some way be impaired arguing that the law “would permit freedom of discussion of proceedings in Parliament including in court proceedings, except where that would impeach or question the freedom of speech or debates in parliamentary proceedings.”<sup>197</sup>

However, in contrast, Fitzgerald P noted that s. 16(3) of the *Parliamentary Privileges Act 1987* (Cmth) plainly prohibits proving, stating, submitting or commenting that statements made by members of Parliament in the House were false, and that this provision should not be read down to accommodate the freedom of political communication implied in the Constitution. He said:

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<sup>193</sup> *Reynolds v Times Newspapers Limited and Others*, available at <http://www.publications.parliament.uk/pa/ld199899/ldjudgmt/jd991028/rev01.htm> at paragraph 116 (per Lord Cooke of Thorndon).

<sup>194</sup> *Ibid*, at paragraph 118 (per Lord Cooke of Thorndon).

<sup>195</sup> See Carney, Gerard, *Members of Parliament: Law and Ethics*, 2000, pp. 197-9.

<sup>196</sup> *Laurence v Katter and Another* (1996) 141 ALR 447 at 486.

<sup>197</sup> *Ibid*, at 490.

*Leaving aside any question concerning whether freedom of political discourse is correctly regarded as an individual right, its existence has been implied into the Commonwealth Constitution because it is seen as necessary to the effective working of our representative democracy. Parliamentary privilege and immunity are other aspects of the same fundamental public interest. The reconciliation of those competing considerations is committed to the Commonwealth Parliament by s. 49 of the Constitution. As will be seen, Richards provides a strong authority for giving the “very plain words of s. 49” their natural meaning. While an implied constitutional freedom of political discourse had not been identified at the time when Richards was decided, it would be contrary to the entire tenor of that decision to invalidate s. 16 of the Parliamentary Privileges Act by reference to such a constitutional implication, or to require it to be read down to accommodate such an implication.*<sup>198</sup>

His Honour also referred to *John Fairfax Publications Pty Ltd v Doe*<sup>199</sup> where it was held that s. 16 of the *Parliamentary Privileges Act 1987* does not offend an implied constitutional freedom of political discourse.<sup>200</sup>

A similar approach to Fitzgerald P was taken by the Full Court of the South Australian Supreme Court in *Rann v Olsen*<sup>201</sup> when it held that the absolute privilege afforded to proceedings of Parliament cannot be brought into question by courts due to an implied freedom of political communication. In coming to this conclusion the court determined that s. 16(3) of the *Parliamentary Privileges Act 1987* (Cmth) imposes a necessary restriction on freedom of political communication in that it is reasonably appropriate and adapted to freedom of speech in Parliament.<sup>202</sup> The Full Court did, however, concede that s. 16(3) inhibits freedom of political communication in that it can make it impossible for a defendant to a defamation action to establish defences to the action if the subject of the defamation suit was a reference to “proceedings in Parliament.”<sup>203</sup>

The New South Wales Court of Appeal in *Arena v Nader* considered whether the implied freedom operated as a restriction on the power of the Parliament to enact laws with respect to parliamentary privilege. Mrs Arena contended that the *Special Commissions of Inquiry Amendment Act 1997* had the effect of contravening the implied guarantee of freedom of political discussion. The court said that:

*...it does not in any event seem to us that political discussion is impaired by the 1997 Act. It has given each House of Parliament the power to waive parliamentary privilege in one sense but even when a House does waive parliamentary privilege in that sense the waiver declaration “does not operate to waive parliamentary privilege to the extent that it can be asserted by a member...in relation to anything said or done by the member in parliamentary proceedings”. This seems to us quite plainly to mean that the immunity of a member conferred by parliamentary privilege remains untouched by the 1997 Act.*<sup>204</sup>

The court did concede that members might be deterred from exercising their freedom of speech in a House of Parliament given that their statements can be subjected to executive inquiry and criticism. However, it was argued that “[t]he

<sup>198</sup> *Laurence v Katter and Another* (1996) 141 ALR 447 at 453.

<sup>199</sup> (1995) 130 ALR 488.

<sup>200</sup> *Laurence v Katter and Another* (1996) 141 ALR 447 at 453.

<sup>201</sup> (2000) SASC 83.

<sup>202</sup> See comments by Doyle CJ at paragraphs 185-8 who wrote the leading judgement on this point.

<sup>203</sup> See comments by Doyle CJ at paragraphs 223 and 224 where he sums up the view of the majority.

<sup>204</sup> *Arena v Nader and Another* (1997) 42 NSWLR 427 at 434.

possibility of responsible criticism, no matter what its source, cannot in our opinion be regarded as any impediment to free speech.”<sup>205</sup>

It is argued that any determination that the constitutional right to freedom of political communication has been violated must take into consideration “whether the exercise of a privilege has burdened the freedom of political communication and whether this can be justified as a proportionate response to protect some other public interest.”<sup>206</sup> Furthermore, the implied freedom of political communication necessarily prevents any statutory erosion of the freedom of speech as provided for in the *Bill of Rights 1688* unless it is justified as being in the public interest.<sup>207</sup>

### **3.12 Right of reply**

The freedom of speech afforded to members of Parliament may leave citizens vulnerable to allegations being raised about them in Parliament. In order to ensure that the public has a mechanism by which they can publicly defend themselves against such allegations, the Legislative Assembly has adopted a citizen’s right of reply. The procedure, first introduced in 1996, enables persons and corporations subject to allegations in the House to seek to have a response to those allegations published in *Hansard*.

The citizen’s right of reply does not affect members’ freedom of speech in Parliament and they still have full and absolute parliamentary privilege for what they say in the House. The right of reply gives a citizen or corporation, subject to allegations under that privilege, an opportunity to have a response to those allegations published in the record of the forum in which they were made. For further information see Chapter 29 of Part One.

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<sup>205</sup> *Ibid*, at 435.

<sup>206</sup> Carney, Gerard, *Members of Parliament: Law and Ethics*, 2000, p. 199.

<sup>207</sup> *Ibid*.