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**Parliamentary privilege: first  
principles and recent  
applications**

by

**Gareth Griffith**

**Briefing Paper No 1/09**



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This is a revised version of a paper delivered at the Australian and New Zealand Association of Clerks-at-the-Table (ANZACATT) Conference, Norfolk Island, 28 January 2009.

**ISSN 1325-5142**  
**ISBN 978 0 7313 18469**

February 2009

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**by**

**Gareth Griffith**

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## SUMMARY

This paper is in two parts. The first starts by defining the subject, before looking at parliamentary privilege in the context of a wider constitutional setting, in relation to its underlying purpose, by reference to such doctrines as the separation of powers and the relationship between the courts and Parliament.

Parliamentary privilege concerns the powers, privileges and immunities from aspects of the general law conferred on the Houses of Parliament, their members, officers and committees. [2]

The justification for parliamentary privilege is that the freedom to control their own proceedings and the freedom of speech in Parliament are necessary if the Houses of Parliament are to perform their constitutional functions effectively - that is, to inquire, debate and legislate. [2.5]

Based on the 1999 First Report of the UK Joint Committee on Parliamentary Privilege, the test that applies to parliamentary privilege is whether any particular power or privilege is necessary today, in its present form, for the effective functioning of a House of Parliament? [2.4]

In Australia the law of parliamentary privilege varies across jurisdictions. To take three examples: at the Commonwealth level it is codified under the *Parliamentary Privileges Act 1987*; in Victoria it is defined by statute under s 19(1) of the *Constitution Act 1975* by reference to the privileges of the House of Commons as at 1855; in New South Wales, Article 9 of the Bill of Rights of 1689 applies further to s 6 of the *Imperial Laws Applications Act 1969*, but otherwise the privileges of its Houses are largely on a common law basis, to be implied by reasonable necessity. [2.2]

This makes for an area of law that constitutes an interesting combination of statutory law, the conferral of privilege on an inherent basis, and by the law and custom of Parliament as this developed in the United Kingdom, as part of the common law yet not made by the common law courts.

Historically, in 17<sup>th</sup> century England, parliamentary privilege was political, not legal, in origin, forged in the conflict between Parliament, the Executive and the courts. Parliamentary privilege can be located within what has been called the 'rough' doctrine of the separation of powers that operates in Westminster parliamentary systems. The fundamental rights of the House of Commons were asserted against the prerogatives of the Crown and the authority of the courts. The assertion of privilege was a declaration of its independence from the other branches of government. [2.6]

The historical relationship between the courts and Parliament is set out in *May's Parliamentary Practice*, where the landmark 19<sup>th</sup> century cases are explained, notably *Stockdale v Hansard* (1839) and *Bradlaugh v Gossett* (1884). From these cases it emerged that the Houses of Commons had exclusive jurisdiction over its

own internal proceedings. At the same time it was held that, whenever a claim of privilege arose in determining the rights and liabilities of individual subjects, the courts had no option but to determine the correctness of a claim of privilege. In effect, the courts claimed they had the jurisdiction to declare what were the powers, privileges and immunities of the House of Commons. Parliamentary privilege was therefore part of the general law of the land and it was for the courts to apply and interpret the law. [3]

In this last context it is argued that conflict has emerged between two different lines of thought; one based on the administration of justice and the rights of citizens to have their cases heard before the courts, with all available evidence before the courts; the other based on the exclusive rights of Parliament which operate as an exception to the general law. Put another way, the tension is between the administration of justice, on one side, and the powers and immunities of Parliament, on the other. [3.1]

*Prebble v TV New Zealand* [1995] 1 AC 321 is considered. There Lord Browne-Wilkinson for the Privy Council said the case illustrated 'how public policy, or human rights, issues can conflict'. Three issues were in play: (i) the need to ensure that the legislature can exercise its powers freely on behalf of its electors; (ii) the need to protect freedom of speech generally; and (iii) the interests of justice in ensuring that all the relevant evidence is available to the courts. It was declared: 'Their Lordships are of the view that the law has been long settled that, of these public interests, the first must prevail...'. [3.2]

That would seem to be clear enough – a bright exclusionary line was apparently drawn where admissibility questions were raised. But note in this respect that two caveats were added to the exclusionary rule in *Prebble*, leaving the door ajar for a judicially creative approach, which might redefine the relationship between the administration of justice and the exclusionary rule. [3.2]

The 'historical exception doctrine' is discussed in this context, an exception which some argue is becoming the 'rule' in those cases where freedom of speech in Parliament is at issue. [3.3]

The second part of the paper looks at outcomes - how the courts have dealt with parliamentary privilege in selected recent cases, including:

- *Toussaint v Attorney General of St Vincent and the Grenadines* [2007] 1 WLR 2825
- *Mees v Roads Corporation* (2003) 128 FCR 418
- *Buchanan v Jennings* [2005] 1 AC 115
- *Erglis v Buckley* [2004] 2 Qd R 599
- *Canada (House of Commons) v Vaid* [2005] SCR 667 and
- *President of the Legislative Council (SA) v Kosmas* [2008] SAIRC 41

In the concluding comments it is said that case law is rarely compact or tidy, a process of reasoning all pointing in the one direction. Nonetheless, at least in relation to certain categories of cases - freedom of speech in Parliament and the



use of ministerial statements in Parliament - there is something akin to a pattern emerging, away from the exclusionary rule and towards the administration of justice.

The controversial decision of the Privy Council in *Buchanan v Jennings* is a case in point. [4.4] So, too, is decision of the Queensland Court of Appeal in *Erglis v Buckley*. This last case is an instance of where the courts by piecemeal, case by case means arrive at conclusions which strike at the *raison d'être* behind parliamentary privilege. [4.5]

In relation to the freedom of speech immunity, Bernard Wright has suggested that Parliament may be 'asked to amend the law to accommodate what can be called the "administration of justice" interest'. He also quotes Professor Lindell as suggestion that 'this area of the law should be absorbed as part of the wider law of public interest immunity'. Whether a root and branch change of this kind occurs remains to be seen. Do the courts really need assistance from Parliament in this respect? It may be that in *Toussaint*, where the use of ministerial statements in Parliament was at issue, first steps have already been taken in the direction of some kind of public interest test. [5]

The Canadian case of *Vaid* is a different category of privilege case, one concerning the exclusive cognisance or jurisdiction of Parliament over its own 'internal affairs' - or more specifically the exclusive jurisdiction over 'the management of employees'. The case involved the Speaker's chauffeur who claimed he had been constructively dismissed, contrary to the Canadian Human Right Act. [4.6]

The South Australian case of *Kosmas* is another exclusive cognisance case. There the question of paying overtime to a Committee officer was treated as 'internal' to Parliament, and one to which the rule of non-intervention by the courts applied. Whether it was correctly decided is a matter for debate. At the very least it indicates that there is life yet in the exclusive cognisance doctrine, as formulated by reference to Parliament's constitutional role. [4.8]



## 1. INTRODUCTION

This paper is in two parts. The first starts by defining the subject, before looking at parliamentary privilege in the context of a wider constitutional setting, in relation to its underlying purpose, by reference to such doctrines as the separation of powers and the relationship between the courts and Parliament. The second part looks at outcomes - how have the courts dealt with parliamentary privilege in selected recent cases, including *Canada (House of Commons) v Vaid*,<sup>1</sup> *Erglis v Buckley*,<sup>2</sup> *Toussaint*,<sup>3</sup> *Mees v Roads Corporation*<sup>4</sup> and *President of the Legislative Council (SA) v Kosmas*?<sup>5</sup>

Three cautionary notes can be made. One is that different constitutional settings apply over jurisdictions, as between the UK, Australia, Canada and New Zealand. Second, the jurisprudence in one jurisdiction may not be a reliable guide to that in others. Certainly decisions outside Australia are not precedents for our courts to follow. However, they can be persuasive and influential, and important as points of departure and comparison. Thirdly, only very few privilege related issues are litigated, and therefore a review of recent cases is not representative of the full complement of privilege matters at issue at any time.

By way of a general opening statement, the 1999 First Report of the UK Joint Committee on Parliamentary Privilege commented:

Parliamentary privilege is, in its detail, a complex, technical and somewhat arcane subject. This is partly because of its historic origins and partly because of the multifarious functions of Parliament.<sup>6</sup>

## 2. FIRST PRINCIPLES

In essence, parliamentary privilege concerns the powers, privileges and immunities from aspects of the general law conferred on the Houses of Parliament, their members, officers and committees.

A distinction can be drawn between those rights and immunities enjoyed by

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<sup>1</sup> [2005] SCR 667.

<sup>2</sup> [2004] 2 Qd R 599.

<sup>3</sup> [2007] 1 WLR 2825.

<sup>4</sup> (2003) 128 FCR 418.

<sup>5</sup> [2008] SAIRC 41.

<sup>6</sup> Joint Committee on Parliamentary Privilege, *Report: Volume 1 – Report and Proceedings of the Committee*, UK Parliament, Session 1998-99, HL Paper 43 –1, HC 214-1, Ch 1, para 11.

members and parliamentary officers individually (but not for their personal benefit), and the rights and powers of the Houses of Parliament in their collective capacity.

The principal powers and privileges are:

- Freedom of speech in Parliament
- Exclusive cognisance (jurisdiction) over internal affairs
- Power to discipline members
- Power to punish for contempt

## **2.1 Inherent/statutory/customary privileges**

The privileges enjoyed by the Houses of Parliament can be conferred as a matter of inherent right, or under statute, or in the case of the Westminster Parliament, parliamentary privilege is also derived from the law and custom of Parliament –the *lex parliamenti*.

The distinctions can be significant, but the lines of difference can also be hard to draw. Clear-cut is the power to punish for contempt, by imprisonment (or by fine under s 7(5) of the Commonwealth *Parliamentary Privileges Act 1987*). This judicial power is not an inherent right – in the sense that it is necessary to a legislative chamber performing its constitutional functions - but derives from Westminster’s peculiar history as the High Court of Parliament. For other Houses of Parliament to enjoy the same power they must do so under statute.

In terms of the other three principal privileges, these can be discussed in terms of a combination of custom, inherent rights and statutory powers and immunities. For example, freedom of speech in Parliament can be said to derive from the law and custom of Parliament, to be an inherent right and, in Article 9 of the Bill of Rights 1689, to find statutory confirmation.

Article 9 provides

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

## **2.2 Parliamentary privilege in Australia**

For a number of Australian jurisdictions, parliamentary privilege is defined by statute, but this is achieved by reference to privileges of the House of Commons at a certain date. For example, s 19 of the Victorian Constitution Act defines the Parliament’s power and privileges by reference to those of the House of Commons as at 1855. In this way it adopts and incorporates the customary, inherent and statutory sources of privilege into Victorian law. The privileges of the Western Australian Parliament are now defined as those of the House of Commons as at 1989 (*Parliamentary Privileges Act 1891* as amended in 2004); in South Australia,

the relevant date is 1856.<sup>7</sup>

In Queensland there is a partial codification of parliamentary privilege under the *Parliament of Queensland Act 2001*, but otherwise the Parliament's privileges are defined by reference to the House of Commons as at 1901.

This formulation follows s 49 of the Commonwealth Constitution. Federally, of course, codification has occurred under the *Parliamentary Privileges Act 1987*. However, this codification is not necessarily complete, with s 5 of the Act providing that, unless provided otherwise, the powers under s 49 of the Commonwealth Constitution are to continue in force. Even in this context, therefore, the combination of customary, inherent and statutory sources may still apply.

Something of an exception is NSW, where Article 9 applies further to s 6 of the *Imperial Laws Applications Act 1969*,<sup>8</sup> but otherwise the privileges of its Houses are on a common law basis, to be implied by reasonable necessity.<sup>9</sup>

### 2.3 Rise of Article 9 and statutory sources

The 23<sup>rd</sup> edition of *May's Parliamentary Practice* comments on the recent judicial reliance in privilege cases 'on the statutory expression of the right to freedom of speech in Parliament contained in Article 9 of the Bill of Rights'. According to Erskine May:

None of the great 19<sup>th</sup> century cases did more than glance at Article 9, if that: decisions then were based on constitutional first principles'.<sup>10</sup>

As Justice McHugh observed in *Egan v Willis*:

In neither *Stockdale[v Hansard]* nor *Bradlaugh[v Gossett]* did the judges

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<sup>7</sup> *Constitution Act 1934* (SA), s 38.

<sup>8</sup> For other statutes relevant to parliamentary privilege in NSW see – G Griffith, *Parliamentary privilege: major developments and current issues*, NSW Parliamentary Library Background Paper No 1/07, pp 11-16.

<sup>9</sup> *Kielly v Carson* (1842) 4 Moo PC 63; 13 ER 225. Tasmania has several parliamentary privilege Acts, but none provides a general incorporation of power by reference to the House of Commons. By s 3 of the *Parliamentary Privileges Act 1858* the Houses do have a power to punish for contempt. See also *Australian Capital Territory (Self Government) Act 1988* (Cth), s 24, by which the House of Assembly's privileges are defined for the time being by reference to those of the House of Representatives; and the partial codification of parliamentary privilege under the *Legislative Assembly (Powers and Privileges) Act 1992* (NT), with any residual privileges again being defined by reference to those of the House of Representatives. The relevant legislation in New Zealand is the *Parliamentary Privileges Act 1865*, by which the privileges of the New Zealand House of Representatives is defined by reference to those of the House of Commons as at 1 January 1865

<sup>10</sup> *Erskine May's Parliamentary Practice*, 23<sup>rd</sup> edition, Lexis Nexis UK 2004, p 177.

suggest that it was Art 9 of the Bill of Rights that precluded them from exercising jurisdiction. Rather, their reasoning indicates that by parliamentary law – which as customary law is part of the common law – matters affecting the internal administration of the House of Commons are outside the jurisdiction of the common law courts.<sup>11</sup>

The same can be said of the NSW defamation case of *Gipps v McElhone*,<sup>12</sup> where it was the doctrine of the inherent ‘necessity’ of freedom of speech in Parliament that was applied.<sup>13</sup>

As for the contemporary emphasis on Article 9, David McGee comments:

The greater focus on Article 9 may be part of a tendency to look for an authoritative legislative or judicial expression of law in a form recognisable to the practising lawyer.<sup>14</sup>

More fundamentally, it might be asked whether the tendency to associate parliamentary privilege with Article 9 directs attention towards statutory interpretation, the usual domain of the courts, and away from constitutional first principles – the ‘why’ of parliamentary privilege. By Article 9 attention is directed to such questions as:

- What is meant by ‘impeaching’ or ‘questioning’? Is it enough if a member does not feel inhibited when actually speaking in Parliament? Or should the courts consider broader issues relating to the continuing flow of information to members?
- What are ‘proceedings in Parliament’?
- What is encompassed by the phrase ‘any court of place out of Parliament’? Does it include Royal Commissions, police questioning a member, ICAC investigations? Of course, in 1689 none of these investigative bodies existed.

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<sup>11</sup> (1998) 195 CLR 424 at para 69.

<sup>12</sup> (1881) 2 LR (NSW) 18.

<sup>13</sup> Groves and Campbell cite this case as one example of where the ‘Courts have held that even in the absence of statutory provisions which declare that Article 9 applies to a Parliament established by British imperial decree, the Article applies in that polity...’: ‘Parliamentary privilege and the courts: questions of justiciability; (Winter 2007) 7(2) *Oxford University Commonwealth Law Journal* 175, fn 1. But this not strictly so. What applies is freedom of speech in Parliament by inherent right. This also applies to the other cases cited – *Chenard and Co v Arissol* [1949] AC 127 at 134 and *R v Turnbull* [1958] TAS SR 80 at 83-4. In fact Article 9 is recited in the last case as part of historical review of privilege. However, the judgment is based on the doctrine that freedom of speech in Parliament is an essential attribute of every free legislature and ‘inherent in the constitution of Parliament’.

<sup>14</sup> D McGee, ‘The scope of parliamentary privilege’ (March 2004) *The New Zealand Law Journal* 84.

It might be said that, by directing attention to such questions, the emphasis on Article 9 has helped to broaden our conception of parliamentary privilege. This now seems to include such instruments of the Executive as Royal Commissions, thus increasing the ambit of protection for freedom of speech in Parliament.<sup>15</sup>

More generally, for the courts Article 9 might be said to set a boundary around what is to be an exception to the general law. If the language of Article 9 is not transparent, its interpretation does raise questions familiar to the courts. This is unlike the conferral of privilege on the basis of the inherent rights of Parliament, an approach that is more open-ended and nebulous, making for an uneasy fit with the rule of law.

## 2.4 Inherent privileges and test of necessity

At least since the landmark case of *Stockdale v Hansard*,<sup>16</sup> the test of necessity is said to apply to inherent privileges. As Lord Denman CJ said in that case:

If the necessity can be made out, no more need be said: it is the foundation of every privilege of Parliament, and justifies all that it requires.<sup>17</sup>

Mahoney P in *Egan v Willis & Cahill*<sup>18</sup> explained that:

The decisions in this area of the law show that the powers which have been held to be inherent in legislative bodies have not been limited to powers without which it would not have been possible for the bodies to function. They have extended to powers which are clearly adapted to the needs and purposes of the body in question.<sup>19</sup>

‘Necessity’, the Canadian Supreme Court said in *Canada (House of Commons) v*

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<sup>15</sup> Note that in 1917 a royal commission was set up in NSW to inquire into the truth of allegations made by Richard Price in the Legislative Assembly. No regard was had in this process to Article 9, or indeed to any inherent rights or privileges. In this respect, by the analysis of the roles of the Executive and Parliament, Article 9 jurisprudence can feed into the broader constitutional debate about first principles.

<sup>16</sup> (1839) 112 ER 1112.

<sup>17</sup> (1839) 112 ER 1112 at 1169. Privilege could, he said, be grounded on ‘three principles – necessity, practice, universal acquiescence’.

<sup>18</sup> (1996) 40 NSWLR 650.

<sup>19</sup> (1996) 40 NSWLR 650 at 676. Note that, at the High Court level in *Egan v Willis* (1998) 195 CLR 424 at 467, McHugh J argued that ‘A legislative chamber relying on “reasonable necessity” must show that it would be impossible, in the absence of the power asserted, to carry out the relevant function and that therefore that power is implicitly “supplied by necessary intendment”’.

*Vaid*,<sup>20</sup> is to be ‘read broadly’ in this context, by reference to what ‘the dignity and efficiency of the House’ require.<sup>21</sup>

In *Egan v Willis & Cahill* Mahoney P went on to consider that what is ‘necessary’ to a legislative body may change over time, stating:

The concept of necessity involves that the court must consider, from time to time and as the need arises, what are the functions of the body and the purposes it is to achieve and accordingly what it must be able to do.<sup>22</sup>

Likewise, in *Vaid* the Canadian Supreme Court established a ‘purposive’ approach,<sup>23</sup> by which necessity had to be tested by reference to the functions of Parliament, as understood in a contemporary setting:

...the court must not only look at the historical roots of the claim but also to determine whether the category of inherent privilege continues to be necessary to the functioning of the legislative body today. Parliamentary history, while highly relevant, is not conclusive. (emphasis in original)<sup>24</sup>

Based on the UK Joint Committee, the test can be expressed as whether any particular power or privilege is necessary today, in its present form, for the effective functioning of a House of Parliament?<sup>25</sup>

## 2.5 Constitutional functions

In *Vaid* parliamentary privilege is set in a broader constitutional context. The justification for parliamentary privilege is that the freedom to control their own proceedings and the freedom of speech in Parliament are necessary if the Houses of Parliament are to perform their constitutional functions effectively - that is, to inquire, debate and legislate. The Supreme Court of Canada said that parliamentary privilege is ‘necessary’

to protect legislators in the discharge of their legislative and deliberative

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<sup>20</sup> [2005] 1 SCR 667.

<sup>21</sup> [2005] 1 SCR 667.at para 29.7. The burden of proof is on the party seeking to rely on the immunity provided by parliamentary privilege.

<sup>22</sup> (1996) 40 NSWLR 650 at 676. The idea that parliamentary privileges are not ‘frozen in time’ was expressed by Wallace P in *Armstrong v Budd* (1969) 71 SR (NSW) 386 at 402 and Kirby J in *Egan v Willis* (1998) 195 CLR 424 at 495-6.

<sup>23</sup> [2005] 1 SCR 667 at para 43.

<sup>24</sup> [2005] 1 SCR 667 at para 29.6. Strictly speaking, by the Supreme Court’s reference to the earlier authority of *New Brunswick Broadcasting and Harvey v New Brunswick (Attorney General)* [1996] 2 SCR 876, the rule was restricted to Provincial legislatures.

<sup>25</sup> Joint Committee on Parliamentary Privilege, n 6, Ch 1, para 4.



functions, and the legislative assembly's work in holding the government to account for the conduct of the country's business.<sup>26</sup>

The UK Joint Committee had this to say:

Without this protection, members of Parliament would be handicapped in performing their parliamentary duties, and the authority of Parliament itself in confronting the executive and as a deliberative forum would be diminished.<sup>27</sup>

## 2.6 Separation of powers

Parliamentary privilege can be located within what has been called the 'rough' doctrine of the separation of powers that operates in Westminster parliamentary systems. As Lamer CJ in *New Brunswick Broadcasting v Nova Scotia*<sup>28</sup> said

given its historical development, it is fair to say that its [parliamentary privilege] source is constitutional in the most fundamental sense in that it has everything to do with the relationship between the different branches of government.

In the words of David McGee:

Privilege is part of the way in which the separation of powers is delineated...and a principal means of effecting a *modus vivendi* between the legislature and the other two branches of government...Parliamentary privilege...helps preserve Parliament's freedom from outside control and to give it and its members the legal tools and confidence they will need to perform their constitutional functions.<sup>29</sup>

Historically, in 17<sup>th</sup> century England, parliamentary privilege was political, not legal, in origin, forged in the conflict between Parliament, the Executive and the courts. The fundamental rights of the House of Commons were asserted against the prerogatives of the Crown and the authority of the courts. The assertion of privilege was a declaration of its independence from the other branches of government.

McHugh J in *Egan v Willis* stated:

The view of the Tudor and Stuart monarchs was that the House of Commons was summoned only to vote on the appropriations asked of

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<sup>26</sup> [2005] 1 SCR 667 at para 41.

<sup>27</sup> Joint Committee on Parliamentary Privilege, n 6, p 8.

<sup>28</sup> [1993] 1 SCR 319.

<sup>29</sup> David McGee, 'The scope of parliamentary privilege' [2004] NZLJ 84.

them, to approve legislation submitted to them and to express opinions on matters of policy only when asked. The House of Commons would not have become the powerful institution that it is if the views of those monarchs had prevailed. The importance of Parliament under the Westminster system is in no small part due to the seemingly inconsequential right of the House of Commons to control its business.<sup>30</sup>

In contemporary terms it is sometimes said that the focus is on the relationship between Parliament and the courts – on the separation of judicial and legislative power - with parliamentary privilege operating ‘now as a constraint on the judicial arm of government’.<sup>31</sup>

One might ask whether this particular separation of powers continues to be ‘necessary’ now that the courts are recognised to be independent of the Executive? Do the same constitutional first principles apply in contemporary circumstances as in the past? Are the same immunities required or, stating the issue in another way, should the immunities relating to freedom of speech in Parliament be placed on a different constitutional basis?

A further consideration is that, as the earlier statements from *Vaid* show, parliamentary privilege also serves to assert Parliament’s independence from the modern day Executive. Parliament’s immunities prevent incursions into parliamentary freedoms, by commissions of inquiry, police questioning or other means. Its powers facilitate the scrutiny of the Executive on behalf of the electorate.

Parallels can also be drawn with the prerogative powers. Like parliamentary privilege, the prerogative consists of special rules that ‘evolved to enable public bodies to perform their functions’.<sup>32</sup> In both cases the rules were customary in origin, and were developed and decided in special courts – the Star Chamber or Privy Council where the prerogative powers were concerned, the High Court of Parliament in the case of parliamentary privilege. AV Dicey wrote:

Between ‘prerogative’ and ‘privilege’ there exists a close analogy: the one is the historical name for the discretionary authority of the Crown; the other is the historical name for the discretionary authority of each House of Parliament.<sup>33</sup>

At odds as the two doctrines were historically, there may yet be parallels to draw between the way the courts have brought both species of discretionary powers

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<sup>30</sup> (1998) 195 CLR 424 at 478.

<sup>31</sup> *Mees v Roads Corporation* (2003) 128 FCR 418 at para 78.

<sup>32</sup> C Munro, *Studies in Constitutional Law*, Butterworths, 1987, p 136.

<sup>33</sup> AV Dicey, *Introduction to the Study of the Law of the Constitution*, 6<sup>th</sup> edition, Macmillan 1902, p 371.

more and more under the rule of the general law.

## 2.7 Parliamentary sovereignty and privilege

What emerged triumphant from the conflicts of the 17<sup>th</sup> century was the supremacy or sovereignty of Parliament. Indeed, the Bill of Rights of 1689 can be read as an expression of Parliament's hard won sovereignty, in that it curbs the Crown prerogative and at the same time places the customary/inherent doctrine of freedom of speech in Parliament on a statutory basis.

Many issues arise in relation to parliamentary sovereignty.<sup>34</sup> The central question, however, is whether the doctrine applies at all under Australia's federal constitutional arrangements, where legislation is routinely subject to judicial review for constitutional validity.<sup>35</sup> Assuming for the present the relevance of parliamentary sovereignty in Australia, the point to make is that, as between sovereignty, privilege and prerogative, it is the first that stands at the apex of the constitutional hierarchy. Just as the Crown cannot enlarge its prerogatives, it is agreed that the Houses cannot by their own act, by mere resolution, create new

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<sup>34</sup> For example, the word 'parliamentary' does not bear the same meaning in both contexts. In relation to parliamentary sovereignty, it refers to 'the Crown in Parliament'; whereas for parliamentary privilege the reference is to the two Houses of Parliament, separately constituted. If privilege serves the political cause of sovereignty, it is not its legal equivalent. In *New Brunswick Broadcasting* [1996] 2 SCR 876 one question at issue was the interpretation of the word 'Legislature' in s 32(1)(b) of the Canadian Charter of Rights and Freedoms. The question was whether the Charter applied to the Houses of the Provincial Parliaments as components of the Legislature. The answer was that it did not.

<sup>35</sup> The doctrine of parliamentary sovereignty establishes a jurisdictional limit on the courts, which have the power to interpret statutes but not to override or set aside legislation, even on the ground that it violates some fundamental human right. In Australia of course the doctrine can only operate in a qualified way, where powers are divided under a federal system and where judicial review is established under a written constitution. For judicial consideration of the relevant issues see – *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1; *Durham Holdings v NSW* (2001) 205 CLR 399; and generally F Wheeler, 'BLF v Minister for Industrial Relations: the limits of State legislative and judicial power' in *State Constitutional Landmarks* edited by G Winterton, The Federation Press 2006, Ch 13. The relationship between parliamentary sovereignty and parliamentary privilege can also arise in cases concerning the judicial review of the legislative process – *Trethowan v Peden* (1930), *Marquet v AG (WA)* (2002), *Jackson v AG* (2005). Colin Munro has argued that in such cases: where 'the validity of an Act of Parliament is challenged on the ground of alleged defects of parliamentary procedure, and the courts refuse to investigate, their refusal might be justified on grounds of sovereignty or privilege': C Munro, *Studies in Constitutional Law*, Butterworths 1987, p 144. Cited in a British context are: *Bradlaugh v Gossett* (1884) 12 QBD 271 and *British Railways Board v Pickin* [1974] AC 765. It is said that, in the latter, 'the sovereignty aspect was emphasised, but privilege was also adduced as a justification in the speeches of Lord Simon of Glaisdale and Lord Morris of Borth-y-Gest'. Somewhat different issues arise in an Australian context where the justiciability question can vary on a case by case basis, depending for example on whether a manner and form provision is at issue (as in the *Trethowan* and *Marquet* cases), or a constitutional provision, as in the case of s 57 of the Commonwealth Constitution in *Cormack v Cope* (1974). See generally – A Twomey, *The Constitution of New South Wales*, The Federation Press 2004, pp 240-245.

privileges. This can only be done by legislation – by the Crown in Parliament. Generally speaking, parliamentary sovereignty permits Parliament to change, repeal or codify the rest of the common law. The privileges of Parliament therefore can be wholly or partially codified or confirmed by statute. Those privileges can also be regulated or curtailed by statute, as in the case of s 8 of the Commonwealth privileges legislation, which abolishes the power to expel members.

Leaving the array of constitutional questions for another time, it can be said that, like parliamentary privilege, parliamentary sovereignty is a common law doctrine not made by the courts. Goldsworthy describes parliamentary sovereignty ‘as a matter of common law in the old sense of the term, meaning a custom that the courts have recognised, but did not create’.<sup>36</sup> The same applies for parliamentary privilege. Both were established by political struggle, not judicial decision.

Goldsworthy has also suggested there may be a more ‘intimate relationship’ between the two doctrines, saying:

If the Houses of Parliament and their members did not enjoy certain immunities from external interference – if, for example, they did not have unfettered freedom of speech – would not legislative sovereignty of Parliament as a whole be jeopardised? Could an institution be truly sovereign, if its component parts could be threatened or coerced by an external person or body? Even if its laws could not be invalidated after enactment, would there not be a danger that it could be prevented from enacting certain laws at all?<sup>37</sup>

Groves and Campbell refer to the same quote in their recent article on ‘Parliamentary privilege and the courts’. They take the view that, to the extent that it suggests that the existence and ambit of privilege is something for the Parliament to determine alone, to alter only by legislation, it does not reflect current reality. The fact is Parliaments do now accept the jurisdiction of the courts in this respect.<sup>38</sup>

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<sup>36</sup> J Goldsworthy, *The Sovereignty of Parliament*, Clarendon Press 1999, p 243.

<sup>37</sup> J Goldsworthy, ‘Book symposium: response to the commentators’ (2002) 27 *Australian Journal of Legal Philosophy* 193 at 205.

<sup>38</sup> Groves and Campbell, 13, p186.

### 3. PARLIAMENT AND THE COURTS

The historical relationship between the courts and Parliament is set out in *May's Parliamentary Practice*, where the landmark 19<sup>th</sup> century cases are explained, notably *Stockdale v Hansard* (1839) and *Bradlaugh v Gossett* (1884).<sup>39</sup> From these cases it emerged that the Houses of Commons had exclusive jurisdiction over its own internal proceedings. At the same time it was held that, whenever a claim of privilege arose in determining the rights and liabilities of individual subjects, the courts had no option but to determine the correctness of a claim of privilege. In effect, the courts claimed they had the jurisdiction to declare what were the powers, privileges and immunities of the House of Commons. Parliamentary privilege was therefore part of the general law of the land and it was for the courts to apply and interpret the law.

To that extent, the Houses of Parliament 'yielded' to the courts. As Sir William Anson pointed out in 1909, the claim that no court has jurisdiction to discuss the legality of anything ordered by a vote of a House of Parliament was rejected, with Anson commenting 'it is safe to say that the courts have won the day'.<sup>40</sup>

Sir William Holdsworth, writing in 1924 about the 19<sup>th</sup> century cases, stated in a similar vein:

All these cases illustrate the determination of the courts to assert the supremacy of the law over the working of all parts of the constitution. They show that the privileges of each of the Houses of Parliament are as much subject to the rule of law as the prerogatives of the Crown; and that a subject, who complains that he is oppressed by an undue exercise of privilege, has the same right to apply to the courts for redress as a subject who complains that he is oppressed by an undue exercise of the prerogative. The courts are subject to the enactments passed by King, Lords and Commons, for they are law; but they are subject to no other authority.<sup>41</sup>

The jurisdiction of the courts to determine privilege questions was never in dispute in Australia. The broad rule is that the existence of a privilege is justiciable, but its exercise is not. As Dixon J said in *R v Richards; Ex parte Fitzpatrick and Browne*:

[I]t 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. ...<sup>42</sup>

<sup>39</sup> *May's Parliamentary Practice*, n 10, Chapter 11.

<sup>40</sup> Sir WR Anson, *The Law and Custom of the Constitution*, 4<sup>th</sup> ed, Clarendon Press, 1909, vol 1, p 147; cited with approval by McHugh J in *Egan v Willis*, p 459.

<sup>41</sup> Sir W Holdsworth, *History of English Law, Volume VI*, 2<sup>nd</sup> ed, Methuen and Co Ltd 1937, p 272.

<sup>42</sup> (1955) 92 CLR 157 at 162.

To quote Lamer CJ, the general rule is that ‘the courts will inquire into the existence and extent of privilege, but not its exercise’.<sup>43</sup>

These rules do not always provide a clear guide. What is an ‘undoubted privilege’ one might ask if, as in *Vaid*, the courts query whether a particular category of ‘inherent privilege continues to be necessary...’? More particularly, grey areas exist between where Parliament enjoys exclusive jurisdiction and where the courts may intervene. The distinction between what are ‘internal’ and ‘external’ affairs may not be clear, just as the extent of a privilege may not be distinguishable from its exercise.

The role of the courts was explained by Justice Gray in *Mees v Roads Corporation*, stating:

The fundamental rationale of a court is the resolution of legal disputes through the exercise of impartial decision-making power and the ability to enforce the resulting decisions. Courts have a duty to resolve the disputes that are brought to them. There is therefore obvious scope for conflict between the duty of a court to decide a particular case according to law and the privilege of parliament to retain control over its own proceedings in a case which raises, or has the potential to raise, an issue about what has occurred in parliamentary proceedings.<sup>44</sup>

As a rule the courts are apt to pay closer attention to those claims to privilege which impact on non-parliamentarians than to those which involve matters entirely internal to the Parliament. This principle was affirmed in *Vaid*, where the Canadian Supreme Court observed:

That the role of the courts is to ensure that a claim of privilege does not immunize from the ordinary law the consequences of conduct by Parliament or its officers and employees that exceeds the necessary scope of the category of privilege.<sup>45</sup>

Quoted with approval was this statement from *Stockdale v Hansard*:<sup>46</sup>

All persons ought to be very tender in preserving to the Houses all privileges which may be necessary for their exercise, and to place the most implicit confidence in their representatives as to the due exercise of those privileges. But power, and especially the power of invading the rights of

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<sup>43</sup> *New Brunswick Broadcasting v Nova Scotia* (1993) 1 SCR 319 at 350.

<sup>44</sup> (2003) 128 FCR 418 at para 78.

<sup>45</sup> [2005] 1 SCR 667 at para 29.11.

<sup>46</sup> (1839) 9 Ad & E 1 (112 ER 1112)

others, is a very different thing: it is to be regarded, not with tenderness, but with jealousy; and, unless the legality of it be clearly established, those who act under it must be answerable for the consequences.<sup>47</sup>

### 3.1 Two lines of thought

Broadly speaking, a conflict emerges between two different lines of thinking: one based on the administration of justice and the rights of citizens to have their cases heard before the courts, with all available evidence before the courts; the other based on the exclusive rights of Parliament which operate as an exception to the general law. Put another way, the tension is between the administration of justice, on one side, and the powers and immunities of Parliament, on the other.

As Geoffrey Lock wrote in 1998:

Two lines of thinking, which are not easy to reconcile, are perceptible in judicial attitudes to these matters: the need to safeguard the interests of litigants, and the desirability of avoiding a conflict between Parliament and the courts.<sup>48</sup>

For the most part, conflict has been avoided by the courts and Parliament exercising mutual respect and understanding for their respective rights, privileges and constitutional functions. In this context, the principles underlying the separation of powers find expression in the ideas of 'comity' or 'non-intervention'.

### 3.2 *Prebble v TV New Zealand*<sup>49</sup>

Traditionally, the decisions of the courts on parliamentary privilege tended to be mostly favourable to Parliament, as re-affirmed in the 1995 case of *Prebble*. There a New Zealand Minister had brought a defamation case, in answer to which the defendants wished to assert that the Minister had made misleading statements in the House of Representatives to the effect that the government did not intend to sell state assets when he was conspiring to do just that. The question was really about what constitutes a fair trial under the rule of law where, by the operation of parliamentary privilege, evidence relevant to the case is rendered inadmissible.

The comity principle and its historical antecedents were discussed by reference to:

a long line of authority which supports a wider principle, of which article 9 is merely one manifestation, viz. that the courts and Parliament are both

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<sup>47</sup> (1839) 9 Ad & E 1 (112 ER 1112 at 1192); *Canada (House of Commons) v Vaid* [2005] 1 SCR 667 at para 39.

<sup>48</sup> G Lock, 'Statute law and case law applicable to Parliament' in *The Law and Parliament* edited by D Oliver and G Drewry, Butterworths 1998, p 54.

<sup>49</sup> [1995] 1 AC 321.

astute to recognise their respective constitutional roles. So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges.<sup>50</sup>

In *Prebble*, the submissions of the defendants were rejected. The ‘basic concept’ was that members of the House and witnesses before committees should be able to:

speaking freely without fear that what they say will later be held against them in the courts. The important public interest protected by such privilege is to ensure that the member or witness *at the time he speaks* is not inhibited from stating fully and freely what he has to say.<sup>51</sup> (emphasis in original)

In terms of the broader issues involved Lord Browne-Wilkinson for the Privy Council said the case illustrated ‘how public policy, or human rights, issues can conflict’. Three issues were in play: (i) the need to ensure that the legislature can exercise its powers freely on behalf of its electors; (ii) the need to protect freedom of speech generally; and (iii) the interests of justice in ensuring that all the relevant evidence is available to the courts. It was declared: ‘Their Lordships are of the view that the law has been long settled that, of these public interests, the first must prevail...’<sup>52</sup>

That would seem to be clear enough – a bright exclusionary line was apparently drawn where admissibility questions were raised. At the time, academic writers interpreted the statement critically. Patricia Leopold said it ‘goes too far in favour of freedom of speech in Parliament at the expense of the proper administration of justice’.<sup>53</sup> Geoffrey Marshall said it follows that no balancing of conflicting public interests is in fact involved where the privileges of Parliament are at stake. He wrote that if:

it is really settled that the first interest has to prevail, what sense can be given to the view that the other two interests are in play? If they are bound to lose, there is no conflict of interest and no balancing of public interests to be done.<sup>54</sup>

But note in this respect that two caveats were added to the exclusionary rule in *Prebble*, leaving the door ajar for a judicially creative approach, which might redefine the relationship between the administration of justice and the exclusionary

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<sup>50</sup> [1995] 1 AC 321 at 332.

<sup>51</sup> [1995] 1 AC 321 at 334.

<sup>52</sup> [1995] 1 AC 321 at 336.

<sup>53</sup> P Leopold, ‘Free speech in Parliament and the courts’ (1995) 15 *Legal Studies* 204 at 209.

<sup>54</sup> G Marshall, ‘Impugning parliamentary impunity’ (Winter 1994) *Public Law* 509 at 512.



rule.

In *Prebble* it was said, first, that the two other interests cannot be ‘ignored’;<sup>55</sup> and, second, that the exclusionary principle ‘does not exclude all references in court proceedings to what has taken place in the House’.<sup>56</sup>

From this, Lord Browne-Wilkinson in *Prebble* went on to argue against a stay of proceedings, saying that there was no problem with the defendant at trial alleging that certain events occurred or words were said in Parliament, so long as this was not accompanied by an ‘allegation of impropriety or any other questioning’. The relevant passage reads:

their Lordships wish to make it clear that if the defendant wishes at the trial to allege the occurrence of events or the saying of certain words in Parliament without any accompanying allegation of impropriety or any other questioning there is no objection to that course.<sup>57</sup>

### 3.3. The historical exception doctrine

David McGee calls this ‘the historical exception doctrine’. He argues, by reference to two later New Zealand defamation cases – *Peters v Cushing*<sup>58</sup> and *Buchanan v Jennings*<sup>59</sup> – that this supposed ‘exception’ has since become the ‘rule’.

What does the historical exception mean? Is it only that judicial notice can be taken of the parliamentary record to ascertain that something was said or done on a certain date, or does it involve reference to the substance or meaning of what was said or done? By reference to the New Zealand Court of Appeal’s decision in *Buchanan v Jennings*, Gray J said in *Mees v Roads Corporation*:

At one time, there was a controversy as to whether the court could receive evidence of the words spoken, as distinct from evidence that something was said, but this appears to have been resolved in favour of the view that the words spoken can be tendered in evidence.<sup>60</sup>

Is there a change taking place here, redefining the relationship between the courts and Parliament, at least as far as freedom speech cases are concerned? Or is it the case that our perception can be skewed by the emphasis on defamation

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<sup>55</sup> [1995] 1 AC 321 at 336.

<sup>56</sup> [1995] 1 AC 321 at 337.

<sup>57</sup> [1995] 1 AC 321 at 337.

<sup>58</sup> [1999] NZAR 241.

<sup>59</sup> [2002] 3 NZLR 145. The reference was to the decision of the New Zealand Court of Appeal.

<sup>60</sup> (2003) 128 FCR 418 at para 80.

cases? Are there any trends to be found in the conflict between Lock's two lines of thought in recent cases?

It is worth noting in this respect that the historical exception doctrine did not originate in *Prebble* and its use does not date from that time. The NSW case of *Mundey v Askin*<sup>61</sup> pre-dates *Prebble* by two decades.<sup>62</sup> In that case, *Hansard* was admitted into evidence to prove, as a fact, that certain things had been said in the course of a debate in the NSW Legislative Assembly. The NSW Court of Appeal said that '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...'.<sup>63</sup> Distinguished was the UK case of *Church of Scientology of California v Johnson-Smith*<sup>64</sup> where it was 'held that what was said or done in Parliament in the course of proceedings there could not be examined outside Parliament for the purpose of supporting a cause of action, even though the cause of action itself arose out of something done outside Parliament'.<sup>65</sup> The Court of Appeal said that that 'principle had nothing to do with the present case... The ratio of *Johnson-Smith's case* therefore does not apply'.<sup>66</sup> Quoted with approval from that case was the statement of Browne J that *Hansard* could be admitted 'simply as evidence of fact, what was in fact said in the House, on a particular day by a particular person'.

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<sup>61</sup> [1982] 2 NSWLR 369.

<sup>62</sup> Although reported in 1982, the case was heard in 1975. In *Mundey* *Hansard* was admitted on behalf of Askin who sought to prove that the subject of industrial violence and lawlessness in aid of political demands had been debated in the Legislative Assembly, a fact that was relevant to his defence of qualified protection under s. 17 (h) of the *Defamation Act 1958* (NSW).

<sup>63</sup> [1982] 2 NSWLR 369at 373.

<sup>64</sup> [1972] 1 QB 522.

<sup>65</sup> [1982] 2 NSWLR 369at 373.

<sup>66</sup> [1982] 2 NSWLR 369at 373.

## 4. RECENT APPLICATIONS

### 4.1. *Toussaint v Attorney General of St Vincent and the Grenadines*<sup>67</sup>

At issue in the case was whether the courts could admit a Prime Ministerial statement made in the House of Assembly into evidence for the purposes of the review of Executive action? It is an unusual case, therefore, which asks whether parliamentary privilege could act as a bar to the review of a decision made by the Executive. The answer, on the facts of the case, was 'no' it could not. In effect, the jurisdiction of the court to engage in the judicial review of administrative action was not to be curtailed or impeded by parliamentary privilege.

The facts were that Toussaint brought an action against the government claiming that the acquisition of his land was unconstitutional and unlawful. Toussaint was a former commissioner of police in St Vincent. In 1990 he bought a parcel of land in the Grenadines for about \$6, 500 from a government instrumentality (the Development Corporation). In 2002, following a change of government, it was demanded that Toussaint pay a further \$84, 200 for the land. It was claimed that because of his close relationship with the former government, the price Toussaint paid for the land was far below market value. Toussaint refused to meet the demand. On 5 December 2002, during a televised budget speech in the House of Assembly, the Prime Minister said that the land would be compulsorily acquired. In the statement the Prime Minister read the draft wording of the Governor's declaration compulsorily acquiring the land for educational purposes. Immediately afterwards, the declaration was published in the Gazette. No compensatory payment was mentioned in the declaration, but the Lands and Surveys Department informed Toussaint that just over \$9, 700 had been deposited in the Treasury Department in his name – the original price plus interest of 5% over 10 years.

As the Privy Council emphasised, the case did not concern proceedings against a member of Parliament but, rather, 'against the executive for action taken outside the House', of which the Prime Minister had given prior notice in his budget speech.<sup>68</sup> No one was seeking to sue the Prime Minister for damages.

For his part, Toussaint claimed that, taken as a whole, the PM's statement during the budget debate showed the true reasons for the acquisition. He alleged that these were political. He also alleged that the educational purpose cited in the Governor's declaration was 'a sham and a stratagem to deprive him of his land unlawfully'.

The privilege issue in the case arose from the fact that Toussaint wished to rely on the statement made by the PM in the House of Assembly explaining why the compulsory acquisition had been made.

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<sup>67</sup> [2007] 1 WLR 2825.

<sup>68</sup> [2007] 1 WLR 2825 at paras 8 and 19.

In addition, in a second limb to the privilege issue, by s 16 of the local *Privileges Act* no evidence of proceedings in the House of Assembly was admissible 'unless the court...is satisfied that permission has been given by the Speaker for such evidence to be given'. Read with s 3 of the same Act, in the exercise of any power conferred on him the Speaker was made immune from the jurisdiction of the court. This can be interpreted as an expression of the control by the Houses of Parliament over 'debates or proceedings in the House', a doctrine based either on Article 9 or on the wider doctrine of exclusive cognisance. The Speaker had refused permission for Toussaint to use evidence of the Prime Minister's statement in court proceedings. For Toussaint, it was claimed that the *Privileges Act* had to be read in a qualified manner, so as not to bar his constitutional right of access to the court to enforce his property rights.

In summary, the judgment for the Privy Council (delivered by Lord Mance) held, first, that Toussaint should be able to rely on the statement as a record of what was said as to the reasons for acquisition, although it would not be permissible to impugn the statement itself. In other words, the 'meaning' of the words spoken was to be admitted into evidence, but no 'judgment' was to be made about that meaning. Secondly, it was held that Toussaint's right of access to the courts would be unduly undermined if he could not rely on the statement, which meant that s 16 of the *Privileges Act* had to be adapted to enable evidence of such statements to be admissible, in order to enable judicial review and to explain executive action.

***The administration of justice:*** The Privy Council therefore combined a concern for the right of access of non-parliamentarians to the courts with the 'administration of justice' policy issue in *Prebble*, namely the interests of justice in ensuring that all the relevant evidence is available to the courts. McGee's historical exception doctrine was again in play therefore. Indeed, the reasoning in *Prebble* was central to the decision in *Toussaint*. For the Privy Council, Lord Mance explained:

the Board observes that the meaning of the Prime Minister's statements to the House is an objective matter. Mr Clayton accepts that Mr Toussaint can only *rely on the statements for their actual meaning*, whatever the judge may rule that to be. While no suggestion may be made that the Prime Minister misled the House by his statement, Mr Toussaint also remains free to deploy any evidence available to him on the issue whether the public purpose recited in the declaration was a sham – for example, evidence as to the nature and location of the land and the likelihood or otherwise of its being required for a Learning Resource Centre. The Prime Minister's statement to the House is potentially relevant to Mr Toussaint's claim as an admission or explanation of the executive's motivation. If the Prime Minister were to suggest that he expressed himself incorrectly, and did not intend to say what he said, then it would not be Mr Toussaint who was questioning or challenging what was said to the House. (emphasis added)<sup>69</sup>

One comment is that this leaves a lot of work for the trial judge in guiding counsel

<sup>69</sup> [2007] 1 WLR 2825 at para 23.

away from areas likely to infringe parliamentary privilege. It also assumes that statements made in Parliament can be used in evidence without inferences being drawn from these. 'The actual meaning' of what the Prime Minister said was admissible, although this was defined in terms of 'whatever the judge may rule that to be'. Perhaps it is misleading to claim that the statement is founded on a naïve philosophy of language. Does it, however, suggest an exaggerated confidence in the courts to guide counsel through the admissibility maze created by the historical exception doctrine?

***The separation of powers:*** The use of a ministerial statement for the purposes of the judicial review of administrative action introduced a constitutional dimension to *Toussaint*, concerning the respective roles of the Parliament, the Executive and the courts. In particular, the case raised the accountability of the Executive to Parliament, as well as its accountability to the rule of law by means of judicial review.

Reference in *Toussaint* was made to the report of the UK Joint Committee, specifically to its view that Parliament should 'welcome' the use of ministerial statements in judicial review, on the basis that 'Both parliamentary scrutiny and judicial review have important roles, separate and distinct, in a modern democratic society'.<sup>70</sup> Further quoting from the UK Joint Committee's First Report, Lord Mance said:

The contrary view would have bizarre consequences', hampering challenges to the 'legality of executive decisions by ring-fencing what ministers said in Parliament', and 'making ministerial decisions announced in Parliament ... less readily open to examination than other ministerial decisions'... The Joint Committee observed, pertinently, that

That would be an ironic consequence of article 9. Intended to protect the integrity of the legislature from the executive and the courts, article 9 would become a source of protection of the executive from the courts.<sup>71</sup>

Is a different kind of test being applied here, one that does not proceed, logically, from the concern to protect freedom of speech in Parliament but, rather, from a broader 'public interest' standpoint? The concern of the court is, in essence, with its own jurisdiction, with its capacity to undertake judicial review of administrative decisions, the public interest in which overrides any considerations arising from Article 9.

Reflecting on the admissibility of ministerial statements made in Parliament, the UK Joint Committee commented:

The development represents a further respect in which acts of the executive

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<sup>70</sup> According to the Joint Committee on Parliament Privilege, n 6, Ch 2 para 50:

<sup>71</sup> [2007] 1 WLR at para 17.

are subject to a proper degree of control. It does not replace or lessen in any way ministerial accountability to Parliament... Parliament must retain the right to legislate and take political decisions, but only the courts can set aside an unlawful ministerial decision.<sup>72</sup>

The UK Joint Committee explained:

Article 9 becomes germane when judicial review proceedings relate to a ministerial decision announced, or subsequently explained, in the House. Typically, in the court proceedings the applicant quotes an extract from the official report and then sets out his grounds for challenging the lawfulness of the decision in the light of the reasons given by the minister.<sup>73</sup>

In *Toussaint*, the Joint Committee was quoted with approval as saying:

Use of *Hansard* in this way has now occurred sufficiently often for the courts to regard it as established practice. Some examples will suffice as illustrations. In several cases challenges were made to the lawfulness of successive policy statements, announced in Parliament, regarding changes in the system for the parole of prisoners. In each case the court proceedings involved scrutinising the ministerial decisions and the explanations given by the minister in Parliament<sup>74</sup>... In none of these cases does any argument seem to have been advanced, by the government or anyone else, about the admissibility in evidence or the use in court of the statements made in Parliament. Indeed, the practice in court is for both the applicants and the government to use the official reports of both Houses to indicate what is the government's policy in a particular area.<sup>75</sup>

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<sup>72</sup> Joint Committee on Parliament Privilege, n 6, Ch 2 para 50.

<sup>73</sup> Joint Committee on Parliamentary Privilege, n 6, Ch 2 para 48.

<sup>74</sup> *In re Findlay* [1985] AC 318; *Pierson v Home Secretary* [1997] 3 AER 577; *R v Home Secretary, ex parte Venables* [1998] AC 407; and *R v Home Secretary, ex parte Hindley* [1998] QB 751. Reference was also made to *R v Home Secretary, ex parte Brind* [1991] 1 AC 696; *R v Secretary of State for Foreign Affairs, ex parte World Development Movement* [1995] 1 WLR 386; and *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513.

<sup>75</sup> [2005] 1 AC 115 at para 16; Joint Committee on Parliamentary Privilege, n 6, Ch 2 para 49.

## 4.2 Mees v Roads Corporation<sup>76</sup>

*Toussaint* bears comparison with the Australian case of *Mees v Roads Corporation*. The facts were, pursuant to Commonwealth legislation,<sup>77</sup> the applicant (Mees) sought to restrain the respondents (the Victorian Roads Corporation – VicRoads) from taking further action relating to the Scoresby Freeway or Eastern Ring Road in Melbourne. The second respondent in the case was the Victorian Minister for Transport (Peter Batchelor), a Member of the Legislative Assembly. In that House he had made a statement in October 2001 denying that the Government had any intention of linking the Eastern Freeway with the Greensborough Bypass. An answer to the same effect was given in the Legislative Council in March 2002 on behalf of the Minister for Transport. An injunction was sought by Mees on the ground that false and misleading information had been provided to avoid the Transport Minister having to refer the road construction proposal to the Commonwealth Environment Minister.<sup>78</sup>

The Federal Court held it had a duty to resolve the issue whether misleading information had been provided to the Commonwealth Environment Minister at any stage. A finding to this effect would indirectly call into question what had been said by the Victorian Minister for Transport in Parliament (evidence of which could be admitted only to establish that the words had been spoken as a matter of historical fact). As Gray J said:

As long as the Court refrains from making a finding, or drawing an inference, to the effect that Parliament has been misled, it commits no breach of parliamentary privilege and does not trespass upon the area for which Parliament alone has responsibility, namely control of its own proceedings.<sup>79</sup>

Referring to the relevant English cases, Justice Gray commented:

The English courts do not appear to have found it difficult to examine the content of a statement to parliament in one circumstance. That is where the statement contains a minister's reasons for a decision of which judicial review is sought. Apparently, examination of the content of such a statement, even for the purpose of considering whether the decision is so unreasonable that no reasonable decision-maker could have made it, is not considered to be impeaching or questioning the statement. See *R v Secretary of State for the Home Department; Ex parte Brind* [1991] UKHL 4; [1991] 1 AC 696. With this exception, it seems that any form of critical

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<sup>76</sup> (2003) 128 FCR 418.

<sup>77</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 475.

<sup>78</sup> In contravention of s 489 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

<sup>79</sup> (2003) 128 FCR 418; [2003] FCA 306 at para 87.

examination of the content of what has been said to parliament will not be undertaken by a court. It is certainly not permissible to tender the content of a statement to parliament for the purpose of proving that it was false or misleading.<sup>80</sup>

The same ground was covered by the Privy Council in *Toussaint*, but without reference to *Mees v Roads Corporation*. It seems that in *Mees v Roads Corporation* the parliamentary statements were used in judicial review proceedings merely to establish the Victorian government's policy or position on the matter under review. The ministerial statement itself did not provide the ground for judicial review.<sup>81</sup> The same would appear to be the case in *Toussaint* where the applicant 'wished to rely [on the PM's statement] to explain the motivation of executive action taken outside Parliament'. Indirectly, however, the court's findings in both *Mees* and *Toussaint* call into question the truthfulness of the statements made and the motivations behind them.

#### 4.3 R (Bradley) v Secretary of State for Works and Pensions<sup>82</sup>

*Mees v Roads Corporation* was concerned with parliamentary privilege under s 19(1) of the Victorian Constitution Act. Not in issue was the Commonwealth *Parliamentary Privileges Act 1987*. On the same subject of the admissibility of ministerial statements made in Parliament, comment was made in the recent English High Court case of *Bradley* on the potential operation of the Commonwealth legislation.

A number of privilege questions were at issue in *Bradley*, a case in which the litigants sought to use critical comments made about the Government's winding up of a pensions scheme, made first, by the Ombudsman in evidence to a parliamentary committee and, subsequently, in the report of the Public Administration Select Committee [PASC]. The Ombudsman's evidence was inadmissible, it was decided, with Justice Bean stating:

I agree with Mr Speaker that to allow the evidence of a witness to a Select Committee to be relied on in court would inhibit the freedom of speech in Parliament and thus contravene article 9 of the Bill of Rights.<sup>83</sup>

On the other hand, citation from the Select Committee report was admissible, with Justice Bean saying:

It seems to me unlikely that a Committee would be inhibited from

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<sup>80</sup> (2003) 128 FCR 418; [2003] FCA 306 at para 80.

<sup>81</sup> D McGee, *Parliamentary Practice in New Zealand*, 3<sup>rd</sup> ed, Office of the Clerk of the House of Representatives, 2005, p 629.

<sup>82</sup> [2007] EWHC 242 (Admin).

<sup>83</sup> [2007] EWHC 242 (Admin) at para 34.



expressing its view, whether critical or supportive of the actions of the government, by the thought that its report might be referred to in support of a party's submissions in civil litigation.<sup>84</sup>

It was said further that reliance would not be placed on the Select Committee report on other grounds, with Justice Bean striking a jurisdictional note in saying:

My view is that I should not place reliance on the PASC report for an entirely different and more fundamental reason, which is that, in the words of the Privy Council in *Prebble*, the courts and Parliament are both astute to recognise their respective constitutional roles. It is for the Courts, not the Select Committee, to decide whether the Secretary of State has acted unlawfully in rejecting the findings and recommendations of the Ombudsman in this case. I note and respect the views of the Select Committee but in the end they are not of assistance on the questions of law which I have to determine'.<sup>85</sup>

In the course of his judgment, Justice Bean touched on the interpretation of s 16(3)(c) of the Commonwealth privileges legislation. The sub-section provides:

(3) In proceedings in any court or tribunal, it is unlawful 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...

(c) drawing, or inviting the drawing of, inferences or conclusions wholly or partially from anything forming part of those proceedings in Parliament.

Justice Bean said that, 'if read literally' the sub-section 'is extremely wide'. He continued:

It would seem to rule out reliance on or a challenge to a ministerial statement itself on judicial review of the decision embodied in that statement (which was permitted in *R v Secretary of State for the Home Department; Ex parte Brind* [1999] 1 AC 696, and to which no objection has been raised in the present case)...or to assist in establishing the policy objectives of an enactment (*Wilson v First County Trust Ltd* [2004] 1 AC 816). It would also prohibit reliance on reports of the Joint Committee on Human Rights, which...have been cited in a number of appellate cases in this jurisdiction...As Lord Nicholls of Birkenhead observed in *Wilson*, "there are occasions when courts may properly have regard to ministerial and other statements made in Parliament without in any way 'questioning' what has been said in Parliament, without giving rise to difficulties inherent in treating such statements as indicative as the will of Parliament, and without in any

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<sup>84</sup> [2007] EWHC 242 (Admin) at para 35.

<sup>85</sup> [2007] EWHC 242 (Admin) at para 35.

other way encroaching upon Parliamentary privilege by interfering in matters properly for consideration and regulation by Parliament alone". I therefore do not treat the text of subparagraph (c) of the Australian statute as being a rule of English law.<sup>86</sup>

Justice Bean added:

In *Hamilton v Al-Fayed* Lord Woolf MR, giving the judgment of the Court of Appeal said ([1999] 1 WLR 1569 at 1586F) that "the vice to which Article 9 is directed (so far as the courts are concerned) is the inhibition of freedom of speech and debate in Parliament that might flow from any condemnation by the Queen's Courts, being themselves an arm of government, of anything there said." The case went to the House of Lords but their Lordships' speeches do not appear to cast doubt on the accuracy of Lord Woolf's observations.

The interpretation of s 16 of the Commonwealth Act remains to be authoritatively decided by the Australian High Court. In *Mees*, Gray J doubted 'whether s 16(3) is merely a codification of the law',<sup>87</sup> but that was not a matter upon which he had to rule.<sup>88</sup>

#### 4.4 **Buchanan v Jennings**<sup>89</sup>

The same ground as in the British cases on the admissibility of ministerial statements in Parliament for judicial review purposes was covered in the New Zealand case of *Buchanan v Jennings*. Again, extensive reference was made to the relevant discussion in the UK Joint Committee report, effectively to bolster the use made of the historical exception doctrine. This led the Privy Council to conclude:

Thus it cannot now be said, as it once perhaps could, that mere reference to or production of a record of what was said in Parliament infringes Article 9.<sup>90</sup>

Whether parliamentary proceedings should have been admissible in *Buchanan* is another matter. It might be argued that, by piecemeal means, and in a quite perfunctory way, the line of reasoning concerning ministerial statements in Parliament was used to dilute the exclusionary rule against the use of

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<sup>86</sup> [2007] EWHC 242 (Admin) at para 32.

<sup>87</sup> (2003) 128 FCR 418; [2003] FCA 306 at para 84.

<sup>88</sup> On the constitutional validity of the Commonwealth legislation generally, see E Campbell, *Parliamentary Privilege*, The Federation Press 2003, Ch 15.

<sup>89</sup> [2005] 1 AC 115.

<sup>90</sup> [2005] 1 AC 115 at paras 16 and 131.

parliamentary proceedings beyond anything contemplated in *Prebble*, or indeed in *Pepper v Hart*.<sup>91</sup>

In a brief judgment delivered by Lord Bingham of Cornhill the Privy Council found that a member is liable in circumstances where they say that they 'do not resile' from what they said in the House.

The facts of the case were that, in December 1997 the MP, Jennings, alleged abuse of expenditure and an illicit relationship on the part of officials involved in the sponsorship of a sporting tour. He was subsequently interviewed by a journalist who then published an article recording that Jennings withdrew some of his financial allegations, and reported him as saying that he 'did not resile' from his claim about the illicit relationship between the officials and the sponsors. The affirmation or 'effective repetition' was admitted into evidence and damages were awarded against Jennings in both the New Zealand High Court and the Court of Appeal. From there it went to the Privy Council, which upheld the earlier rulings. There was no doubt that what Jennings said in the House was protected by absolute privilege. However, that privilege did not extend to cover his republication of that statement by reference outside the House. The Privy Council concluded:

A statement made out of Parliament may enjoy qualified privilege but will not enjoy absolute privilege, even if reference is made to the earlier privileged statement. A degree of circumspection is accordingly called for when a Member of Parliament is moved or pressed to repeat out of Parliament a potentially defamatory statement previously made in Parliament. The Board conceives that this rule is well understood, as evidenced by the infrequency of cases on the point.

By any standards *Buchanan v Jennings* is a controversial decision.

It has been the subject of trenchant criticism, most recently in the July 2008 Senate Privileges Committee report on *Effective Repetition*. Reviewing the case law – including *Beitzel v Crabb*<sup>92</sup> and *Laurence v Katter*<sup>93</sup> – the report commented:

The potential impact of these decisions, in the committee's view, is to redraw the boundary between privileged and unprotected speech to the detriment of the institution of Parliament. The concept of incorporation or adoption by reference, applied to privileged speech, undermines the basis of the privilege as it has been previously understood to apply. It allows an unprotected statement which, on its face, contains nothing actionable to become a cause of action through reliance on a privileged statement.<sup>94</sup>

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<sup>91</sup> [1993] AC 593.

<sup>92</sup> [1992] 2 VR 121.

<sup>93</sup> (1996) 141 ALR 447.

<sup>94</sup> Parliament of Australia, Senate Privileges Committee, 134<sup>th</sup> Report: *Effective Repetition*, June 2008, p 5.

As such, the decision seems to dilute *Prebble*, at least to the extent that it indicates a re-assessment of the relationship between the three public interests at issue in privilege cases, away from freedom of speech in Parliament and towards the interests of justice in ensuring that all relevant evidence is available to the courts.<sup>95</sup>

#### 4.5 *Erglis v Buckley*<sup>96</sup>

In another controversial decision heard before the Queensland Court of Appeal, McPherson JA said that the approach taken by the Court of Appeal in New Zealand in *Buchanan v Jennings* supported the conclusion he had reached in *Erglis v Buckley*.<sup>97</sup>

The novel question in that case was whether parliamentary proceedings could be admitted into evidence for the limited purpose of claiming greater damages in defamation proceedings.

The facts were that the Health Minister had tabled in the Assembly a copy of a letter written by a group of nurses, responding to claims made by the plaintiff about a ward at the Royal Brisbane Hospital. In these earlier proceedings, Erglis claimed she had been defamed and sought to have the tabling of the letter admitted into evidence. On the other hand, the defendants claimed immunity for the document on the grounds that its admission into evidence would amount to a questioning of parliamentary proceedings. The specific issue before the Court of Appeal was whether certain paragraphs in Erglis' statement of claim should be struck out. These sought substantially greater damages on the basis of the publication of the

<sup>95</sup> The New Zealand Privileges Committee recommended appropriate amendment of the *Legislature Act 1908*. That the Act be amended to provide that no person may incur criminal or civil liability for making any statement that affirms, adopts or endorses words written or spoken in proceedings in Parliament where the statement would not, but for the proceedings in Parliament, give rise to criminal or civil liability (Privileges Committee, *Final Report on the question of privilege referred 21 July 1998 concerning Buchanan v Jennings*, 1.17G, May 2005, p 9). For a commentary see A Geddis, 'Parliamentary privilege: *quis custodiet ipsos custodes?* [Winter 2005] *Public Law* 696; A Geddis, 'Defining the ambit of the free speech privilege in New Zealand's Parliament' (2005) 16 *Public Law Review* 5; J Harker, 'The impact of Jennings v Buchanan on freedom of speech and defamation: the erosion of parliamentary privilege?' (2005) 11 *Auckland University Law Review* 27. In April 2006 these concerns were endorsed by the Procedure and Privileges Committee of the Western Australian Legislative Assembly. It recommended: (a) that the *Parliamentary Privilege Act 1891* be amended to include a provision which ensures that parliamentary proceedings cannot be used to establish what was 'effectively' but not actually said outside Parliament; and (b) that the a uniform national approach be adopted through the auspices of the Standing Committee of Attorneys General - Western Australia, Legislative Assembly, Procedure and Privileges Committee, *Effective Repetition: Decision in Buchanan v Jennings*, Report No 3, 2006.

<sup>96</sup> [2004] 2 Qd R 599.

<sup>97</sup> *Erglis v Buckley* [2004] 2 Od R 599; [2004] QCA 223. The issue was considered in *Thomson v Broadley* [2000] QSC 100, but there the reasoning of Jones J seemed to be more relevant to a wider question of admissibility.

letter to the Minister, in circumstances where the defendants knew that the Minister would be likely to read it in Parliament, with all the consequent publicity in the media that would follow. The issue was whether admission of the fact of the tabling of this letter – an act in itself protected by parliamentary privilege – for the purposes of claiming greater damages, constituted an impeaching or questioning of parliamentary proceedings?

By a 2:1 majority the Queensland Court of Appeal held that, for the specific purpose at issue, the tabling of the letter was admissible. McPherson JA found that the tabling of the letter was relied on by the plaintiff (Erglis) only as ‘a matter of history’, and that such limited purpose did not impeach, question or impair parliamentary freedom of speech and debate.<sup>98</sup> Fryberg J found that neither the allegation of indirect damage caused by the tabling of the letter, nor that of publication of defamatory material in Parliament caused the statement of claim to constitute an impeachment of parliamentary freedoms.<sup>99</sup>

Dissenting, Jerrard JA held that, where proof of publication of words in Parliament is relied on, even in an action brought against third parties, the proceedings in Parliament are called into question. Jerrard JA reasoned that ‘Proving that the Minister was the medium for the defendant’s message means that a sufficient reason for the Minister’s making the statement to Parliament is established to the court’s satisfaction’.<sup>100</sup> He further argued that a foreseeable consequence of allowing the appeal would be unwillingness of citizens to provide information to MPs, with consequences for proceedings in Parliament.<sup>101</sup>

In contrast, McPherson JA found that parliamentary democracy in Australia is ‘sufficiently vigorous’ not to be threatened by such considerations. He stated that the plaintiff’s statement of claim involved no allegation that the Minister’s motives were improper. The adverse consequences asserted were not against the Minister but against those who provided the letter to her, knowing it would become public knowledge. McPherson JA continued:

That does not reflect, nor is it intended to reflect, on the Minister, who was simply informing Parliament of what the letter said. Nor do I consider that she was or would have been inhibited in any way by the risk, if she had contemplated it, that, by doing so, the defendants might, if the plaintiff brought these proceedings for defamation, be likely to incur liability for larger damages by reason of the potential for greater publicity following the Minister’s action.<sup>102</sup>

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<sup>98</sup> [2004] 2 Od R 599; [2004] QCA 223 at para 9.

<sup>99</sup> [2004] 2 Od R 599; [2004] QCA 223 at para 89.

<sup>100</sup> [2004] 2 Od R 599; [2004] QCA 223 at para 31.

<sup>101</sup> [2004] 2 Od R 599; [2004] QCA 223 at para 34.

<sup>102</sup> [2004] 2 Od R 599; [2004] QCA 223 at para 11.

It should be said, however, that the views of Jerrard JA would seem to be more consistent with the continued provision of information to members of Parliament, the flow of which should not be impeded if parliamentary democracy is to remain vigorous. Writing in a similar vein, Campbell and Groves comment:

The reasoning of the majority of the court in *Erglis* does not sit easily with the wider purpose of parliamentary privilege. The fundamental purpose of the freedom of speech embodied in Art 9 of the Bill of Rights and its successors is to grant members the freedom to say in parliament what they wish without incurring possible legal liability. That right can be impeded if people who provide information to members of parliament face liability, or increased liability, when a member who receives information subsequently uses it in proceedings of parliament. This possibility might inhibit the conduct of members of parliament and is, therefore, in tension with the freedom of speech and debate in parliament. The right of citizens to complain to members of parliament about a wide range of issues is a cornerstone of modern democratic government. That right might be hampered if citizens could face increased legal liability as a result of having complained to a member of parliament.<sup>103</sup>

It is an instance of where the courts by piecemeal, case by case means arrive at conclusions which strike at the *raison d'être* behind parliamentary privilege.

#### 4.6 Canada (House of Commons) v Vaid<sup>104</sup>

*Vaid* is a different category of privilege case, one concerning the exclusive cognisance of Parliament over its own 'internal affairs' - or more specifically the exclusive jurisdiction over 'the management of employees'.<sup>105</sup> The case involved the Speaker's chauffeur who claimed he had been constructively dismissed, contrary to the Canadian Human Right Act. There were two limbs to the case.

**Abrogation of parliamentary privilege:** One question was whether express statutory words are needed for the abrogation of parliamentary privilege? Traditionally, the interpretive rule is that unmistakable and unambiguous language is required to abrogate parliamentary privilege.<sup>106</sup> The rule is a shield for the protection of parliamentary privilege against the inadvertent or implied operation of legislative measures, as in the case of statutory secrecy provisions.

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<sup>103</sup> E Campbell and M Groves, 'Correspondence with Members of Parliament' (2006) 11(3) *Media and Arts Law Review* 227 at 235.

<sup>104</sup> [2005] SCR 667.

<sup>105</sup> [2005] SCR 667 at para 50.

<sup>106</sup> *Criminal Justice Commission v Parliamentary Criminal Justice Commissioner* (2002) 2 Qd R 8 at 23; *Duke of Newcastle v Morris* (1870) LR 4 HL 661.

In *Vaid*, the ‘express abrogation’ rule was decisively rejected by the Court on two grounds. First, it was explained that the argument ‘presupposes the prior establishment of a parliamentary privilege, which has not been done’. Secondly, the Court said that the ‘presumption’ suggested by Lord Hatherley 135 years ago ‘is out of step with modern principles of statutory interpretation in Canada’. Referred to in this context was the second edition of Driedger’s *Construction of Statutes*, which states:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.<sup>107</sup>

The argument appears to be therefore that an Act of Parliament can by necessary implication limit parliamentary privilege, where this is perceived to be consistent with ‘the intention of Parliament’. The fact therefore that the Canadian Human Rights Act did not expressly indicate that it was intended to extend to employees of Parliament was not determinative of the issue. Indeed, that Act was said to be a ‘quasi-constitutional document’ and any exemption from it had to be ‘clearly stated’.<sup>108</sup>

This is an important finding. On one view, it is the thin end of the wedge, with *Odgers’ Australian Senate Practice* commenting, if the ‘express words’ rule is abandoned, ‘there is no end to the provisions which may be interpreted as inhibiting the powers of the Houses and their committees’.<sup>109</sup>

**Exclusive cognisance:** The second limb in *Vaid* was whether Parliament is a statute-free zone? This is a matter of debate. Geoffrey Lock has argued that only in the *Graham-Campbell* case in 1935<sup>110</sup> was it asserted that Parliament is a statute-free zone for all purposes. In that English case the court would not hear a complaint about the selling of liquor in the parliamentary precincts without the necessary licence. The provision of ‘refreshment for the mind in the library and refreshment for the body in suitable places’ was judged to be ‘connected with the affairs of the House’.

In *Vaid*, the Canadian Supreme Court reconsidered the issue and rejected the ‘fundamentalist’ interpretation of the exclusive cognisance doctrine. Applying the ‘test of necessity’ it was held that exclusive and unreviewable jurisdiction over all House employees was not necessary to protect the functioning of the House of Commons. The attachment of privilege to ‘some’ parliamentary employees was

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<sup>107</sup> [2005] SCR 667 at para 80.

<sup>108</sup> [2005] SCR 667 at para 81.

<sup>109</sup> H Evans ed, *Odgers’ Australian Senate Practice*, 11<sup>th</sup> ed, Department of the Senate 2004, pp 51-52.

<sup>110</sup> [1935] 1 KB 594.

undoubtedly necessary, but not those who were only indirectly connected to the legislative and deliberative functions of the House.<sup>111</sup> This was the case in respect to the Speaker's chauffeur. Distinguishing the *Graham-Campbell* case, Binnie J concluded that

British authority does not establish that the House of Commons at Westminster is immunized by privilege in the conduct of all labour relations with all employees irrespective of whether those categories of employees have any connection (or nexus) with its legislative or deliberative functions, or its role in holding the government accountable.<sup>112</sup>

On behalf of the Court, Binnie J formulated of the test of necessity in these terms:

In order to sustain a claim of parliamentary privilege, the assembly or member seeking its immunity must show that the sphere of activity for which privilege is claimed is so closely and directly connected with the fulfillment by the assembly or its members of their functions as a legislative and deliberative body, including the assembly's work in holding the government to account, that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their work with dignity and efficiency.<sup>113</sup>

In its analysis the Court relied heavily on the UK Joint Committee's First Report. Quoted with approval was the Joint Committee's account of the difficulties involved in drawing a 'dividing line' between privilege and non-privileged activities. It said:

Perhaps the nearest approach to a definition is that the areas in which the courts ought not to intervene extend beyond proceedings in Parliament, but the privileged areas must be so closely and directly connected with proceedings in Parliament that intervention by the courts would be inconsistent with Parliament's sovereignty as a legislative and deliberative assembly.<sup>114</sup>

The Joint Committee's argument appears to be that Parliament's control of its internal affairs derives exclusively from the immunity for freedom of speech in

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<sup>111</sup> [2005] SCR 667 at para 75.

<sup>112</sup> [2005] SCR 667 at para 70.

<sup>113</sup> [2005] SCR 667 at para 46.

<sup>114</sup> Joint Committee on Parliamentary Privilege, n 6, Ch 5 para 247; *Vaid* para 44. The UK Joint Committee recommended legislation clarifying that, as to activities which are not related to the internal proceedings of Parliament, 'there should be a principle of statutory interpretation that in the absence of a contrary expression of intention Acts of Parliament bind both Houses'. Consistent with its general approach, the report said, 'For the future, whenever Parliament is to be exempt, a reasoned case should be made out and debated as the legislation proceeds through Parliament'. (Joint Committee on Parliamentary Privilege, Ch 5 para 251) The onus therefore should be on Parliament to establish its case for exemption.



## Article 9.

What emerges from *Vaid* is that some employees and officers of Parliament, those directly connected with the fulfilment of Parliament's constitutional functions, would come under the exclusive cognisance doctrine, as belonging to the 'internal affairs' of Parliament. Other employees would not. And it is for the courts to decide either way on the extent of the immunity granted to Parliament from the general law in each particular instance.

### 4.7 **Bear v State of South Australia**<sup>115</sup>

Australian authority is thin on the ground. In *Bear* a single judge of the State's Industrial Court rules that an injury to a waitress in the parliamentary dining room was not part of the internal business of Parliament and was not protected by privilege. The relationship in question was one between 'Parliament and a stranger'.

### 4.8 **President of the Legislative Council (South Australia) v Kosmas**<sup>116</sup>

Recently, the question was revisited in *Kosmas*. The facts were that George Kosmas worked as a committee secretary to the Legislative Review Committee. He claimed, further to the *Fair Work Act 1994*, that he was not paid overtime over a period from April 2003 to May 2005. He applied to the Industrial Relations Court for relief. In response it was claimed on behalf of the Legislative Council that, on the grounds of parliamentary privilege, a person working in such a capacity had no access to the Court to enforce any rights they might otherwise have claimed. The nature of the work done by Kosmas was directly connected to the business of Parliament. It was therefore within the "internal affairs" of Parliament. At first instance, it was further argued that parliamentary privilege exists in respect of all employees of Parliament,<sup>117</sup> but this does not seem to have been pursued on appeal to the full Court.

At first instance, a single judge of the Industrial Court – Judge Gilchrist – found in favour of Kosmas. It was said that the privilege sought was not established by any authority. *Vaid* was considered, about which it was said that

the observations made in *Vaid* about parliamentary privilege extending to some employees of Parliament were *obiter*, not clearly explained and were declared by a Court that has no authority over this Court.<sup>118</sup>

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<sup>115</sup> (1981) 48 SAIR 604.

<sup>116</sup> [2008] SAIRC 41.

<sup>117</sup> [2008] SAIRC 41 at para 44.

<sup>118</sup> *Kosmas v Legislative Council (SA) and Others* [2007] SAIRC 86 at 61.

On appeal, this finding was overturned. The arguments submitted by Kosmas were as follows:

- The principle question for determination was whether there was an established privilege of the House under which his circumstances fell.
- The only established principle was that of ‘proceedings in Parliament’, as embodied in Article 9. This was primarily a technical parliamentary term, it was submitted, which referred to formal action, usually a decision taken by the House in its collective capacity but also the process of debate by which the House reached a decision. It was really quite a limited area.
- A narrow approach was argued for in respect to ‘proceedings in Parliament’. Moreover it was submitted the term ‘internal affairs’ did not expand the scope beyond what was included in ‘proceedings in Parliament’.
- The circumstances under contest involved what was described in *Vaid* as ‘management of employees’ and that was not encompassed by the privilege.
- To attract the privilege the connection needed to be to an actual part of the proceedings in Parliament.
- The employment of the Secretary to a Committee or a Research Officer did not fall within that scope. Kosmas contended at most only 10% of his duties with the Legislative Review Committee would meet that description. He acknowledged there were employees in the House with respect to whom privilege would operate, (though not his own position), the question was determined not by labels but by the predominance of the actual function discharged.
- In the alternative, Kosmas argued that, if the privilege was to be relied on, it had to be proved by reference to the necessity test that such a privilege was required.

The Full Court’s analysis was based on the judgment of McHugh J in *Egan v Willis*,<sup>119</sup> where he reviewed the exclusive cognisance doctrine by reference to the case law, notably *Stockdale v Hansard* and *Bradlaugh v Gosset*. The latter is authority for the proposition that Parliament has control over the administration of its own internal proceedings even when this contradicts a statutory provision. In the last case, Bradlaugh, an atheist, was disqualified from membership of the Commons after refusing to take the oath, even where the Parliamentary Oaths Act 1866 permitted the making of an affirmation. ‘The jurisdiction of the Houses over their own members, their right to impose discipline within their walls’ was declared to be ‘absolute and exclusive’.<sup>120</sup> McHugh J put it thus:

the common law courts will not examine the administration of the law – including statute law – within the walls of Parliament when the matters involved relate only to the internal procedure of a House of Parliament.<sup>121</sup>

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<sup>119</sup> (1998) 195 CLR 424.

<sup>120</sup> (1884) 12 QBD 271 at 275 (per Lord Coleridge CJ).

<sup>121</sup> (1998) 195 CLR 461.

The law laid down in *Bradlaugh* was said by McHugh J to state correctly the relationship between the courts and Parliament in NSW.<sup>122</sup> It was also taken by the South Australian Industrial Relations Court to correctly state the same relationship in that State.

Against Kosmas, it was said that the term 'internal affairs' is not reducible to 'proceedings in Parliament', just as Article 9 is not the only source of the privileges of the South Australian Parliament. The main statutory provision is s 38 of the *Constitution Act 1934*, by which the privileges of the South Australian Parliament are defined in terms of those of the UK House of Commons as at 1856. However, as those privileges are not themselves defined by statute, the basis of the asserted privilege can be assumed to be 'inherent' in nature. One might further assume from this that the test of necessity would be applied. In fact, this was rejected by the Full Court which took the view, by reference to *Kielly v Carson*,<sup>123</sup> that the test would place the South Australian Parliament on the same footing as a 'colonial legislature'.<sup>124</sup>

The rejection of the necessity test may seem odd in the light of the Full Court's reliance on *Vaid*. The relevance of *Vaid* was acknowledged when it was noted that the Canadian House of Commons, like the South Australian Parliament, takes 'its privileges as they existed in the House of Commons of the UK at a particular date'.<sup>125</sup> Whereas Judge Gilchrist at first instance had declined to follow that decision, the Full Court said 'We are of a different view as to the application of that authority to the facts before us'.<sup>126</sup> Justices McCusker, Hannon and Farrell went on to say:

The matters we draw from *Vaid* applicable to the matter we must decide include the following. *Firstly the claimed privilege has been authoritatively established in relation to certain employees of the House of Commons at Westminster.* That is where the employment activity for which the privilege is claimed is so closely and directly connected with the fulfilment by the Assembly or its members of their functions as a legislative and deliberative body including the Assembly's work in holding the Government to account that outside interference would undermine the level of autonomy required to enable the Assembly and its members to do their legislative work with dignity and efficiency. (emphasis added)

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<sup>122</sup> (1998) 195 CLR 424 at p 462.

<sup>123</sup> (1842) 4 Moo PC 63; 13 ER 225.

<sup>124</sup> (1981) 48 SAIR 604 at para 37.

<sup>125</sup> (1981) 48 SAIR 604 at para 35. The Canadian Parliament defines its privileges by reference to those of the UK House of Commons as at 1867 (*Parliament of Canada Act*, s 4).

<sup>126</sup> (1981) 48 SAIR 604 at para 39.

### The Full Court continued

*Certainly that matter is a question of fact and perhaps degree.* It is approached in our view by notionally dividing those engaged in the House into two groups. Those engaged in the direct business of the House, the investigation, debate and legislating and those indirectly engaged. The latter are not included in the privilege. The decisions, particularly *Vaid*, recognise there is no bright line that always divides the two classes of employees. (emphasis added)<sup>127</sup>

### And further

On that basis the chauffeur in *Vaid* would be clearly indirect as would be the catering staff in *Bear v State of South Australia*. The management function regarding the provision of services to the House would also be indirect. In contrast a primary function closely and directly associated with the fulfilment of the key function of the legislature as undertaken by the respondent here would seem directly connected.<sup>128</sup>

### The Full Court concluded:

The characterisation of the respondent's function is determined by what he was engaged to do even if he does not attend to such duties all the time. The job specifications detailed in the evidence make clear that he acts as manager of the Committee on behalf of the members and his duties included ensuring the, "Committee's investigations are undertaken efficiently and expeditiously", as well as researching, reporting and supervising other Committee staff. That is he was directly engaged in the purpose and the business of Parliament. The jurisdiction of this Court is in our conclusion therefore removed by privilege.<sup>129</sup>

Thus, the case was treated as 'internal' to Parliament, and one to which the rule of non-intervention by the courts applied. Whether it was correctly decided is a matter for debate. At the very least it indicates that there is life yet in the exclusive cognisance doctrine, as formulated by reference to Parliament's constitutional role.<sup>130</sup> As Lord Nicholls of Birkenhead observed in *R (Jackson) v Attorney General*:

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<sup>127</sup> (1981) 48 SAIR 604 at para 40.

<sup>128</sup> (1981) 48 SAIR 604 at para 41.

<sup>129</sup> (1981) 48 SAIR 604 at para 44.

<sup>130</sup> The same might be said in respect of such cases as *Halden v Marks* (1995) 17 WAR 447 and *Crane v Gething* (2000) 169 ALR 727. These cases are discussed in M Groves and E Campbell, 'Parliamentary privilege and the courts: questions of justiciability' (Winter 2007) 7(2) *Oxford University Commonwealth Journal* 175.

This principle [the sovereign right of the courts to interpret statutes] is as fundamental in this country's constitution as the principle that Parliament has exclusive cognisance (jurisdiction) over its own affairs.<sup>131</sup>

## 5. CONCLUDING COMMENTS

Case law is rarely compact or tidy, a process of reasoning all pointing in the one direction. Nonetheless, at least in relation to certain categories of cases - freedom of speech in Parliament and the use of ministerial statements in Parliament - there is something akin to a pattern emerging, away from the exclusionary rule and towards the administration of justice. This may be viewed as peculiar to the law of Parliament or as part of broader trend. According to Goldsworthy 'For causes that are obscure, an increase in both the ability and willingness of judges to control the other organs of government appears to be a worldwide phenomenon'.<sup>132</sup> A similar observation is found in the 23<sup>rd</sup> edition of *May's Parliamentary Practice*, which noted 'an expansion in the role of the courts which has led them into broader areas of public life than was the case half a century ago...'.<sup>133</sup> It is claimed that the rule of law is now the dominant constitutional principle, as much in the UK, as it is in Australia with its written constitution.<sup>134</sup> Comity and non-intervention notwithstanding, it may be that anything lying to one side of general law, the vestiges of history embodied in the prerogatives of the Crown and the privileges of Parliament, will be led by a firm hand into the jurisdiction of the courts. This may be by reliance on Article 9 or other statutory formulations of parliamentary privilege, or by other means.

In relation to the freedom of speech immunity, Bernard Wright has suggested that Parliament may be 'asked to amend the law to accommodate what can be called the "administration of justice" interest'. He also quotes Professor Lindell's suggestion that 'this area of the law should be absorbed as part of the wider law of public interest immunity'.<sup>135</sup>

Whether a root and branch change of this kind occurs remains to be seen. Do the courts really need assistance from Parliament in this respect? It may be that in *Toussaint*, where the use of ministerial statements in Parliament was at issue, first steps have already been taken in the direction of some kind of public interest test.

<sup>131</sup> [2005] 3WLR 733 at para 51. Supporters of fox hunting argued that the Hunting Act 2004 was not a valid Act, on the ground that the 1949 amendments to the *Parliament Act 1911* were invalid and that the procedures used to pass the Hunting Act – without the consent of the House of Lords – were also invalid.

<sup>132</sup> J Goldsworthy, *The Sovereignty of Parliament: History and Philosophy*, Clarendon Press 1999, p 3.

<sup>133</sup> Erskine May, n 10, p 177.

<sup>134</sup> *Jackson* [2005] 1 AC 262 at para 107 (Lord Hope).

<sup>135</sup> B Wright, *Patterns of change: parliamentary privilege*, ANU Parliamentary Studies Paper 2, 2008, at 8.7-8.8.

A final observation is that, for its part, the common law tends to develop, not by leaps and bounds, but by less spectacular means, by what JWF Allison calls 'the economy of the common law', by which he means the pragmatic, piecemeal development of the law, where the courts avoid any semblance of radical change.<sup>136</sup>

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<sup>136</sup> JWF Allison, *The English Historical Constitution*, Cambridge University Press 2007, pp 125-127.