FREEDOM OF SPEECH AND DEBATE IN AUSTRALIAN PARLIAMENTS

Freedom of speech and debate in Parliament has long been accepted as one of the most essential ingredients for the proper working of parliamentary government. In England the struggle by Parliament, or more accurately, the House of Commons, to secure legal recognition of this privilege stretches back as far as the 14th century. It was not, however, until the Bill of Rights, 1689, that the matter was placed on a sure footing. By Article 9 of this historic legislation it was declared "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".

The interpretation of this guarantee has posed a number of interesting and sometimes difficult problems. While it has never been seriously doubted that thereby members of Parliament acquired absolute immunity in respect of their speeches in Parliament, there is still some dispute as to the application of the Article to statements made by members outside the House but related in some way to parliamentary proceedings. The extent to which members are protected depends principally on the meaning to be given to the term "proceedings in Parliament". Although the courts reserve to themselves the power to determine the extent of the privileges of the Houses of Parliament, few occasions have arisen in which the courts have been called upon to decide what does and what does not fall within parliamentary proceedings. A further problem arising in connection with Article 9 is its effect on the law of evidence. To what extent does it prevent the admission in evidence before courts of law, Royal Commissions and the like, of statements made in Parliament, or in parliamentary papers, or in the records of votes and proceedings in Parliament? This and other questions relative to the interpretation of Article 9 and its counterparts in Australian law will be examined in the following pages.

But first attention needs to be given to the applicability of the Bill of Rights, Article 9 in Australia. The Parliament referred to in Article 9 is, of course, the English Parliament. It is doubtful whether this by itself would preclude the application of the Article by virtue of the Imperial Act 9 Geo. IV, c.83, s.24. This provision adopted for the colonies of New South Wales (which at that time included the colonies of Victoria and Queensland) and Tasmania English law in force on July 25th, 1828 so far as the same was applicable in the colonies mentioned at the date on which English law was to be received. The Act also provided for the establishment of Legislative Councils. It might therefore be argued that

the conditions existed in these colonies for the application of Article 9. There is no judicial ruling directly on the point, however it is now well settled that at common law, members of colonial legislatures possess the same immunity from liability in defamation as do members of the Imperial Parliament. In Victoria, South Australia and Western Australia the problem of the application of Article 9 has been resolved by local legislation adopting for the Houses of Parliament in those States, their committees and their members the powers, privileges and immunities of the House of Commons, its committees and members.[1] Similar provision is made in the Federal Constitution, S. 49.

Both in Queensland and Tasmania there also is legislation on parliamentary privilege but in neither case is Article 9 specifically adopted. In these two states and in New South Wales two questions arise for consideration: first, the ambit of the privilege regarding freedom of speech which inheres in the Houses of Parliament as a matter of common law; and secondly, the effect of local defamation legislation. At common law, the Houses of colonial legislatures possess only those powers, privileges and immunities as are reasonably necessary for their self-protection and the proper discharge of their legislative functions.[2] In *Gipps v. McElhone* (1881)[3] the Supreme Court of New South Wales ruled that on the principle of reasonable necessity, members should be immune from legal liability for words uttered in the course of debate. Significantly, the Court did not go so far as to suggest that the Bill of Rights, Article 9 was applicable in its entirety. Indeed, the applicability of the Article was never raised. Subsequently the Privy Council has confirmed the position taken by the New South Wales Court.[4] The three states in question now have statutory provisions concerning the liability of members of Parliament in defamation. Their effect is considered below.

Liability in Defamation

Both in England and in all Australian jurisdictions members of Parliament enjoy absolute privilege in respect of defamatory words uttered in the course of debate. This privilege does not however extend to members who publish reports of their speeches outside the House.[5] Also it is highly doubtful whether it covers defamatory

1. See Constitution Act Amendment Act, 1958, ss. 12 & 13 (Vic.); Constitution Act, 1934-59, s. 38 (S.A.); Parliamentary Privileges Act, 1891, s. 1 (W.A.).
2. *Kielly v. Carson* (1842) 4 Moo. P.C.C. 63; *Fenton v. Hampton* (1858) 11 Moo. P.C.C. 347.
3. (1881) 2 L.R. (N.S.W.) 18.
4. *Chenard & Co. v. Arissol* [1949] A.C. 127.
5. *R. v. Lord Abingdon* (1795) Esp. 228; *R. v. Creevey* (1813) 1 M. & S. 273.

utterances made during casual conversations in the legislative chamber.[6] In this respect the Queensland, Tasmanian and Western Australian statutory provisions specifically limit the protection to defamatory material published "in the course of any speech made by him [the member] in Parliament".[7]

An even more difficult problem is presented by the member of Parliament who publishes defamatory material other than in the course of debate but in the course of his duties as a parliamentary representative. The Bill of Rights, Article 9 speaks not only of speeches and debates but also of "proceedings in Parliament". In New South Wales the Defamation Act, 1958, S. 11(1) provides that: "A member of either House of Parliament does not incur any liability as for defamation by the publication of any defamatory material in the course of a proceeding in Parliament". Whether a publication made by a member outside the House may in any circumstances be termed a proceeding in Parliament is still debatable. The opinion has been expressed by the Select Committee of the House of Commons on the Official Secrets Act, 1939, that a member is absolutely privileged when he "sends to a Minister the draft of a question he is thinking of putting down or shows it to another member with a view to obtaining advice as to the propriety of putting it down or as to the manner in which it should be framed".[8] The Committee here cited with approval the opinion in *Coffin v. Coffin*,[9] a decision of the Supreme Court of Massachussetts, and the dissenting opinion in *R. v. Bunting*[10] a Canadian case, that members enjoy absolute privilege in respect of statements made while attending to their parliamentary duties. More recently the Speaker of the House of Commons ruled that a letter written by a member to a Minister of the Crown in reply to the latter's request for further information regarding a question set down on the Order Paper by the member was also privileged.[11] On the other hand, in the Strauss case the line was drawn at a letter written by a member to the Paymaster complaining about the activities of a statutory board.[12]

6. *Coffin v. Coffin* 4 Mass. 1.
7. Defamation Act, 1899, s. 9 (Q.); Criminal Code Act, 1899, s. 6 (Q.); Criminal Code, 1899, s. 371(1) (Q.); Defamation Act, 1957, s. 10(1) (Tas.); Criminal Code, 1924, s. 202 (Tas.); Criminal Code Act, 1913, s. 5 (W.A.); Criminal Code, 1913, s. 351(1) (W.A.).
8. H.C. Paper No. 101 (1938-39).
9. 4 Mass. 1.
10. (1885) 7 Ont. R. 524 at 563.
11. 591 H.C. Deb. 809-13.
12. 568 H.C. Deb. 819-22; 579 H.C. Deb. 391-488; 589 H.C. Deb. 1054; 591 H.C. Deb. 208-396. For discussion of this case see (1957) 26 *The Table*, 39-52; S.A. de Smith, "Parliamentary Privilege and the Bill of Rights", (1956) 21 *Mod. L.R.*, 465-83; G. Marshall, "Privilege and Proceedings in Parliament", (1958) 11 *Parl. Affairs*, 396-404.

If communications regarding questions proposed to be put down are clothed with privilege there seems to be no good reason why privilege should not extend also to statements made by members at meetings of the parliamentary members of political parties. The writer has discovered only one case in which this question arose for judicial decision. In *R. v. Turnbull*,[13] a Tasmanian case, the prosecution proposed to tender evidence regarding meetings of Caucus to which counsel for the defence took objection. The trial judge, Gibson J. was of opinion that no breach of parliamentary privilege was involved in the reception of evidence of this kind. "The Caucus," his Honour said, "or private meetings of members of a party, to determine joint action in Parliament, is essentially a body which operates outside Parliament, whatever effect it intends to produce in Parliament."

While the dearth of judicial authority prevents any firm conclusions being advanced about the scope of the privilege, it is unlikely that the courts today would enlarge the concept of proceedings in Parliament to such a degree that a publication by a member outside the course of debate would be absolutely privileged just because it related to the member's parliamentary duties. The argument that without such protection the work of Parliament would be impeded ignores the point that in most cases of this type qualified privilege might be pleaded. This, it would seem, is protection enough.

The absolute privilege conferred by Article 9 extends not only to the parliamentary speeches of members but also to petitioners to Parliament and parliamentary witnesses. Both at common law[14] and in some jurisdictions by statute,[15] no action for defamation lies against a person who publishes false or scandalous matter in a petition to Parliament. The same applies to defamatory material published in evidence before Parliament or parliamentary committees.[16] In both instances, the publication is made during the course of proceedings in Parliament.

Communications directed to members of Parliament by private citizens do not fall within parliamentary privilege albeit they are

13. 1958 Unreported. See the writer's note in (1958) 1 *Tas. U.L.R.*, 263-80.
14. *Lake v. King* (1667) Saund. 131.
15. Defamation Act, 1958, s. 11(2) (N.S.W.); Criminal Code, 1899, s. 371(2) (Q.); Defamation Act, 1957, s. 10(2) (Tas.); Criminal Code, 1924, s. 202(2) (Tas.); Criminal Code, 1913, s. 351(2) (W.A.).
16. *May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 16th ed. (1957), 59, 128-31; *Goffin v. Donelly* (1881) 6 Q.B.D. 307. See also Leg. Cl. S.O. 228 (Vic.); Leg. Ass. S.R. & O. 181 (Vic.); Leg. Cl. S.O. 365 (W.A.); Leg. Ass. S.R. & O. 406 (W.A.). Parliamentary Evidence Act, 1901, s. 12 (N.S.W.); Criminal Code, 1897, s. 372 (Q.); Defamation Act, 1957, s. 11(b) (Tas.); Criminal Code, 1924, s. 203 (Tas.); Criminal Code, 1899, s. 352.

made in the precincts of Parliament.[17] Moreover there appears to have been little disposition on the part of Parliaments to claim so broad a scope for their privileges even though the communication in question has been solicited by a member or is the basis of subsequent statements in Parliament. The Committee of Privileges of the House of Commons has advised that a person who has volunteered information of public interest to a member in a personal capacity is not entitled to parliamentary privilege notwithstanding that the information supplied is later used by the member in Parliament.[18]

Evidence of Proceedings in Parliament

Proceedings in Parliament ought not to be impeached or questioned in any place outside of Parliament. This exhortation in the Bill of Rights has been construed by the courts as imposing limits on the reception of evidence as to what has been said or what has taken place in Parliament. In considering the admission of such evidence there are three main issues: first, whether a member of Parliament is compelled to appear on a subpoena; secondly, whether officers of Parliament are compelled to produce the House's records of its proceedings; and thirdly, whether a member who takes his stand in the witness-box is privileged from disclosure of what has transpired in Parliament.

The courts consistently have taken the view that to compel a member to appear as a witness in legal proceedings whilst the House is sitting would be to contradict the House's paramount right to the service of its members. For their part the Houses of Parliament have insisted that a member who is subpoenaed should not absent himself from the House in order to give evidence in court unless he has the leave of the House. The House may give or refuse leave.[19] According to House of Commons practice, where leave is refused the Speaker on behalf of the House formally requests the Court to excuse the member.

Section 39 of the South Australian Constitution Act, 1934-1959 expressly states that no member of Parliament shall be immune from subpoena, however it goes on to provide that no member

17. In *Rivlin v. Bilainkin* [1935] 1 Q.B. 485 it was held that a letter posted by a private person within the precincts of Parliament was not protected by parliamentary privilege.
18. H.C. Paper No. 112 (1954-5).
19. In 1948 a member of the Western Australian Legislative Assembly was subpoenaed to produce in a local court a document from which he had read to the House. The House directed that the member should not produce the document but the court took the view that the privilege claimed by the House did not exist and accordingly demanded production. This did not deter the House from adhering to the position it had previously taken. See W.A. Hansard, 1948, pp. 1735, 1870, 2210.

shall be "liable to any penalty or process for non-attendance as a witness in any court when such non-attendance is occasioned by his attendance in his place in Parliament".

Whether a member is immune from subpoena when he has been given leave to appear in court by the House of which he is a member has not been decided. Simply because the immunity can be waived only by the House as a whole, it does not necessarily follow that the member's personal immunity (if such it is) is thereby overridden. If it were the case that the permission of the House did override the member's personal immunity, situations could arise in which the parliamentary majority could use its power to grant or refuse leave to its own political advantage. Thus if on an impending vote a close division was expected, and let us say the Opposition refused a pair for an absent member of the governing party, the majority could by giving leave to an Opposition member to appear in court, indirectly secure a majority on the crucial division. If the representative theory of parliamentary government has any meaning at all, it must surely be open to a member to give attendance in Parliament when he so chooses, notwithstanding that the House of which he is a member has permitted him to absent himself from the House. After all, when the House gives leave to attend, it is not ordering the member to attend. Indeed, it is doubtful whether it could lawfully order a member to absent himself from Parliament and give evidence in a court of law.

The production of minutes of proceedings, and production of parliamentary records and papers is specifically dealt with in the Standing Rules of the Houses of Parliament.[20] Custody of these documents is vested in the Clerk of the House but generally these cannot be removed from the House without the consent of the House or its presiding officer. The Rules of the Legislative Assembly of Queensland, the Legislative Councils of New South Wales, Tasmania and Victoria require that leave of the House be obtained, however under the Rules of the Legislative Assemblies of New South Wales, Tasmania and Western Australia and the Rules of the Legislative Council of Western Australia, the leave of the presiding officer of the House is sufficient. Rule 43 of the Tasmanian House of Assembly further provides that if it appears by order of a Supreme Court judge that production of the documents is necessary in proceedings in a case pending in *any* court the Clerk of the House shall be authorised to produce the documents without the Speaker's leave.

20. Leg. Cl. S.O. 17 (N.S.W.); Leg. Ass. S.O. 53 (N.S.W.); Leg. Ass. S.R. & O. 327 (Q.); Leg. Cl. S.O. 52 (Vic.); Leg. Cl. S.O. 36 (W.A.); Leg. Ass. S.R. & O. 52 (W.A.).

Notwithstanding that a member of Parliament has been sworn as a witness he cannot be compelled to answer questions relating to proceedings in Parliament unless the House of which he is a member has given him leave to testify.[21] On the other hand it was held by Lord Ellenborough in *Plunkett v. Cobbett* (1803)[22] that although the Speaker of the House of Commons was not obliged to disclose what another member had said in Parliament, he was bound to divulge whether that member had participated in debate. Similarly in *R. v. Turnbull*,[23] Gibson J. held that evidence could be received as to the times of proceedings in Parliament.

This case is also of interest on the question of the admissibility of evidence relating to proceedings in Parliament. The accused, a Minister of the Crown, was indicted on several charges of bribery and as evidence against him the prosecution proposed to produce statements made by him in Parliament as recorded in the Votes and Proceedings of the House of Assembly and notes taken by a journalist present in the House at the time. In upholding the defence's objection to the admission of this evidence the trial judge, Gibson J., emphasised the necessity of protecting members of Parliament "from the use of statements made by them in Parliament in civil and criminal proceedings". His Honour went on to say that the Bill of Rights, Article 9 was of special importance to Ministers of the Crown insofar as they "are responsible to Parliament, and so have to answer to Parliament for their exercise of the administrative functions entrusted to the Cabinet by the enactments of Parliament".

The decision on this aspect of the case prompts the following comments: (1) Gibson J. apparently accepted the Bill of Rights as part of the inherited law of Tasmania. (2) The evidence proposed to be adduced was of a kind tending to incriminate the accused. How material this second factor was is not entirely clear. There is no indication that the House or the Speaker had given leave for the production of the evidence and certainly no indication in the trial judge's opinion that waiver would have affected his decision.

An interesting parallel to this case is provided by the South African case of *Kahn v. Time Inc.* (1956).[24] Sec. 2 of the Powers and Privileges of Parliament Act, 1911, guarantees "freedom of speech and debate or proceedings in Parliament" and provides that "such freedom of speech and debate or proceedings shall not be liable to be impeached or questioned in any court or place out of Parliament". Sec. 8 reinforces s. 2 by conferring immunity from liability etc. on members in respect of things said or done in

21. *Chubb v. Salomons* (1852) 3 Car. & K. 75.
22. 5 Esp. 136.
23. 1958 Unreported.
24. [1956] (2) S.A.L.R. 580.

Parliament. Finally s.24 prohibits members, officers of Parliament and short-hand writers employed by the Houses from giving evidence elsewhere in respect of parliamentary proceedings without the special leave of the House. In the present case the court held that providing the permission of the House were forthcoming, evidence given before a parliamentary committee was admissible as evidence before a court of law. In each case, however, the court had to be satisfied that the admission of such evidence would not prejudice freedom of speech. In the words of the court—[25]

> The court must be satisfied when called upon to determine whether the privilege may have been breached in a particular case that what is sought to be done is something which will or will not endanger the right of free speech enjoyed by members by visiting upon members concerned some consequence which might prevent him or deter him from carrying out his duties completely free from the fear of any outside interference.

On this line of argument the admission of evidence tending to incriminate a member of Parliament must surely be excluded irrespective of whether the House's permission has been obtained or not.

Parliamentary Privilege and Royal Commissions

Allegations made by members in Parliament on occasions have prompted the executive to appoint Royal Commissions to enquire into the truth of the allegations and sometimes also the sources of the members' information. The first problem raised by such enquiries is whether or not they amount to a questioning of proceedings in Parliament. The answer would seem to depend on the precise terms of reference of the Commission.

In June 1943 the Commonwealth Government commissioned Lowe J., a puisne judge of the Victorian Supreme Court, to enquire into and report on the truth of a statement made by the then Minister for Labour and National Service (the Hon. E. J. Ward M.H.R.). In the House the Minister had stated that a document vital in the nation's defence plans relating to a matter known as "The Brisbane Line" was missing from the official files. The Commissioner's terms of reference required him to enquire into and report on (*inter alia*) the Minister's statement and whether or not the document was in fact missing and if so the particulars of the document. At the opening of the hearing counsel for the Minister submitted that the Commission was incompetent to enquire into any of the matters listed in the terms of reference since to do so would be in breach of the House's privileges. Lowe J. ruled however that enquiry into the main question, whether or not the document was in fact missing, involved no issue of privilege. On the other hand, he

25. *Id.* at 584.

took the view that the Commission had no power to direct the Minister to attend before it and give evidence regarding either his statement or his sources of information. In so deciding Lowe J. was emphatic that he did not accept the submission of counsel for the Minister that matters raised by members in Parliament cannot be investigated by any tribunal judicial or quasi-judicial. In short, although the fact of whether or not the allegation had been made was not examinable, the truth of the reported allegation was.[26]

The point at issue in the Victorian Royal Commission of 1952 enquiring into allegations of bribery of members was somewhat different.[27] The allegations here were made first in affidavits sworn by several members and subsequently brought to the notice of Parliament. Their substance was that pecuniary and other inducements had been held out to members to support a motion of no-confidence in the coalition government. In the House a motion by the Leader of the Opposition that a Select Committee be appointed to enquire into the matter was defeated. Subsequently the appointment of a Royal Commission consisting of the Chief Justice and two puisne judges of the Supreme Court was announced and a motion that members of the Legislative Assembly be given leave "to attend, if they think fit, as witnesses before the Royal Commission" was agreed to. During the early stages of the Commission's hearing the Clerk of the Legislative Assembly, H. K. McLachlan was questioned by counsel on the authority of the executive to appoint a Royal Commission into the conduct of members of Parliament. In reply the Clerk said: "First and foremost I would suggest the Imperial Acts Application Act, 1922, which applies the Bill of Rights to Victoria. The Bill of Rights—I think it is Article 9—states that no court or other person shall enquire into the proceedings of Parliament." The Commission's only comment on the matter was that they "were satisfied this Commission was validly appointed, and that it was within the competence of the Executive Council to appoint a Royal Commission to enquire into the matters set out in the Commission and to report thereon". The Commission's terms of reference, it should be noted, required it to enquire only into the matters alleged in the affidavits and not into any statements made in Parliament.

During debate on the motion that members be given leave to attend and give evidence before the Commission the Speaker was asked what interpretation was to be placed on the words in the motion "if they [*i.e.* members] think fit". In reply the Speaker

26. See (1944-5) 18 A.L.J. 70-6. cf. V. & P. of the L.A., Sess. 1899-1900, Vol. I, 40, 41 (Vic.).
27. See H. K. McLachlan, "Reference to a Royal Commission of a Matter affecting Parliamentary Privilege" (1953) 22 *The Table*, 72-82.

said that there was no compulsion on members to answer questions if they did not wish to. This opinion finds support in the observations of Townley J. the Royal Commissioner appointed by the Queensland Government to enquire into allegations in the federal Senate of bribery regarding dealings in Crown leaseholds.[28] The author of the allegations Senator I. A. C. Wood was requested to attend as a witness before the Commission and to forward to the Crown Solicitor a statement of the evidence he was prepared to swear. After reviewing the English authorities the Commissioner concluded that "a member of the House of Commons [*semble* a member of the federal Parliament] is not bound to give evidence of what passes in the House without the permission of the House. I do not think it follows that he is bound to give such evidence if he has the permission of the House but with that question I am not really concerned". A different view appears to have been taken by Lowe J. in the "Brisbane Line" case. While he did not find it necessary to make a definite ruling on the point, Lowe J. ventured to say that had the Royal Commission been established by statute or authorised by resolution of the House, the Minister might have been compelled to attend the Commission and to testify as to his statement in Parliament or his sources of information.

Where there is no question of a member incurring legal liability for things said in Parliament is there any good reason why a prior authorisation by the House for members to give evidence should not have the effect of making members who take the witness stand compellable? The privilege in question, namely that parliamentary proceedings should not be questioned outside Parliament, is one belonging to the Houses of Parliament in their collective capacity and can be waived only by the House affected. That being so it is difficult to appreciate why a member should be privileged when the House of which he is a member has waived privilege. The only qualification that seems to be required by the Bill of Rights is that enunciated in *Kahn v. Time Inc.*[29]

Freedom of Speech and National Security

In guaranteeing absolute freedom of speech to members of Parliament the law makes no concession to the possible conflicting demands of national security. A member is not legally responsible for seditious utterances made in the course of parliamentary proceeding,[30] nor it is submitted, can he be guilty of breaches of the official secrets legislation committed in the course of proceedings in Parliament. If controls are to be exercised over members in

28. *Royal Commission into Certain Crown Leaseholds* [1956] S.R.Q. 225.
29. [1956] (2) S.A.L.R. 580 at 584.
30. *Eliot's Case* (1627-40) 3 St. Tr. 332.

this respect, express legislation is required or else the Houses of Parliament must impose indirect control by, for example, holding secret sessions.

Historically the right of the House of Commons to exclude strangers and to conduct debates in camera is closely intertwined with the claim to freedom of speech. As Anson puts it, the "reason was the possible intimidation which might be exercised by the Crown if reports were made of the speech and action of members, in days when freedom of debate was not fully recognised as a privilege of the House."[31] The right of Australian Houses of Parliament to deliberate in camera has never been contested but as far as one may gather, it has been exercised only by the federal Parliament and then only in time of war. During World War II the Houses of federal Parliament held secret sessions whenever Ministers were about to disclose information which if made public would have prejudiced the nation's defence.[32] Reference to proceedings at such secret sessions was prohibited by the Consolidated Censorship Instructions issued in July, 1942.

As suggested previously it is very doubtful whether a member of Parliament may be held guilty of breaches of the official secrets provisions of the federal Crimes Act committed during the course of parliamentary proceedings. On the other hand, where by his conduct in Parliament a member gives the law enforcement authorities reasonable cause to suspect that breaches of the Act have been committed, may the member properly be interrogated as to his sources of information? On the one hand it may be argued that since at common law a person is under no duty to answer questions asked of him by a police officer and is not liable to any penalty for his failure to do so, the mere request for information cannot of itself be in breach of parliamentary privilege. On the other hand it may sometimes be difficult to draw the line between persistent requests for information and molestation of a member on account of his conduct in Parliament.

The only Australian parliamentary precedent discovered by the writer which has immediate bearing on the problem is one arising from a complaint made by the Leader of the Country Party (the Hon. A. W. Fadden, M.H.R.) in the federal House of Representatives in 1948.[33] Briefly, the complaint was that the honourable member had been questioned in his room at Parliament House by officers of the Commonwealth Investigation Service concerning two documents from which he had quoted in a speech in the House. One

31. *Law and Custom of the Constitution*, Vol. I, 5th ed. (1922), 171.
32. *Australia in the War of* 1939-1945—*Civil—Vol. I: The Government and the People* 1939-1941 by Paul Hasluck (1952), 420.
33. 198 Cwlth. Parl. Deb. 1328-52, 1385-92; 199 Cwlth. Parl. Deb. 1664-1718.

of the documents purported to be a record of a Cabinet meeting in London; the other, a record of a meeting of the Council for Scientific and Industrial Research. The motion that it was in breach of privilege for the member to "be interrogated or sought to be interrogated by security police at the instigation of the Prime Minister and the Government in the precincts of Parliament and in his official room in respect of matters occurring in and arising out of the discharge of his public duties" in the Federal Parliament was defeated.

Speakers to the motion placed considerable reliance on the Report of the House of Commons Select Committee on the Official Secrets Acts respecting the case of Mr. Sandys M.P.[34] That case, however, bears only a superficial resemblance to the one under discussion insofar as Mr. Sandys had been threatened with prosecution unless he disclosed his source of information. The information, moreover, had not been publicly given in Parliament. On June 27, 1938, Mr. Sandys had notified the Speaker and the House of Commons that he had received certain information concerning British defence preparations. He proposed to question the Secretary of State for War on the matter but appreciating that public disclosure of the information might be prejudicial to the national interest, he had first written to the Minister enquiring whether he had any objection to the question being asked. On receipt of this letter the Minister concluded that the Official Secrets Acts had been infringed and had forthwith referred the matter to the Attorney-General. Subsequently the Attorney-General approached Mr. Sandys about his sources of information at the same time intimating that if the request were not complied with the honourable member might face prosecution. Shortly afterwards the Army Council appointed a military court of enquiry to investigate the leakage. Mr. Sandys, himself a military officer was summoned to attend.

In its report the Select Committee advised that Mr. Sandys' letter to the Secretary of State for War was a proceeding in Parliament and consequently protected by privilege. The actions of both Ministers concerned were censured in the strongest terms while the summons to appear before the military tribunal was held to be in breach of privilege.

Freedom v. Licence of Speech

A former Prime Minister of the Commonwealth, the late J. B. Chifley is reported in Hansard as having once said that freedom of speech and debate in Parliament could well be abolished.[35]

34. H.C. Paper No. 101 (1938-39). The Sandys case is reviewed in (1938) 7 *Jo. of the Clerks-at-the Table*, 122-49 and (1938-9) 2 *Mod. L.R.* 163-5, 231-5.
35. 202 Cwlth. Deb. 525 (1949).

Doubtless the prospect of so revolutionary a change in the system of parliamentary government would not be received with equanimity by most legislators. Admittedly the freedom enjoyed by members can be and has been abused by members but experience has shown that on balance any disadvantages that might flow from this so-called "legal monopoly in slander"[36] are outweighed by the advantages of free discussion and ventilation of grievances. Sir J. Manning in *Gipps v. McElhone* epitomised the problem when he said:[37]

> Doubtless there may be members of strong energy, easy credulity, and impulsive temperament who, in discussing a question of public interest, may injure an individual by reckless and injudicious statements. But it is of greater importance to the community that its legislators should not speak in fear of actions in defamation. It is most important that there should be perfect liberty of speech in Parliament, even though it may degenerate into licence.

If it does degenerate into licence the remedy lies in the hands of the Houses of Parliament themselves and in their presiding officers. As a final resort the House may suspend or expel a member who abuses his privilege or if it possesses the requisite power, it may also commit him for contempt. Such drastic action is seldom taken. More often it is left to the Speaker or President to restrain intemperate members by ruling their statements out of order. If however injurious statements are allowed to pass without censorship from the chair, persons aggrieved have no legal remedy against the author of those statements or even against persons who publish reports of debates by order or authority of the House. On the other hand, there is no legal bar to contradiction of a member's statements in Parliament or to requesting public apology. It is gratifying to know that in some instances members of Parliament have indicated their willingness to "waive" privilege by repeating the offending parts of their speeches outside the House.[38]

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36. *Per* Coleridge J. in *Stockdale v. Hansard* (1837) 9 Ad. & E. 242.
37. (1881) 2 L.R. (N.S.W.) 18 at 24.
38. In 1952 a member of the federal Parliament upon discovering the falsity of certain imputations made by him in Parliament against members of the Commonwealth Literary Fund chivalrously offered to waive privilege. The Speaker ruled however, that while the honourable member could retract his remarks, privilege could not be waived except by the House as a whole. See 219 Cwlth. Parl. Deb. 1991-3, 2104-5 (1952).

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