In Defence of Parliamentary Privilege

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The High Court of Parliament has never existed in Australia, but the substance of the powers, privileges, rights and immunities of the UK House of Commons ("parliamentary privilege") — derived in part from its status as a constituent of that court and in part from claims made good by civil war — have been applied by the several Australian parliaments to their constituent Houses[1] as a necessary incident to the performance of their functions.[2]

Most citizens never collide with the majesty of parliament and have only the haziest notion of what parliamentary privilege means and the role that it has in the affairs of the state. Some commentators would have us believe that the privilege is anachronistic, anti-democratic, and thus in dire need of wholesale pruning. Even politicians can appear shocked by certain aspects of privilege. They are probably relieved to find that a sound flogging is not a penalty that can be imposed for contempt in lieu of imprisonment!

So, why should I, and others like me, want to defend the apparently indefensible and hold the line against erosion of the "laws and customs of parliament"? The answer is quite simple: if privilege did not exist, we would have to invent it.

What appears to be forgotten in the push to cut back on privilege is an acknowledgement of its restricted ambit, its reason for existence and the political and judicial constraints on its abuse or misuse.

It also needs to be said that very little criticism is levelled against the daily exercise of parliamentary powers and privileges (eg, the immunity attaching to papers tabled or ordered to be printed by resolution). By and large, the actual functioning of parliament according to its customs and usages

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1. The NSW Parliament is the exception. Its Houses rely on the common law privileges laid down by the Privy Council in *Kielley v Carson* (1824) 13 ER 225. At common law, a colonial legislature had only those powers necessary to protect the integrity of its proceedings, ie, the powers were in the nature of a shield, not a sword.
2. See Constitution Act 1889 (WA) s 36 (prospective grant of power) and Parliamentary Privileges Act 1891 (WA) (application of Commons' powers etc to WA Houses; but note the proviso to s 1 as to inconsistency between derived powers and those conferred by the 1891 Act itself).

attracts little comment.[3]

There are two aspects of privilege that seem to draw most of the adverse criticism. The first is the immunity of parliamentary proceedings from being questioned or scrutinised in judicial and other proceedings. This immunity was found by the Royal Commission into the Commercial Activities of Government (the "WA Inc" inquiry)[4] to be particularly irksome. The second aspect, and probably the one that draws most of the flak, is the exercise by a House of its penal jurisdiction to punish contempts and other breaches of privilege.

THE "WIDER PRINCIPLE"

In a judgment given on 27 June 1994, the Privy Council in *Prebble v Television New Zealand Ltd,*[5] after quoting Article 9 of the Bill of Rights 1688, went on to say:

> In addition to Article 9 itself, there is 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 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 the protection of its established privileges.[6]

In *Prebble*, the Privy Council simply re-stated orthodox belief and cited some of the "long line of authority" cases. Note the words of limitation in the last part of the quote: privilege is not "licence" but confined to the operations of the legislature.

Their Lordships went on to make it very clear that the interpretation of parliamentary immunity adopted by Hunt J in *R v Murphy*[7] was heretical and "not correct so far as the rest of the Commonwealth is concerned".[8] They also specifically disapproved *Wright and Advertiser Newspapers Ltd v Lewis,*[9] a South Australian case, and overruled an earlier new Zealand

3. That leaves aside, of course, attacks on the use of a House's powers by the majority to curtail debate on a particular measure; but very little is said outside of parliamentary circles about the right of a House to regulate its own proceedings.
4. WA Royal Commission *Report into Commercial Activities of Government and Other Matters* (Perth: Govt Printer, 1992) Parts I & II.
5. [1994] 3 All ER 407.
6. Id, 413.
7. *R v Murphy* (1986) 64 ALR 498. This decision prompted the enactment of the Parliamentary Privileges Act 1987 (Cth). The Law Lords in *Prebble* supra n 5, 414 remarked that s 16(3) "contains what, in the opinion of their lordships, is the true principle to be applied" in construing Art 9.
8. *Prebble* supra n5, 414. The Law Lords also acknowledged that they could not determine the law for Australia.
9. (1990) 53 SASR 416. Commenting on this case the Privy Council in *Prebble* supra n 5, 416 said: "[T]hey cannot accept that the fact that the maker of the statement is the

authority[10] on which the South Australian Supreme Court had relied for its opinion in *Lewis*.[11] In adhering to the traditional interpretation of Article 9 of the Bill of Rights, and its express disapproval of *R v Murphy*,[12] the Privy Council disagreed with the WA Royal Commission,[13] whose approach to privilege had been commented on by the New Zealand Court of Appeal.[14] It appears that *Prebble*[15] has confirmed the opinions expressed by the Presiding Officers of the Western Australian Parliament to the WA Royal Commission.

PENAL JURISDICTION

The use of coercive powers by a House against a citizen, particularly punishment for contempt, usually incites adverse comment. The rationale advanced is that politicians cannot judge these matters fairly or impartially and that, absent a trial in a court of law, no one should suffer punishment.

The instances of Houses using their contempt powers against a citizen are few, so much so that the cases are all well known and clearly documented.[16] The criticism also tends to ignore procedures intended to avoid confrontation, including rights accorded to witnesses[17] and the increasing use of select committees of privilege to ascertain facts and make recommendations to the House before any action is taken Moreover,

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initiator of the court proceedings can affect the question whether Article 9 is infringed ... The wider principle ... prevents the courts from adjudicating on issues arising in or concerning the House, viz, whether or not a member has misled the House or acted from improper motives. The decision of an individual member cannot override that collective privilege of the House to be the sole judge of such matters".

10. *News Media Ownership v Finlay* [1970] NZLR 1089.
11. The Privy Council also went to some lengths to reaffirm English law's recognition that parliamentary powers and privileges vest in each House to the exclusion of the individual member. Accordingly, no MP may "waive" privilege. Although not called on to decide the point, implicit in the Law Lords' opinion is the belief that the finding of the NZ House of Representatives that, absent statutory authority, it had no power to waive privilege, was correct.
12. *Prebble* supra n5, 414. These currents of opinion are significant, but I do not think that they could justify a reinterpretation of Art 9 which would of itself take what was said in the House by the plaintiff and other ministers outside the scope of the privilege for the purposes of defence in the present case. If the defendant were to be held free to have parliamentary debates and proceedings examined at a trial of this action, it would have to be on other grounds.
13. Supra n4.
14. *Prebble v TVNZ* [1993] 3 NZLR 513.
15. *Prebble* supra n5.
16. For a detailed account of cases in the WA Parliament, see D Black (ed) *The House on the Hill: A History of the Parliament of WA* 1832-1990 (Perth: WA Parliamentary History Project, 1991).
17. Eg WA Parliament, Legislative Council, *Standing Order No 358* (as at Nov 1994).

surrendering parliament's contempt powers to the Supreme Court would violate the basis of the Privy Council's "wider principle" and make justifiable that which the Full Bench of the Supreme Court held should not be.[18]

But the greatest threat to privilege is that posed by successive governments (and their bureaucracies) who pay lip-service to the rights of parliament and then do their utmost to avoid providing meaningful information or to discharge their obligation to account. Under these circumstances, any contraction of privilege would set the stage for a re-run of the Petition of Right and its 1688 successor.

The remedy for perceived abuse of contempt powers is not to abolish or surrender them but to ensure that MPs are made fully conversant with the reasons for their existence and the necessity for a non-partisan approach to their exercise.

PRIVILEGE IN A FEDERATION

In *Prebble*, the Privy Council demonstrated its awareness of laws that have the potential to make inroads into parliamentary privilege:

> But the present case [*Prebble*] and *Wright's* case illustrate how public policy, or human rights, issues can conflict. There are three such issues in play in these cases: first, the need to ensure that the legislature can exercise its powers freely on behalf of its electors, with access to all relevant information; second, the need to protect freedom of speech generally; third, the interests of justice in ensuring that all relevant evidence is available to the courts. Their Lordships are of the view that the law has been long settled that, of these three public interests, the first must prevail. But the other two public interests cannot be ignored.[19]

Both the English and Australian courts, for similar reasons, are having to reconcile parliamentary privilege with contemporary views of human rights, particularly in cases where individual rights conferred by law are held subject to parliamentary immunities. In Australia, there are constitutional developments that may affect the operation and ambit of parliamentary privilege.

The first is the impact on Australian domestic law of international treaties, acceded to by Australia, prescribing individual rights in the social, economic and political fields. Second, and relatedly, there is the view found in recent High Court opinions that the Court will read the Commonwealth

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18. *R v Wainscot* [1899] 1 WALR 77. An inference may be drawn from the court's reasoning that estoppel operates to prevent a House, having heard evidence of criminal conduct or dealing on the part of a witness, from subsequently purporting to remove privilege so as to permit that evidence being used to ground or support a prosecution. Alternatively, the inability to rescind the immunity may be seen as no more than an example of a House's inability to "waive" privilege absent statutory authority.

19. *Prebble* supra n5, 417.

Constitution and develop the common law of Australia in conformity with international law. There is a possible third avenue of attack through an extension of the *Bropho*[20] principle to parliamentary privilege whereby privilege gives way by contextual intendment, or on the basis of implied constitutional freedoms having effect as paramount law at least so far as the States are concerned.

The "Speech and Debate" provision of the United States Constitution[21] has cohabited with the First Amendment. Similarly, it may be expected that the High Court would reconcile constitutional guarantees, express or implied,[22] so as not to conflict with parliamentary privilege at Commonwealth and State level.[23]

Of more concern is the effect that Commonwealth legislation might have on State parliamentary privilege.[24] When this issue was aired in 1986, there was a distinct difference of opinion, illustrated by the report of the Senate's Constitutional and Legal Affairs Committee.[25]

While the mutual-indestructibility doctrine[26] springs to mind as the first line of defence against any Commonwealth intrusion on State parliamentary privilege, the legislative context and the extent to which the High Court is prepared to give effect to the words "subject to this Constitution" in section 106[27] assume a high degree of importance. The question was, and remains, whether a Commonwealth law, otherwise valid, which has the effect of abrogating State parliamentary privilege may nonetheless be invalid at least so far as that abrogation is concerned.

If United States law is to be taken as any type of precedent, it seems that abrogation for a discrete purpose is achievable.[28] Particularly is this so

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20. *Bropho v WA* (1990) 71 CLR 1. The High Court held that the applicability or otherwise of statutes to the Crown was a rule of construction and not, as had been supposed, a rule of law.
21. "For any speech or debate in either House, they [the members of Congress] shall not be questioned in any other place."
22. Cf *ACTV Pty Ltd v Cth* (No 2) (1992) 177 CLR 106.
23. Commonwealth parliamentary privilege would seem better protected by reason of s 49 of the Constitution. Implied [constitutional] guarantees are "subject to this Constitution".
24. Recent amendments to the Commonwealth's industrial relations laws are a case in point. It is unlawful for an employer to dismiss employees on stated discriminatory grounds. The question arises whether Commonwealth law, without expressly purporting to override Commonwealth or State parliamentary immunities of the type recognised in *Bradlaugh v Gossett* (1884) 12 QBD 271, has that effect by necessary intendment.
25. The difference between US and UK legislative immunities was explained in *US v Brewster* 108 US 501, Burger CJ, 515: "We should bear in mind that the English system differs from ours in that their Parliament is the supreme authority, not a co-ordinate branch. Our speech or debate privilege was designed to preserve legislative independence, not supremacy."
26. *Melbourne Corp v Cth* (1947) 74 CLR 31.
27. Commonwealth Constitution 1901.
28. In *US v Gillock* (1980) 445 US 360, the Supreme Court held that a valid federal law that

when the enactment deals with matters exclusively within the competence of the Commonwealth parliament. It would be difficult to argue that, under those circumstances, the abilities or continued functioning of the States is threatened by a valid exercise of the Commonwealth's exclusive legislative power.

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provides criminal penalties for violation applies equally to a State legislator. The Court denied any immunity attached to State legislators by operation of the US Constitution (Art I, § 6, cl 1) or its State equivalent and overruled the finding in *In Re Grand Jury Proceedings* (1977) 563 F 2nd 577, where the Court of Appeals (3d Circ) had found a common law immunity existed on evidential grounds (R501 based on a "comity among the States" proposition).