

## **Protection of Persons Who Provide Information to Members\***

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### **The questions**

In recent times senators have been concerned about action taken against persons who have supplied them with information and documents. The action taken has included legal proceedings and extra-legal punitive action. In the case of legal proceedings, the reference by the senators to the information in parliamentary proceedings cannot be used against the persons who supplied it, but can otherwise facilitate legal action. Also, subpoenas, search warrants and orders for the discovery of documents have been issued and served on senators, to gain access to documents supplied to senators and to facilitate action against the persons who supplied them. This kind of activity has great potential to discourage people from approaching the parliamentary forum with their grievances or with allegations of malfeasance.

A significant question arises in relation to these matters: does the protection afforded by parliamentary privilege extend to the provision of information by other persons to members of parliament?

This question encompasses two distinct issues:

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(a) whether the immunity afforded by parliamentary privilege extends to the communication of information to members by other persons; and

(b) whether a house may treat as a contempt any interference with such communication of information to members by other persons.

The answer to question (a) does not necessarily determine the answer to question (b). If the communication of information to members does not attract the immunity of parliamentary privilege it may still be lawful for a house to treat as a contempt any interference with such communication. If, however, the communication of information to members *is* protected by parliamentary privilege, this probably determines the answer to question (b), in that there can then be little room for doubt that it is open to a house to use its contempt jurisdiction to protect such communication.

The two questions may be considered in turn.

**(a) Parliamentary privilege and communications with members**

It has always been generally accepted that the immunity of parliamentary proceedings from any impeachment or question before any court or tribunal extends to matters which, while not part of the actual proceedings of a house or its committees, are closely connected with those proceedings. The kinds of examples usually cited include the ‘publication’ by a member of information to a parliamentary officer or to a stenographer in the course of seeking advice on, or composing, a notice of motion or question to be used in a house or a committee; it is fairly certain that a member would be protected by parliamentary privilege in making such ‘publications’. It is possible to postulate many other circumstances in which the immunity applies or should apply.

This extended operation of the immunity is provided for at the Commonwealth level in Australia in the *Parliamentary Privileges Act 1987* in the following terms:

‘proceedings in Parliament’ means all words spoken and acts done in the course of, *or for purposes of or incidental to*, the transacting of the business of a House or of a committee [emphasis added].

This provision is regarded as a codification of the pre-existing law, not as an extension of the law, and the relevant section of the Act has been accepted in general as such by the Federal Court in *Amann Aviation v Commonwealth* (1988) 19 FCR 223.

In relation to the Commonwealth houses, therefore, the extended operation of the immunity is a matter of statutory interpretation. There has yet been no occasion for judicial construction of the relevant words of this provision.

The issue which arises is whether this extended operation of the immunity applies to communications of information to members by other persons.

The answer to this question is likely to be determined by the closeness of the connection between the communication of the information to the member and

potential or actual proceedings in a house or a committee. For example, if a person provides information to a senator with an explicit request that the senator initiate some action in the Senate in relation to that information, such as an inquiry by the Senate, there is a much stronger basis for concluding that the communication of that information is protected by parliamentary privilege than if the person provides the information simply as a matter of political intelligence or gossip. Similarly, if a senator has requested the information for the purpose of using it in the Senate or a committee, there is a stronger basis for applying the immunity than if there is no evidence of any potential relationship between the information and parliamentary proceedings. If a senator has actually used the information in the course of parliamentary proceedings, that also provides a firmer basis for applying the immunity to the provision of the information than if no parliamentary use is made of the information. The courts would be likely to determine the question in particular cases by considering these kinds of factors.

In an old British case, *Rivlin v Bilainkin* (1953) 1 QBD 534, it was held that the publication of information by a person to a member of Parliament did not give rise to an issue of parliamentary privilege because 'the publication was not connected in any way with any proceedings of the House of Commons'. Presumably if the publication *had* been connected with such proceedings a live issue of parliamentary privilege would have been present, and may have been determined by the nature of the connection.

In *Grassby* (1991) 55 A Crim R 419, which involved a prosecution for criminal libel in respect of the provision of a document to a member, Allen J of the Supreme Court of New South Wales found that parliamentary privilege did not protect the provision of the document to the member.

There are difficulties with this judgement which prevent it being regarded as an authority on either of the two issues.

The New South Wales Parliament is unique in that it has no constitutional or statutory provision conferring upon its houses the powers and immunities known as parliamentary privilege and applying to all other Anglo-American legislatures. The powers and immunities of the New South Wales houses depend on a common law doctrine that they are only such as are strictly necessary for the houses to discharge their legislative functions. This doctrine has been expounded in a line of cases and recently confirmed. It is found that the houses do not possess the power to deal with contempts, and therefore the judgement of Allen J cannot have any relevance to issue (b). The houses possess an immunity of freedom of speech, but it is by no means clear that the scope of this immunity is the same as that of other legislatures, because it is not clear whether the Bill of Rights of 1689 applies in relation to proceedings of the New South Wales houses or merely applies in New South Wales in relation to proceedings of the British houses.

The judgement of Allen J does not clarify these matters. In referring to the immunity of freedom of speech of the New South Wales houses, it is not clear whether he thought he was applying the common law doctrine of necessary immunities or expounding article 9 of the Bill of Rights. The references to effects on members and the discharge of their functions (at 429–30) suggest the former. The references to

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article 9 of the Bill of Rights do not explain whether it is taken to apply to the houses or whether it is merely indicative of the content of the inherent immunity of freedom of speech generally. In referring to article 9 (at 432) Allen J cites a collection of judgements some of which are mutually contradictory and one of which was expressly repudiated by the *Parliamentary Privileges Act 1987* of the Commonwealth.

The judgement also mixes up issues (a) and (b) as if they were the same question, and this, as has been indicated, is particularly inappropriate in relation to the New South Wales Parliament. In this aspect the judgement relies heavily on a sweeping statement in Erskine May's *Parliamentary Practice* to which further reference will be made and which, as will be suggested, is not justified by the cases on which it is purportedly based.

As has been indicated, the vital question is the connection between information supplied to a member of parliament and any parliamentary proceedings. In that respect the *Grassby* case was very easy to decide. Not only did Mr Maher, the state member to whom Mr Grassby supplied the offending document, not make use of it in any proceedings, but according to the evidence referred to in the judgement it was highly unlikely he would have done so. The judgement indicates that the case against Mr Grassby attached considerable significance to the lack of interest by Mr Maher in the document. In other words, there was not even a remote connection between the provision of the document to the member by Mr Grassby and any parliamentary proceedings actual or potential.

In different circumstances the matter may not be so easily decided, and a court may well come to a different conclusion. If a member were to make a speech in a house or ask questions in a committee about an issue, and a person were to supply the member with information relevant to that issue, and the member were subsequently to use that information in proceedings in the house or the committee, there would be a much stronger case for concluding that the provision of the information to the member would be protected in both senses (a) and (b), that is, as a question of legal immunity and as a question of protection by exercise of the contempt jurisdiction.

The judgement in *Grassby* is therefore of little value. At most, it merely reinforces the basis of the judgement in *Rivlin v Bilainkin*: where there is no connection with proceedings in parliament, the issue of parliamentary privilege does not arise.

In the case of the Easton petition in Western Australia, a ruling was made by the President of the Western Australian Legislative Council and is relevant to this question. In the course of the ruling, the President stated:

Whatever was done by members, ministers and others before the presentation of the Easton petition is not a proceeding in Parliament and is therefore open to non-parliamentary inquiry.

This sentence, however, elaborated on, and followed on from, the substance of the ruling, which was:

Although the presentation of a petition is as much a proceeding in Parliament as a conference of managers, the preparation, including circulation, of a petition is not.<sup>1</sup>

This ruling is stated to be supported by the conclusions of the Senate Privileges Committee in its 11th Report in 1988. In that report the committee concluded that the circulation of a petition prior to its presentation probably would not be covered by parliamentary privilege. That conclusion, however, was largely based on the fact that the circulation of a petition is not essential to its presentation, as it is not necessary for a petition to bear more than one signature. It cannot be concluded that all dealings with a petition, before or after its presentation, would not be ‘for purposes of or incidental to’ its presentation and therefore covered by the immunity attaching to the presentation itself. In particular, it cannot be concluded that no anterior dealing with a petition would attract the immunity. It is fairly clear that, for example, the ‘publication’ of a petition to a parliamentary officer prior to its presentation would attract parliamentary privilege, and a strong case can be made out that the immunity would also attach to other anterior dealings, such as seeking the advice of another member.

The provision of information to a member of parliament may attract qualified privilege under the common law interest or duty doctrine, whereby the publication without improper motive of matter to a person is privileged if the provider and the recipient of the information have an interest or a duty in providing and receiving it (either one may have either an interest or a duty). Whether the qualified privilege applies would presumably depend on circumstances. The only significant judicial authority appears to be an old British case (*R v Rule* (1937) 2 KB 375). Whether qualified privilege is attracted is not a determinant of the issues here considered.

In the course of his judgement Allen J observed that the protection of qualified privilege is a very strong protection, and may be defeated only by proof of malice or other improper motive on the part of a defendant. He appeared to argue that therefore there is enough protection without parliamentary privilege. The problem with this is that the kinds of persons who supply information about corruption or malfeasance to members of parliament, the kinds of persons commonly known as whistleblowers, are often persons who can be represented as having an improper motive. For example, an employee dismissed by an employer can be represented as activated by a desire for revenge. In the tobacco corporation case, which will be mentioned later, the persons who supplied the documents could well be said to have an improper motive, but there was a legitimate legislative interest in investigating the material they supplied. Qualified privilege is not a satisfactory substitute for parliamentary privilege in such cases.

It may therefore be concluded that, given the right circumstances, the provision of information by a person to a member of parliament may attract the immunity of parliamentary privilege.

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<sup>1</sup> Western Australia. Legislative Council, *Minutes of Proceedings*, 16 May 1995, p. 116.

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**(b) Interference with communications to a member as a contempt**

The issue here is whether it would be lawful for a house to treat as a contempt interference with communication of information to members by other persons.

The most likely form of interference is the taking of legal action in respect of the publication of matter to a member. It is therefore appropriate to reiterate that it is well established that the taking or threatening of legal action can constitute a contempt of parliament (or a contempt of court) if the effect or tendency is to interfere with the conduct of proceedings in parliament (or court proceedings). This question has been dealt with in some detail in reports and associated material of the Senate Committee of Privileges.

For the Commonwealth houses this is a question of statutory interpretation, turning on the application of section 4 of the *Parliamentary Privileges Act 1987*:

Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

Unlike the statutory definition of 'proceedings in Parliament', this provision does not merely give expression to the pre-existing law, but is thought to embody the rationale of the law which empowers the houses to punish contempts. The provision limits the power to punish contempts which existed before the Act was passed.

There has been no judicial construction of the provision, so one can only reason from its terms and first principle.

It is clear that the provision of information to senators is often a vital part of their participation in Senate and committee proceedings, and that the suppression of such provision of information could severely hinder those proceedings. It is also clear, however, that information is often provided to senators without any connection, actual or potential, to parliamentary proceedings. The lawfulness of treating as a contempt any interference with the provision of information to a senator is therefore likely to depend on the closeness of any connection between the provision of information and actual or potential parliamentary proceedings. In a case where interference with the provision of information to a senator clearly had the effect or tendency of hindering the senator in the free performance of the senator's duties, it would be lawful to treat such interference as a contempt.

The word 'improper' in section 4 of the *Parliamentary Privileges Act*, it should be reiterated, does not mean unlawful or improper in some other context. It gives statutory expression to a principle expounded by the courts in relation to contempt of court: acts may constitute interference but may be proper because of their tendency or effect, provided that the means employed are legitimate; for example, urging (but not threatening) a witness to correct evidence which is false (*R v Kellett* (1976) 1 QB 372 at 386–8).

As with other aspects of contempt of parliament, it is instructive to make comparison with the equivalents in relation to legal proceedings, contempt of court and its criminal law counterpart, attempting to pervert the course of justice. If it can be a contempt of court or a perversion of the course of justice for a person to interfere with the provision of information to an actual or potential participant in actual or potential legal proceedings, this is strong ground for concluding that it is lawful for a house to treat interference with the provision of information to a member as a contempt.

A judgement of the High Court throws considerable light on this matter. In *R v Rogerson* (1992) 174 CLR 268 the High Court held that interference with the gathering of evidence by police can constitute a perversion of the course of justice even though such gathering of evidence is not part of the course of justice as such and even though no actual proceedings are contemplated by the police:

The fact that police investigation stands outside the concept of the course of justice does not mean that, in appropriate circumstances, interference with a police investigation does not constitute an attempt or a conspiracy to pervert the course of justice ... it is enough that an act has a tendency to frustrate or deflect a prosecution or disciplinary proceedings before a judicial tribunal which the accused contemplates may possibly be instituted, even though the possibility of instituting that prosecution or disciplinary proceeding has not been considered by the police or the relevant law enforcement agency.<sup>2</sup>

The ways in which a court or competent judicial authority may be impaired in (or prevented from exercising) its capacity to do justice are various. Those ways comprehend, in our opinion, erosion of the integrity of the court or competent judicial authority, *hindering of access to it, deflecting applications that would be made to it, denying it knowledge of the relevant law or of the true circumstances of the case, and impeding the free exercise of its jurisdiction and powers including the powers of executing its decisions.*<sup>3</sup>

To apply these principles to contempt of parliament, interference with the provision of information to a member 'in appropriate circumstances' may constitute a contempt even though such provision of information is not part of proceedings in parliament as such, and even though the member does not contemplate use of the information in proceedings in a house or a committee.

It cannot be suggested that potential legal proceedings are entitled to a greater degree of protection than parliamentary proceedings: the provision of information to a member may lead to inquiry and legislative action in relation to a matter of immense public interest. That is why proceedings in parliament are protected by parliamentary privilege and why houses have the power to deal with interference with their proceedings.

The High Court appeared to consider that a culpable intention on the part of offenders towards potential legal proceedings is an essential element of the offence, at least where there are no proceedings actually on foot or necessarily contemplated. Other

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<sup>2</sup> *R v Rogerson* (1992) 174 CLR 268 at 277.

<sup>3</sup> *ibid.* at 280 [emphasis added].

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authorities make it clear that, in the actual presence or contemplation of proceedings, a culpable intention may not be necessary for an offence to be constituted. These principles are equally applicable to contempt of parliament. (In its report on contempt in 1987, the Australian Law Reform Commission suggested that the offence of attempting to pervert the course of justice may not be constituted by any act in the absence of a culpable intention, and that an act may not be in contempt of court, as distinct from constituting the offence of attempting to pervert the course of justice, unless proceedings have actually commenced<sup>4</sup>. This may or may not be correct, but it does not affect the foregoing analysis. If there are such distinctions between contempt of court and perversion of the course of justice, however, they may be of persuasive influence in consideration of contempts of parliament.)

In two cases in the 1950s the British House of Commons potentially had occasions to consider alleged interference with the provision of information to a member in the context of contempt of parliament. The circumstances of these cases, however, make them not particularly helpful.

The first case involved a letter from an eccentric vicar to a member, who referred the letter to the bishop, who reproached the vicar. Initially this was received and regarded as a complaint against the member. Eventually the Speaker ruled that a motion concerning the matter could not have precedence because it was not raised at the earliest opportunity. A motion to refer the matter to the Privileges Committee was narrowly negatived, and at least some members in the majority seemed to have regarded themselves as bound to uphold the Speaker's 'determination'. Some members, however, may have been influenced by Mr Winston Churchill's assertion that the House should not 'use its Privilege to protect a correspondent ... from some real or supposed injury ... Privilege was never instituted or intended for such a purpose. It is to protect us and those who have to deal with us, and not to protect the vast mass of the nation outside'. (He also made much of the fact that a bishop has no power over a clergyman in a living in the Church of England.)<sup>5</sup>

In the second case, also involving ecclesiastics of a sort, a Deputy Assistant Chaplain General of the army was alleged to have threatened a subordinate army chaplain in consequence of the chaplain's provision of information to a member. The Committee of Privileges was able to point to the lack of precedents for treating as a contempt an attempt by one person to influence another in relation to communications with a member, but was also able to say that this was a matter for the responsible minister, because, as a matter of government regulation, members of the armed forces had a right to communicate with members and should not be subjected to any pressure or punishment on that account.<sup>6</sup>

Erskine May's *Parliamentary Practice* makes too much out of these cases in claiming that 'Although both Houses extend their protection to witnesses and others who solicit business in Parliament, no such protection is afforded to informants, including constituents of Members of the House of Commons who voluntarily and in their personal capacity provide information to Members, the question whether such

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<sup>4</sup> Australian Law Reform Commission, *Report*, no. 35, 1987, p. 103.

<sup>5</sup> H.C. Debates, 1950–51, cc 675–88, 1297–316, 1773–9, 2491–544.

<sup>6</sup> H.C. 112, 1954–55.



information is subsequently used in proceedings in Parliament being immaterial.’<sup>7</sup>. The cases do not provide authority for this sweeping statement. They are of little persuasive value for any general conclusion. The expressions ‘those who have to deal with us’ (Churchill) and ‘others who solicit business in Parliament’ (May) indicate that the boundaries are not as clear cut as May makes out. May is confused on the significance of *Rivlin v Bilainkin*, citing it as if it had to do with qualified privilege<sup>8</sup> when in fact the question of parliamentary privilege was at issue, and also mixes up the questions of the scope of the legal immunity and the extent of the contempt jurisdiction<sup>9</sup>.

A precedent in the Australian House of Representatives is similarly unhelpful. This involved legal proceedings against a person in respect of the provision by the person to a member of a statutory declaration which the member used in debate. The report of the House Privileges Committee, having quoted May and observed the lack of precedent, made a finding that the legal proceedings did not amount to, and were not intended or likely to amount to, improper interference with the free performance by the member of his duties, without providing any analysis of the facts or reasons for the finding. It is not clear from the report whether the committee thought that interference with the provision of information to a member is ever capable of constituting a contempt.<sup>10</sup>

It may therefore also be concluded that, given the right circumstances, it may be lawful for a house to treat as a contempt an interference with the provision of information by a person to a member.

### **Subpoenas, search warrants and discovery of documents**

If the provision of information to a member may in appropriate circumstances be protected, is there any protection against legal processes which may be used to obtain that information and proof of its provision to a member, such as subpoenas, search warrants and orders for the discovery of documents? Such processes may be used to facilitate the taking of action against a person in respect of the provision of information to a member.

The immunity of parliamentary proceedings, and matters ‘for purposes of or incidental to’ those proceedings, which is codified in section 16 of the *Parliamentary Privileges Act 1987*, is an immunity against the use which may be made of material in legal proceedings, not an immunity against processes for the production of such material. There is no immunity against those processes as such (except in relation to in camera evidence: s.16(4)). A member in possession of relevant material must produce it in response to such processes but may subsequently contest the use which may be made of it in the proceedings.

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<sup>7</sup> *Erskine May’s Treatise on the Law, Privileges, Proceedings, and Usage of Parliament*, 21st edn, ed. C.J. Boulton, London, Butterworths, 1989, p. 133.

<sup>8</sup> *ibid.*, p. 133.

<sup>9</sup> *ibid.*, p. 125.

<sup>10</sup> Parliamentary Paper no. 407/94.

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It is possible, however, that subpoenas, search warrants and discovery of documents may be resisted on the basis that the only purpose of the discovery or the subsequent production of the documents would be a purpose contrary to the parliamentary immunity. In other words, a court may hold that a person is not required to comply with a subpoena, search warrant or order for discovery because it is directed to impermissible use of protected material.

In a recent case in the United States the US Court of Appeals quashed subpoenas on the ground that they constituted an interference with legislative processes protected by the parliamentary immunity (*Brown & Williamson Tobacco Corp v Williams*, 1995, not yet reported). A tobacco company, in pursuit of former employees who had allegedly taken company documents, sought to subpoena the documents from two members of Congress to whom the employees had provided the documents, and who were members of a committee investigating the activities of tobacco companies. The Court of Appeals observed:

the nature of the use to which documents will be put—testimonial or evidentiary—is immaterial if the touchstone is interference with legislative activities ... A party is no more entitled to compel congressional testimony—or production of documents—than it is to sue congressmen.

This judgement was based on a line of Supreme Court judgements indicating that the legislative activity protected by the immunity extends beyond proceedings in the houses or their committees.

This case suggests that, given appropriate circumstances, the immunity protects the provision of information to members and also provides a basis for resisting legal processes which aim to facilitate a legal attack on such provision of information.

## **Solutions**

Clearly an absolute immunity for the publication of matter to members of parliament in all circumstances would not be warranted. It would be difficult to frame legislation to specify the circumstances in which the immunity applies. The *Parliamentary Privileges Act 1987* probably goes as close as can be to covering the question. It can only be hoped that courts will have regard to its terms and make appropriate decisions in any future cases, along the lines of the decision of the US Court of Appeals in the tobacco corporation case and, indeed, of the earlier judgements on which that decision was based. It would also be helpful if houses of parliaments, in appropriate cases, would assert the right to extend their protection to those who seek to assist the pursuit of the public interest by providing information to the tribunes of the nation.