

Publication of Hansard and parliamentary privilege

Purpose of parliamentary privilege

Parliamentary privilege exists to protect the operations of the Houses and their committees and the ability of members to carry out their functions as members. The boundaries of parliamentary privilege are determined by necessity:

- what areas does parliament need to have exclusive jurisdiction over?
- what activities is it necessary to protect in order for parliament to carry out its functions freely and without improper interference?

Parliamentary privilege operates as a collection of immunities from the ordinary law of the land.

Main immunities

Freedom of speech is often cited as the main immunity. It was first codified in the Bill of Rights 1689 (“That the freedom of Speech and debates or proceedings in Parliament ought not to be impeached or questioned in any Court of place out of Parliament”). Freedom of speech is actually part of the broader immunity of proceedings from impeachment or question by the courts. Minor immunities include immunity from arrest in civil causes¹, exemption from jury service and exemption from compulsory attendance in a court or tribunal. Though they are seldom used, they embody the important principle that the Houses have first call on their members, and service as an elected representative should not be impeded by the requirements of legal proceedings before a court.

These immunities have been partially codified in the *Parliamentary Privileges Act 1987* which includes a definition of “proceedings in Parliament” and defines what courts and tribunals are unable to do by way of “questioning or impeaching” those proceedings. The Act also restricts the period of time during which the immunities from arrest in civil causes and compulsory attendance before courts apply to sitting days, committee meeting days and 5 days either side of each.

¹ Such as debt, a common hazard for members of the House of Commons in the 19th century until the abolition of imprisonment for debt in 1870.

Privilege attaching to preparation and publication of documents

Each House, together with its committees, possesses the power to prepare and publish documents with absolute privilege attaching to the publication of the documents and their contents. This power was inherited under section 49 of the Constitution from the UK House of Commons (where it derived from the *Parliamentary Papers Act 1840*). It was partly codified in the *Parliamentary Papers Act 1908 (Cth)* and is now covered by paragraph 16(2)(d) of the 1987 Act (which provides that publication of a document “by or pursuant to an order of a House or a committee” is part of proceedings in Parliament and therefore absolutely privileged). The protection exists as a matter of statute law.

– Hansard

Standing order 43(3) authorises publication of the record of debate in the Senate, known as Parliamentary Debates or Hansard. Because of paragraph 16(2)(d) of the 1987 Act, such publication is absolutely privileged. Unlike the 1908 Act which referred to publication by the Government Printer, the authority to publish in standing order 43 is not limited to any particular publisher or medium. It extends to publication of Hansard in any medium. The protection is regarded as applying to publication of the whole debate.²

When an individual senator chooses to publish an extract of a speech or an individual contribution or a link to part of a larger debate, this is clearly a separate act of publication that does not come within the ambit of the authorisation given by standing order 43(3). The publication of extracts involves different issues to the publication of the debates as a whole:

- it does not serve the general purpose of making the proceedings of parliament available to the public to the maximum extent possible;
- extracts can be selective and therefore unrepresentative of the character of the debate as a whole;
- publication is likely to be for a secondary purpose such as informing constituents or communicating with the media (in other words, a purpose other than participation in proceedings in Parliament).

² For application of this principle in other Houses, see *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*, 24th ed., 2011, p. 224; House of Representatives Practice, 6th ed., 2012, p. 739.

The publication of an extract is not a proceeding in Parliament and does not therefore enjoy the absolute privilege that protects the operations of Parliament as an institution. Publication of extracts is not necessary for the proper functioning of the institution. Protection for individual senators or members – or, indeed, any others – who choose to publish extracts of debates is not a question of parliamentary privilege, but there may be other protections available that are for the courts to apply, including qualified privilege.³

For example, section 10 of the 1987 Act provides a defence in relation to defamation actions for all fair and accurate reports of proceedings in Parliament.

It is also possible, although not tested, that the publication by a member of extracts of debates or an individual speech might attract the implied freedom of political communication found by the High Court in the Constitution as a corollary of the system of representative government.

Privilege attaching to broadcasting of proceedings

Proceedings in Parliament are broadcast by radio, television, by live streaming on the internet and through ParlView, a new service which provides access to audio-visual coverage of current and previous proceedings, together with the capacity to pause, search and download footage.

The *Parliamentary Proceedings Broadcasting Act 1946* requires the ABC to broadcast proceedings of the Houses and any joint sitting on national radio, in accordance with general principles determined by the Joint Committee on the Broadcasting of Parliamentary Proceedings. The principles were last reviewed earlier this year and are contained in a [report](#) presented to both Houses in May and June. Section 15 of the Act confers immunity from legal action, both civil and criminal, on the radio broadcast and rebroadcast of proceedings.

[Resolutions](#) of the Senate authorise:

- the televising of Question Time by the ABC

³ Statements which attract qualified privilege include a statement made in the performance of some public or private duty, legal or moral, provided that the statement is communicated to a person who has a reciprocal interest in receiving it. Qualified privilege is not available where the statement is excessive for the purpose which attracts the privilege or the communication is activated by malice.

- live electronic publication of sound and visual images of proceedings of the Senate and its committees, including on the internet.

These publications attract absolute privilege because they occur by order of the Senate.

Elsewhere, the resolutions permit the broadcasting and rebroadcasting of excerpts of proceedings in accordance with conditions determined by the Senate. (The House has equivalent resolutions.) Broadcasting of excerpts is protected by qualified privilege.

The question raised by the House Committee

The matter referred to the committee by the President under standing order 17(3) was raised by Senator Heffernan at a meeting of the House Committee. It is stated that senators and other people increasingly provide access to debates by sending an electronic link and that this may amount to the republication of an extract that is covered only by qualified privilege. The House Committee requests the Procedure Committee to examine the standing order to ensure that there is adequate protection considering the modern publication methods that are used.

Discussion

As the foregoing analysis of privilege attaching to publication of documents and broadcasting of proceedings shows, if a publication is authorised by the Senate it attracts absolute privilege. Other publications, including publication and republication of excerpts or extracts, may attract qualified privilege if they are fair and accurate. These principles apply regardless of the medium of publication. Just as senators need to be cautious about repeating potentially damaging remarks outside the chamber, they need to exercise the same level of caution in republishing extracts of proceedings in any medium.

Implicit in the question posed by the House Committee is the suggestion that because modern publication methods make republication so easy, perhaps republication should attract more than qualified privilege?

Similar suggestions have been rejected in Australia and comparable jurisdictions over the past couple of decades for the same reason: **Parliamentary privilege should be used to protect only those acts which are necessary for the proper functioning of the parliament.** It should not be used for the protection of secondary purposes.

– *Australia*

For example, in November 1991, the Transport and Communications Legislation Amendment Bill 1991 was amended by the Senate, with the agreement of all parties, to remove provisions amending the Parliamentary Proceedings Broadcasting Act that would have extended absolute privilege to televised proceedings of the Houses and their committees. It was pointed out that the absolute immunity for radio broadcasts was enacted at a time when the ABC's continuous broadcast was the only broadcast available. Permitting television stations to broadcast and rebroadcast excerpts of proceedings involved different issues. Qualified privilege was available for fair and accurate reports. As edited television extracts could constitute highly unfair and inaccurate reports of proceedings it was inappropriate for them to have absolute privilege.

– *New Zealand*

The same distinction has been made in a recent report of the Privileges Committee of the New Zealand House of Representatives (June 2013).⁴ In recommending that the Government introduce a parliamentary privileges bill incorporating many features of the 1987 Australian Act to address inroads by the courts into the business of parliament, the committee recommended that the bill include provisions:

- to confer absolute privilege on:
 - the live broadcast of proceedings in the House and select committees;
 - the delayed broadcast or rebroadcast of such proceedings made by order or under the authority of the House;
- to provide for qualified privilege to apply to:
 - fair and accurate reports of proceedings of the House, or summaries using extracts, by any person;
 - the broadcast or other publication of extracts of parliamentary proceedings, including select committees, made other than by order or under the authority of the House.

These recommendations had also been made by previous NZ Privileges Committees.

⁴ *Question of privilege concerning the defamation action Attorney-General and Gow v Leigh*, Report of the Privileges Committee, 1.17A, June 2013.

– *United Kingdom*

The recent report of the UK Joint Committee on Parliamentary Privilege (July 2013) also affirmed these principles, while noting that the *Parliamentary Papers Act 1840* needed to be brought up to date to remove any ambiguity about the status of electronic records, among other things. Responding to calls by the media for absolute privilege to apply to all fair and accurate reports on the grounds of freedom of speech, the committee concluded:

We do not accept the argument that full freedom of expression in Parliament is dependent on a similar freedom being enjoyed by the media. The fundamental purpose of affording absolute privilege to proceedings in Parliament is to protect those proceedings themselves, so that the democratically elected representatives of the people can engage in free and fearless debate on issues of public concern. Such debate is the cornerstone of any democratic society. But Parliament's work can be done irrespective of whether or not it is reported... So while the freedom to report parliamentary debates in the media is of vital importance in a democratic society, it raises different issues, and it can be protected in different ways. That defence is not available, however, outside the field of defamation.⁵

The report noted the possibility that members could be used, wittingly or unwittingly, by the media to “launder” information that the media could then publish with impunity. While this is an extreme possibility, it also demonstrates the soundness of the traditional approach to what should be covered by parliamentary privilege, including where the line should be drawn between what is necessary and what is secondary.

Conclusion

These examples concern both media reporting of proceedings and the republication of speeches by members. They demonstrate that it is difficult to identify a principled basis on which a distinction could be drawn between the secondary, though important, function of media reporting and republication of parliamentary proceedings, and the secondary, though important, function performed by members in republishing speeches for the information of constituents and the media.

⁵ HL Paper 30, HC 100, p. 49.

If one type of publication were to be covered by qualified privilege and the other by absolute privilege on the basis of the identity of the person performing the act of publishing, this would represent a major shift in parliamentary practice and would raise complex questions about civil and political rights. It would be a departure from practices recommended in the most recent reviews of the issue in comparable jurisdictions.

Such a shift should not be undertaken without a detailed and wide-ranging inquiry by an appropriate committee. As it is highly likely that any such change would require legislation, the appropriate committee may well be a joint select committee to examine the issue on behalf of the Parliament as a whole.

Clerk's Office
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