

20 Parliamentary privilege

1. What is parliamentary privilege?

Parliamentary privilege is a function of the separate constitutional roles of parliament and the courts which enable these institutions to go about their business without being subject to outside interference or control.

The term “parliamentary privilege” refers to two aspects of the law relating to Parliament:

- the privileges or **immunities** of the Houses of the Parliament; and
- the **powers** of the Houses to protect the integrity of their processes, including the power to punish **contempts**.

These powers and immunities are fundamental to the operation of free institutions. They protect the right and ability of the Houses of the Parliament, and their committees, to carry out their functions of inquiring, debating and legislating without interference, and to deal effectively with any attempted interference.

The chief **immunity** from the ordinary law is the freedom of parliamentary debates and proceedings from question and impeachment in the courts. For example, members of Parliament cannot be sued or prosecuted for anything they say in debates; witnesses before parliamentary committees cannot be sued or prosecuted for giving evidence or for the content of the evidence they give.

The principal **powers** of the Houses are:

- the power to compel the attendance of witnesses, the giving of evidence and the production of documents; and
- the power to adjudge and punish contempts.

A **contempt** is a breach of the immunities of a House or any action which improperly obstructs a House or its members in the performance of their duties.

2. What is the legal framework?

[Section 49](#) of the Constitution declared the powers, privileges and immunities of the Commonwealth Parliament to be the same as those of the House of Commons of the United Kingdom at the time the Commonwealth was established. The Constitution also provided that the Commonwealth Parliament could declare its own privileges if it chose to do so.

A significant declaration of the Commonwealth Parliament’s privileges was made in the [Parliamentary Privileges Act 1987](#). This Act declares some important privileges, abolishes others and defines the penalties that a House may impose for contempt.

To supplement the Act, the Senate agreed in February 1988 to a series of resolutions - the “**Privilege Resolutions**”, which establish certain procedures for the Senate and its committees, including:

- procedures to protect the rights of witnesses
- procedures for the investigation of contempts; and
- criteria for determining matters relating to contempt.

The Senate Committee of Privileges, through its many inquiries into possible contempts, has established a body of precedents which assists the Senate to administer and interpret its privileges. The Committee's inquiries and findings, to December 2005, are summarised in its [125th report](#). Other reports, and advices from the Clerk of the Senate on privilege matters, may also be found on the Committee's [web pages](#).

3. Who and what is protected?

Parliamentary privilege protects those who participate in “proceedings in Parliament” from outside interference or suit. The basic protection is provided by article 9 of 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 or place out of Parliament.

This protection is incorporated in Australian law by [section 49](#) of the Constitution and by [section 16](#) of the *Parliamentary Privileges Act 1987*.

“Proceedings in Parliament” defined

Section 16 of the Act defines “**proceedings in parliament**” to include 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.

According to the definition, it includes:

- the act of giving evidence to a House or committee
- the evidence given
- the presentation or submission of a document to a House or committee
- the preparation of a document for purposes of or incidental to the transacting of the business of a House or committee
- formulating, making or publishing a document by or pursuant to an order of a House or committee; and
- the document formulated, made or published by or pursuant to such an order.

Examples

Examples of documents prepared for or incidental to the transacting of the business of a House or committee include:

- submissions to parliamentary committees
- draft questions to ministers (with or without notice)
- questions briefs or possible answers prepared by departments or agencies for their ministers or for their own appearances at Senate estimates; and
- letters from constituents which seek parliamentary action and which can be shown to have a direct connection with parliamentary proceedings – such as a request from a constituent to ask a question or raise a particular matter in debate (but see below).

Examples of documents or actions **not** covered include:

- general constituency correspondence, including with ministers, passing on concerns or issues raised by constituents – such as problems with government agencies or programs (but a qualified privilege may apply – see [chapter 2](#) of *Odgers' Australian Senate Practice*, under “Provision of information to members”.)

- the circulation of petitions (see the [11th Report of the Committee of Privileges](#)); and
- party or caucus meetings (including meetings of party or caucus committees).

Examples of documents formulated, made or published pursuant to an order of a House or committee include:

- business documents such as the *Notice Paper*, *Journals of the Senate* and the *Parliamentary Debates* (Hansard)
- answers to Senate questions on notice
- government reports ordered to be printed by a House
- committee reports; and
- correspondence or documents authorised for publication by a committee.

Note that publication of Hansard attracts absolute privilege, but the publication of *extracts*, such as part of an individual senator’s speech, does not. Publication of “pinks” (subedited drafts provided to senators to check their speeches) by a senator to a journalist (for example) may attract qualified privilege, along with press reports of proceedings, or the use of extracts of speeches in senators’ newsletters. For qualified privilege, see [chapter 2](#) of *Odgers’ Australian Senate Practice*, under “Qualified privilege”.

4. What is contempt?

A contempt is a breach of the immunities of a House or any action which improperly obstructs a House or its members or committees in the performance of their duties. The power to punish contempts is one of the major powers available to most parliaments to protect the integrity of their processes (the other main power being the inquiry power – to require the production of persons and documents).

Whether a person has committed a contempt is determined by a majority vote of the Senate, taken after at least 7 days’ notice ([Privilege Resolution 8](#)) and usually on the recommendation of the Privileges Committee after an inquiry has been conducted.

Contempts by senators

Examples of contempts that may be committed by senators include:

- failure to comply with the resolutions of the Senate relating to the [registration of senators’ interests](#) or the [registration of senators’ qualifications](#) under sections 44 and 45 of the Constitution
- unauthorised disclosure of draft committee reports, unpublished evidence or submissions, or committee deliberations
- asking for, obtaining or receiving a benefit in return for discharging the senator’s duties under outside influence; and
- disobeying a lawful order of the Senate or a committee (for example, to appear before a committee or produce documents to the Senate).

Some of these matters are also covered by the criminal law ([s.13](#), *Parliamentary Privileges Act 1987*; [s.141.1](#), *Criminal Code Act 1995*).

Contempts against senators

Examples of contempts that may be committed by other persons in relation to senators include:

- obstruction of a senator in the exercise of his or her duties
- improper influence of a senator; and
- molestation of a senator.

These contempts may cover such actions as a threat of legal action against a senator to prevent him or her raising a particular matter in the Senate.

Since the first such case of alleged intimidation of a senator was investigated by a select committee of privilege in 1904, the Senate has taken a fairly robust view as to whether senators have been improperly obstructed, probably on the basis that senators are capable of looking after themselves. The greater emphasis has been on the protection of other persons, particularly witnesses before committees, and on the integrity of committee processes.

Other common contempts

By far the most commonly investigated contempts involve conduct by or in relation to witnesses appearing before Senate committees, including:

- the giving of false or misleading evidence; and
- interference with witnesses (for example by punishing them for having given evidence or by giving them an inducement not to give evidence).

The Privileges Committee publishes [summaries](#) of the many cases of possible contempt which it has investigated.

Penalties

In the worst cases, contempt may be punished by a term of imprisonment or the imposition of a fine. The Senate has never imposed such a penalty. Other penalties include admonishment or, in appropriate cases, the withdrawal of access to facilities at Parliament House (for example, the Press Gallery).

5. Matters of privilege

What is a matter of privilege?

A matter of privilege is any action which may constitute a contempt of the Senate and which the Senate may refer to its Committee of Privileges for investigation. The potential or actual improper interference caused by such conduct with the ability of a House, its committees or its members to perform their functions is a key factor in adjudging whether a contempt has been committed.

The following are examples of possible contempts:

- a witness gives evidence to a committee that he or she knows to be false
- a government agency punishes one of its officers for giving evidence to a committee that goes against the official agency line
- a potential witness is given an inducement not to give evidence to a committee
- a key witness is uncooperative at a committee hearing and refuses to provide documents sought by the committee
- a person threatens legal action against a senator to prevent him or her raising a particular issue in the Senate
- a member of a committee gives a copy of the committee's draft report to a journalist; the journalist writes an article about the implications of the committee's proposed recommendations and the article is published before the report is tabled; or
- a member of a committee gives a copy of a confidential submission received by the committee to a Minister's office.

The Privilege Resolutions set out procedures for the investigation of contempts and the criteria for determining matters relating to contempt. [Resolution 6](#) sets out a non-exhaustive list of matters that may constitute contempts.

Raising matters of privilege

[Standing order 81](#) sets out the procedure for raising matters of privilege in the Senate for investigation. The first step is for the senator who intends to raise the matter of privilege to write to the President of the Senate describing the matter.

The President is required to consider the matter against criteria which are also set out in the Privilege Resolutions ([Resolution 4](#)). In determining, as soon as practicable, whether to give precedence to a notice of motion to refer the matter to the Committee of Privileges, the President must consider:

- the principle that the Senate’s power to adjudge and deal with contempts should be used only where it is necessary to provide reasonable protection for the Senate and its committees and for senators against improper acts tending substantially to obstruct them in the performance of their functions, and should not be used in respect of matters which appear to be of a trivial nature or unworthy of the attention of the Senate; and
- the existence of any remedy other than that power for any act which may be held to be a contempt.

The President’s decision is conveyed to the senator and, in most cases, to the Senate. While the matter is under consideration by the President the senator concerned must not take any other action in relation to the matter or refer to it in the Senate.

In most cases, the President decides that the matter should be given precedence. After this decision is notified to the Senate, the senator concerned gives a notice of motion to refer the matter to the Committee of Privileges for inquiry and report. The notice appears at the top of the *Notice Paper* on the relevant day, under the heading “Matter of Privilege”. It is usually dealt with as formal business (see [Guide No. 8](#)—Notices of Motion) but if debate is required, a matter of privilege is dealt with ahead of all other categories of business (see [Guide No. 4](#)—Categories of Business). The question whether the matter be referred is then determined by the Senate.

If the President determines that a matter of privilege should not be given precedence, it remains open to the senator concerned to take any action that is in accordance with the rules of the Senate; for example, referring to the matter in debate or giving notice of a motion seeking specified action, including a reference to the Committee of Privileges. Again, it is then up to a majority of the Senate to decide if that action should be taken.

While only a senator may raise a matter of privilege (other than a right of reply or adverse reflection in committee evidence—see below), aggrieved persons may ask senators or committees to raise matters on their behalf.

6. The right of reply

[Privilege Resolution 5](#) sets out procedures for the protection of persons referred to in the Senate. The Senate was the first known legislature to provide persons referred to in proceedings with a right of reply where those persons felt adversely affected in reputation or in dealings with others, or injured in some sense, including by unreasonable invasion of their privacy.

Most Australian legislatures and others throughout the Commonwealth have now adopted similar procedures.

The right of reply consists of an opportunity for a person who claims to have been adversely affected through being named or otherwise identified in Senate proceedings to have a response incorporated in the parliamentary record. The person makes a submission to the President of the Senate requesting publication of a response. If the submission is not trivial or frivolous, the President refers it to the Committee of Privileges to ensure that the suggested response is not offensive and does not itself contain material that would unreasonably adversely affect or injure another person or invade their privacy or add to or aggravate any such adverse effect, injury or invasion of privacy.

The Committee does not inquire into the truth or merits of the statement in the Senate or the response, but if it is satisfied that a response should be published, it recommends that course of action to the Senate. All such recommendations have been accepted and the responses published in the Committee's report and incorporated in *Hansard*.

The procedure does not apply to Senate committees which are governed by other procedures for dealing with evidence that adversely reflects on another person. These procedures, which are contained in paragraphs (11) to (13) of [Privilege Resolution 1](#), also ensure procedural fairness.

7. Senators and parliamentary privilege

This section collects together aspects of parliamentary privilege, and its interaction with the “ordinary law”, that may be of particular relevance to senators in the performance of their duties.

Freedom of speech

As noted above, the most significant immunity encompassed by the term “parliamentary privilege” is often referred to as freedom of speech in parliament: words uttered and acts done in parliament are not actionable in a court of law. For example, a person cannot take action for defamation against a member of parliament on the basis of words spoken in parliament.

However, the protection does not apply if a member of parliament repeats those words outside of parliamentary proceedings.

Effective repetition

There have also been cases in recent years where courts (erroneously, on the parliamentary view) have allowed reference to be made to parliamentary statements for the purpose of defamation actions, to establish the meaning of statements made outside parliament. Members of parliament who have said words to the effect of “I stand by what I said in the chamber” or, “I do not resile from what I said in the chamber” have been sued for defamation on the basis that they have effectively repeated outside the parliament what was said inside (see the [134th Report of the Committee of Privileges](#), Effective Repetition).

The responsibilities of free speech

The Senate also agreed to a resolution in 1988 that enjoined senators to use their great power of freedom of speech responsibly, and to take into account:

- the damage that allegations made in parliament can do to the subject of the allegations and the institution of parliament
- the limited opportunity available to persons other than members of parliament to respond to such allegations
- the need for senators to have due regard to the rights of others; and
- the desirability of ensuring that any adverse reflections on a person are soundly based.

This exhortation is contained in [Privilege Resolution 9](#).

Interaction between privilege and other laws

Apart from the immunities conferred by parliamentary privilege on senators in the exercise of their duties, senators are subject to the ordinary law like any other person (see [Guide No.22](#) – Provisions governing the conduct of senators).

[Section 15](#) of the *Parliamentary Privileges Act 1987* indicates that the police may exercise in the parliamentary precincts the powers which they possess under the ordinary law. Likewise, electorate offices are within the jurisdiction of the ordinary law.

Senators have no overall immunity from subpoenas, orders issued by courts or tribunals for the discovery of documents, or search warrants. However, the use before a court or tribunal of documents so obtained is restricted by the law of parliamentary privilege.

See [chapter 2](#) of *Odgers' Australian Senate Practice*, under “Subpoenas, search warrants and members” for a discussion of the case law supporting an effective immunity from compulsory production of documents where the documents are so closely connected with proceedings in parliament that their production would involve unlawful questioning or impeaching of those proceedings, contrary to [section 16](#) of the 1987 Act.

Search warrants

In the only relevant Australian case involving the execution of search warrants on a senator's offices (*Crane v Gething*, see [chapter 2](#) of *Odgers' Australian Senate Practice*, under “Subpoenas, search warrants and members”), the court said that it did not have jurisdiction to determine whether parliamentary privilege prevented the seizure of documents by the police because the issue of search warrants is an executive act, not a judicial proceeding. The matter was returned to the Senate to sort out, which it did by engaging an independent third party to assess the documents and determine which ones were covered by parliamentary privilege (on the basis that all parties would accept the umpire's determination).

Since then, the Presiding Officers have entered into a [memorandum of understanding](#) with the Attorney-General and Minister for Justice, endorsing an [Australian Federal Police Guideline](#) on the execution of search warrants in members' and senators' offices.

The guidelines provide an opportunity for senators to claim parliamentary privilege over particular documents uncovered in the course of the search, and for such documents to be sealed and provided to a neutral third party pending a determination of the claim of parliamentary privilege.

Those arrangements were tested for the first time during an AFP investigation into a suspected leak from NBNCo. Three search warrants were executed, and numerous documents seized. Claims of privilege made by a senator and a member were referred to the privileges committees of their respective Houses. Each committee recommended that the claims be upheld, and each House resolved that seized material be returned to the parliamentarians making the claim (see the [163rd](#) and [164th](#) reports of the Senate Committee of Privileges and the [report of the House Committee of Privileges and Members' Interests](#)). A similar outcome was reached in another matter arising in 2018 (see the Senate Privileges Committee's [172nd](#) and [174th](#) report).

Are there any other immunities that apply to senators?

In addition to the major immunity of freedom of speech in parliament there are some minor immunities that preserve senators' freedom to attend parliamentary business without interference from the courts.

These minor immunities (which, in practice, rarely arise or are of little significance) are:

- the immunity from arrest in civil (as opposed to criminal) causes (codified in section 14 of the *Parliamentary Privileges Act 1987*)
- the exemption from jury service (codified in the *Jury Exemption Act 1965*); and
- the exemption from compulsory attendance in a court or tribunal (also codified in section 14 of the 1987 Act and limited to 5 days either side of a meeting of a House or committee).

The basis of these immunities is that the Senate has first call on a senator, particularly on a sitting day. This is also the basis for a resolution regarding the detention of a senator.

Detention of a senator

A [resolution of the Senate](#) of 18 March 1987 declares that it is the right of the Senate to receive notification of the detention of its members (and the cause thereof) including:

- from a court, where a senator is held in custody pursuant to an order or judgment by the court
- from the Governor-General, if a senator is held in custody by order of a court martial or officer of the Defence Force; and
- from the police, if a senator has been arrested.

For more information, see [Senate Brief No. 11](#)—Parliamentary Privilege; [Chapter 2](#) of *Odgers' Australian Senate Practice*.

Need assistance?

Advice on any of the matters covered by this guide is available from the Clerk of the Senate on extension 3350 or clerk.sen@aph.gov.au. Specific advice on the operations of the Committee of Privileges is available from the Secretary on extension 3360 or priv.sen@aph.gov.au.

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