

Franca Arena and Parliamentary Privilege*

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Although the federal and state parliaments of Australia have the power to alter the law of parliamentary privilege by legislation, some core element of parliamentary privilege may be constitutionally entrenched because it is essential for the ability of the parliaments to function, and to that extent parliamentary privilege may therefore not be amenable to alteration by statute.

This was perhaps the most interesting constitutional implication of the Franca Arena saga, which was played out in the New South Wales Parliament and the New South Wales courts and the High Court late in 1997.

Parliamentary privilege is a generic term which refers to legal immunities and powers of the houses of the various parliaments. Those immunities and powers are a notable feature of Anglo-American legislative institutions inherited from the British Parliament.

The Commonwealth Constitution provides in section 49 that the powers, privileges and immunities of each house of the federal Parliament may be declared by the Parliament, and, until so declared, are those of the House of Commons as at 1901. The constitution Acts of the various states, with the notable exception of New South Wales, contain similar provisions prescribing their immunities and powers by reference to those of the House of Commons at a particular date or for the time being. The New South Wales houses rely for their immunities and powers solely on common

* This article was first published in *Constitutional Law and Policy Review*, May 1998.

law, which determines the immunities and powers reasonably necessary for a legislature to function. All of the parliaments seemingly can alter their immunities and powers by legislation. Only at the Commonwealth level has this legislative power been utilised to any significant extent, and the Commonwealth *Parliamentary Privileges Act 1987* is only a partial codification of the existing law.

The identification of the immunities and powers of the houses is therefore largely a matter of consulting British common and statutory law on the subject. The content of that law is fairly well established. There is only one immunity of any substance possessed by the houses and their members: the immunity of parliamentary proceedings from any question or impeachment in any court or tribunal. This immunity is statutorily enshrined in article 9 of the Bill of Rights 1689 in the following terms:

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 immunity is usually referred to as freedom of speech in parliament, because it means that a member of parliament cannot be called to account before any court or tribunal for speeches in parliament. This famously has the effect that a member cannot be sued for defamation contained in a parliamentary speech. This characterisation of the immunity is somewhat misleading, because it has a much wider application. The houses and their members cannot be called to account in any way in legal proceedings for any of their parliamentary actions, and no body can inquire into proceedings in parliament except the houses themselves. This means, for example, that a royal commission or other commission of inquiry appointed by the executive government cannot inquire into proceedings in parliament.

The scope of the activities included in proceedings in parliament and therefore protected by the immunity is not entirely settled. Such proceedings are statutorily defined to include at the federal level, and are generally taken to include at the state level, all words spoken and actions done in the course of the transacting of parliamentary business and in the course of transactions closely associated with that business. There is room for dispute, however. In 1995 a Western Australian royal commission (the Royal Commission into Use of Executive Power) inquired into the circumstances surrounding the presentation of a petition to the Legislative Council. It was clear that the actual presentation of the petition was a proceeding in parliament and therefore not amenable to the inquiry. Some of the matters examined by the commission, for example, advice given by the Clerk of the Council to members, were arguably also protected by the immunity. A legal challenge to the commission by Dr Carmen Lawrence, who was involved in the matter, was not pursued to a conclusion.

The immunity known as freedom of speech in parliament has long been regarded as essential to allow a parliament to debate and inquire freely on behalf of the public without fear of retribution of any kind. Without it, members who would otherwise expose abuses through parliamentary forums could be harassed into silence by the executive government and other powerful interests using legal proceedings and executive-appointed inquiries.

The immunity adheres in the terms of article 9 of the Bill of Rights to the federal houses and those of the states with House of Commons immunities conferred by their constitutions. The New South Wales houses have a common law immunity which appears for practical purposes to be identical in content.

The only power of substance possessed by the houses is the power to punish contempts. This power principally supports the power to conduct parliamentary inquiries, and, for that purpose, to compel the attendance of witnesses, the giving of evidence and the production of documents, and to punish defaults as contempts. Because the New South Wales houses do not statutorily possess House of Commons powers, their power to punish contempts appears to be more circumscribed than that of their counterparts in other jurisdictions.

In recent years there has been concern about the ability of members of parliament to abuse their freedom of speech by recklessly defaming in their speeches persons who then have no redress. This has led to the adoption by various houses, starting with the Australian Senate in 1988, of procedures whereby such persons may make a privileged response to allegations made about them in the houses. An incidental effect of the Franca Arena affair, as it may now be known, was the adoption of those procedures by the New South Wales Legislative Council. It is conceded by their proponents that the procedures provide only limited and often delayed redress, and are inadequate when very serious and damaging allegations of official corruption are made under parliamentary privilege.

Such was the case with speeches made in the Legislative Council by the Honourable Franca Arena. Mrs Arena's contributions culminated in a speech in the council on 17 September 1997 in which she alleged, in effect, that there was a conspiracy between the Premier, the Leader of the Opposition and the royal commissioner inquiring into alleged police protection of paedophilia, Justice Wood, to suppress findings against 'people in high places'.

This allegation was so politically damaging that political leaders considered that it was essential to conduct some inquiry into it.

The most readily available and, because of parliamentary privilege, the only lawful avenue of inquiry would have been an inquiry by the council itself through one of its committees. This was apparently the only form of inquiry acceptable to Mrs Arena. While the council, as has been indicated, possesses powers of inquiry theoretically adequate to the task, such a treatment of the matter would have had a great political drawback: it could be seen as politicians inquiring into themselves. There is also a parliamentary rule of comity between houses that one house does not inquire into the conduct of members of the other house, except ministers acting in that capacity. An inquiry by the council into Mrs Arena's allegations would involve inquiry into the conduct of members of the assembly.

For these reasons some independent commission of inquiry was called for. To any such body, however, the law of parliamentary privilege opposed a barrier. Mrs Arena's speech was undoubtedly a proceeding in Parliament and therefore could not be the subject of inquiry by any body other than the council itself. Attention was

therefore directed to the possibility of the Parliament using its legislative powers to alter its immunities so as to permit an inquiry into Mrs Arena's allegations.

This was the course adopted, but it was approached with great caution. The importance of freedom of speech in parliament to the operation of a parliamentary system, and the danger of legislative dilution of that immunity, obviously weighed heavily on the minds of the legislators. The statute which was eventually passed¹ provided that a house of the Parliament could by resolution authorise a special commission to inquire into and report to the house on a specified matter relating to its proceedings. Such a provision would seem to be sufficient in itself to overcome the problem of parliamentary privilege, because any inquiry under the provision would clearly be an inquiry by the council itself into its own proceedings, through an agent authorised by the council. The clarity of the provision was diminished by an involvement of the state Governor in setting the commission in motion and receiving its report; no doubt this was done to retain some control by the government over inquiries initiated by the council. Further precautions, however, were taken. In order for the special commission to proceed with an inquiry, a house would have to declare by resolution that parliamentary privilege would be set aside to the extent required for the inquiry. Such a waiving of parliamentary privilege would not operate to set aside the privilege attaching to the contributions to parliamentary proceedings of an individual member, but would authorise the member to give evidence voluntarily before the special commission. Resolutions under the provisions would require a two-thirds majority of the members present and voting.

Mrs Arena challenged the validity of this legislation in the courts. Given that parliamentary privilege at state level is a matter on which the state parliament may legislate, there was obviously considerable difficulty in advancing coherent and persuasive grounds of challenge. Several grounds were raised, the principal ground being that parliamentary privilege is essential for the operation of a legislature and therefore cannot be legislatively waived. The Supreme Court of New South Wales rejected the challenge to the statute without giving any credence to this argument. Leave to appeal to the High Court was sought, but was refused. In the course of refusing leave, Chief Justice Brennan made the following significant observations:

The critical question on the present application is whether the Act so affects the parliamentary privilege of free speech that it invalidly erodes the institution of Parliament itself. If an affirmative answer could be given to that question, the applicant would have made a case for the grant of special leave. But whatever limits there might be upon the powers of Parliament legislatively to affect its privileges, it is not possible to regard this Act as exceeding those limits. ... Nothing that we have said should be thought to diminish the importance which the Courts have traditionally accorded to the privileges of the Parliament ...²

This raises the possibility that a different statute, less carefully crafted, might have been held to be invalid on the stated ground. To some extent the law of parliamentary privilege may be constitutionally entrenched notwithstanding the power of

¹ *Special Commissions of Inquiry Amendment Act 1997*.

² *Arena v Nader and Others* [1997] 42 NSWLR 427 at 1605.

parliaments to alter it by legislation, a power which, it might have been thought hitherto, is unlimited. If a malign majority in a parliament were to legislate, say, to take away the immunity of individual members and allow them to be prosecuted for their parliamentary actions, the courts might well strike down such legislation as taking away something essential to the very institution of parliament.

There have been other judicial hints that there may be some basic constitutional and common law principles beyond repudiation by statute although they are not explicitly constitutionally entrenched or even constitutionally implied. This notion has been suggested even in relation to the states, notwithstanding that their parliaments were long thought to have inherited untrammelled legislative sovereignty from the British legislature. Parliamentary privilege, or at least freedom of speech in parliament, may be added to the list of matters thought by some to have this sacred status.³

A special commission, duly authorised by the Legislative Council, and consisting of Mr J.A. Nader, QC, a retired judge of the Supreme Court of the Northern Territory, inquired into Mrs Arena's allegations. Mrs Arena declined to give evidence before the commission. The commission found that there was no evidence to support her allegations and dismissed them accordingly.

The question of the propriety of her conduct was then referred to the Legislative Council Privileges and Ethics Committee, which is to consider a suggestion that she be expelled from the council. The power to expel a member is undoubtedly possessed by the New South Wales houses and by houses with House of Commons powers, but was denied to themselves by the federal houses in their 1987 legislation.

The council also referred to the Police Commissioner documents provided by Mrs Arena in support of her allegations. A report by the commissioner is to be considered by the Privileges and Ethics Committee.

The special legislation passed by the New South Wales Parliament is to expire in accordance with a sunset clause contained in it.

The lesson will no doubt be drawn from this case by parliaments that they must be very careful in legislating in the area of parliamentary privilege; they cannot assume that their legislative power is at large. Any adventurous tampering with the basics may invite equally adventurous judicial review.

In recent times, indeed, there has been something of a spate of court cases on parliamentary privilege. This is largely due, no doubt, to the increasing number and importance of parliamentary committee inquiries and upper houses kicking over the traces of government control. In another New South Wales case, *Egan v Willis and Cahill*,⁴ the Supreme Court was called upon to determine the extent of the Legislative Council's power to compel the production of documents by a minister. The Court found that the council possesses the power to order the production of documents, and

³ This matter is analysed by G. Winterton, 'Constitutionally entrenched common law rights: sacrificing means to ends?', in C. Sampford and K. Preston, *Interpreting Constitutions*. Leichhardt, NSW, Federation Press, 1996, pp. 121–45.

⁴ [1996] 40 NSWLR 650.

acted within its powers in suspending a minister from the council as a penalty for failure to produce documents in accordance with an order. The case has gone to the High Court. Also before the High Court are two cases concerning federal parliamentary privilege, *Katter v Laurance* and *Rowley v O'Chee*, both originating in Queensland. The first involves the use of statements in parliament to elucidate statements outside parliament which are the subject of defamation action; the second involves a claim by a senator to immunity from orders for discovery of documents provided to the senator for the purpose of proceedings in the Senate. The scope of freedom of speech in parliament is therefore in issue in both cases. It seems that the courts will become more involved in determining questions of parliamentary privilege. The very extensive American case law on the subject, which was referred to in the Egan case, may be influential in this process. It will not be a matter of judicial activism, but of parliamentary activism drawing in the courts.