THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

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COMMITTEE OF PRIVILEGES

MATTERS ARISING FROM 67TH REPORT OF THE COMMITTEE OF PRIVILEGES

92ND REPORT

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MATTERS ARISING FROM 67TH REPORT OF THE COMMITTEE OF PRIVILEGES

92ND REPORT

1. On 12 April 2000, the Honourable Justice Jones of the Supreme Court of Queensland brought down a judgment in a defamation action between Michael Rowley as plaintiff and David Armstrong as defendant. These proceedings were one of the subjects of the 67th Report of the Committee of Privileges tabled in the Senate on 3 September 1997 and adopted on 22 September 1997.

2. The judgment was drawn to the committee's attention by the Clerk of the Senate, when he forwarded a letter dated 28 April 2000 from the solicitor acting for Mr Armstrong in his litigation with Mr Rowley, asking whether the Senate would fund an appeal against the judgment of Jones J. on 12 April 2000 or seek to enter an appearance at the hearing of such an appeal. This was later followed by correspondence from Mr Armstrong and former Senator O'Chee, both of whom were involved in the committee's inquiry leading to the 67th Report.

3. While the committee was unable to assist in the terms sought by Mr Armstrong's solicitor, it was so concerned about the issues raised by the judgment that it decided to seek advice from the Clerk of the Senate and, with the approval of the President of the Senate, from Mr Bret Walker SC. The advices are attached as appendices to this report.

4. The committee decided to prepare the report as a matter of urgency to ensure that the advices are publicly available and widely disseminated. It will give more detailed consideration to other issues raised in the correspondence from Mr Armstrong and former Senator O'Chee in due course.

Robert Ray
Chair

APPENDIX A

hc/let/12849

17 May 2000

Senator Robert Ray
Chair
Senate Committee of Privileges
The Senate
Parliament House
CANBERRA ACT 2600

Dear Senator Ray

PARLIAMENTARY PRIVILEGE – *ROWLEY V ARMSTRONG* – JUDGMENT OF JONES J

Thank you for your letter of 12 May 2000, in which the committee seeks extended comment on the judgment of Jones J delivered on 12 April 2000 in *Rowley v Armstrong.*

It is difficult to comment further on the judgment because it is so thin, and much of the short compass which is devoted to the question of parliamentary privilege is occupied by quotations which have little or nothing to do with the question at issue. I hope, however, that the following further observations may be of some use to the committee.

The judgment was delivered on an application by Mr Armstrong to have the action against him by Mr Rowley struck out on the grounds of unreasonable delay and abuse of process. The latter ground was based on the finding by the committee that the action constituted a contempt of the Senate and on the argument that the communication between Mr Armstrong and Senator O'Chee which is the subject of the action was protected by parliamentary privilege. By the second ground, therefore, the court was asked to find whether there was abuse of process in the pursuit of the action. It was not necessary for Jones J to determine the question of parliamentary privilege in order to ascertain whether there was abuse of process. A finding that there was no abuse of process would have left the question of privilege to be determined in the subsequent course of the proceedings. Jones J, however, pronounced on the question of parliamentary privilege.

Given that he decided to do so, the question for determination was whether the communication between Mr Armstrong and Senator O'Chee was related to proceedings in the Senate to the extent that the communication could be said to be for purposes of, or incidental to, those proceedings. This question would turn on the character of the communication and its relationship with proceedings in the Senate. The judgment, however, does not consider the character of the communication or its relationship with Senate proceedings. Jones J manages to avoid any such consideration in the course of the judgment. He simply comes to a general conclusion that "an informant in making a communication to a parliamentary representative

is not regarded as participating in 'proceedings in Parliament' and therefore the provisions of the *Parliamentary Privileges Act* do not apply", and he applies that general conclusion to the particular communication in question.

Contrary to the judgment, this general conclusion is not one which "follows clearly enough" from the matters cited by Jones J, a point to which I shall return. In any event, no such general conclusion can be drawn. Whether the provisions of the Parliamentary Privileges Act apply depends on whether the communication is for purposes of, or incidental to, parliamentary proceedings. The character of the particular communication and its relationship with proceedings has to be examined. No one has ever claimed that *any* communication with a member of Parliament is protected by parliamentary privilege. Jones J has not only determined a question unnecessarily but has mistaken the question to be determined.

The section of the judgment dealing with parliamentary privilege quotes the Parliamentary Privileges Act, and very nearly states correctly the question in issue (referring to "the position in particular", but then failing to return to the particular position). It then diverts to the principle of "the Court's reluctance to interfere with the activities of the parliamentary and executive areas of governments". This issue is illustrated by a long quotation from *Criminal Justice Commission v Nationwide News Pty Ltd*. It is not clear whether this issue was raised by the applicant as an additional support for the application, but it has nothing to do with the case. The question of whether some parliamentary and executive activities are non-justiciable is irrelevant to the question of whether, as a matter of law, a particular communication with a member of Parliament is protected by parliamentary privilege. The judgment then leaves this issue without relating it to the case, and observes that the scope of parliamentary privilege and the Commonwealth and Queensland statutes have been examined in *Laurance v Katter* and *Rowley v O'Chee.* It is then stated that "it is not necessary to re-canvas the issues decided in each of those cases". It is left to the reader to puzzle over the relevance which those judgments were thought to have to the case, because no conclusion is drawn about their relevance.

The judgment then launches into a long quotation from *Rost v Edwards*. This quotation refers to ousting the jurisdiction of the courts, which has no relevance to the interpretation of the provision in the Parliamentary Privileges Act, and it then states that there is no exhaustive definition of proceedings in Parliament. The latter observation, in a British case, refers to the British situation in which there is no statutory equivalent of section 16 of the Parliamentary Privileges Act. It has nothing to do with the task of an Australian court of interpreting that Act. The judgment then baldly states the conclusion that "the defendant's act of communicating with the Senator was not 'a parliamentary proceeding' as that term is contemplated by the statute". That is not a difficult conclusion, but it either avoids or misunderstands the question in issue. The question is whether the communication was for purposes of, or incidental to, parliamentary proceedings, as contemplated by the statute.

The judgment then refers to article 9 of the Bill of Rights of 1689, unnecessarily, as that provision is encompassed and explicated by the Parliamentary Privileges Act. This is followed by a quotation from the judgment in *Hamilton v Al Fayed*, which simply states that parliamentary proceedings are protected in two different ways in court proceedings. Indeed they are, but the question is the relationship of Mr Armstrong's communication with proceedings in Parliament. The quotation adds nothing to that question, and the quoted judgment was not concerned with that issue.

The judgment then proceeds to one of only two relevant authorities which are cited. This is a passage in Erkine May's *Parliamentary Practice,* to which attention was drawn by Sir James Killen, junior counsel for Mr Rowley. This quotation contains the sweeping statement that no protection is afforded to informants of members of Parliament, regardless of whether information is subsequently used in parliamentary proceedings. There are several difficulties with this passage which are unperceived by Sir James Killen or Jones J. Even if it were an accurate summary of the law in the United Kingdom (which it is not, because the question in issue has not been adjudicated there), it would be of no help in interpreting the Australian statute. The passage is directed to the question of whether the House of Commons may protect members' informants by the exercise of its contempt jurisdiction. This is quite different from the question of whether a communication with a member is protected by parliamentary privilege as a matter of law, a distinction to which I shall return. Even as a statement of the House of Commons' exercise of its contempt jurisdiction, however, the passage is defective. It is based on two cases in the 1950s involving communications with members. In one case the House declined to refer a matter of alleged interference with a communication with a member to the Privileges Committee. There were several relevant considerations, apart from an argument, advanced by Winston Churchill, that protection should not be extended to such communications. The Speaker had ruled that the matter could not have precedence because it was not raised at the earliest opportunity, and it was pointed out that the communicant, a clergyman, was merely rebuked by an ecclesiastical superior, a bishop, who had no power to interfere with the clergyman's political activities in any event. In the second case the Committee of Privileges was able to recommend that no action be taken, on the basis that members of the armed forces were involved and it was a matter of military discipline, because government regulations conferred a right on members of the armed forces to communicate with members of Parliament. The two cases cannot be regarded as determining for all time that the contempt jurisdiction will never be exercised to protect a communication with a member.

The judgment then provides a long quotation from Fleming's *Law of Torts* which states that absolute immunity is an aid to the efficient functioning of the legislature, the executive and the judiciary, but which throws no light on the point in question.

The judgment then proceeds to its only other authority, the finding of the Supreme Court of New South Wales in *R v Grassby*, which is quoted at great length. It was there held that the communication of a document to a member of Parliament was not protected by parliamentary privilege. There are several factors involved in this judgment which render it of little assistance. In the first place, it was concerned with the law of parliamentary privilege applying to the Houses of the Parliament of New South Wales, where there is no constitutional or statutory prescription of parliamentary privilege. The protection of the proceedings of the Houses in that state depends on a common law doctrine that the Houses, their committees and members have such protections as are reasonably necessary to allow them to perform their functions. The judgment therefore is of no help in interpreting the Commonwealth Parliamentary Privileges Act. The circumstances of the judgment are also significant. The case was one of an unsolicited communication to a member which had no connection whatsoever with any proceedings in Parliament, actual or potential. The judgment is therefore of little use in determining the position, under Commonwealth law, of a communication which has a very different relationship with proceedings in Parliament.

Jones J then quotes a long passage from the judgment in *O'Chee v Rowley*. The passage deals with some irrelevant points, such as whether an individual member of a House may waive the protection of privilege, and it has only one sentence which is remotely relevant: "The

privilege under s.16(2) attaches when, but only when, a member of Parliament does some act with respect to documents for purposes of, or incidental to, the transacting of House business." This sentence should have suggested to Jones J the question to which he should have directed his attention, namely, whether the communication between Mr Armstrong and Senator O'Chee had a sufficiently close connection with proceedings in Parliament to attract the protection of the statute. On the contrary, the passage suggested to Jones J only that an informant is never protected in making a communication with a member.

The judgment then proceeds to dismiss with great brevity the significance of the Senate Privileges Committee determining that the action against Mr Armstrong was a contempt. The question of whether the action was a contempt, however, was carefully distinguished by the committee from the question of whether Mr Armstrong's communication with Senator O'Chee was protected from legal action by parliamentary privilege. Jones J is not alive to that distinction. He says that the finding of the committee "does not in any way affect the rights of the plaintiff in this instance to pursue his claim and for the Court to determine the question of liability in circumstances of any claim of privilege which the defendant is entitled to raise". So the judgment comes back to the question which, as this sentence appears to suggest, can only be determined in the course of the proceedings on the action brought by Mr Rowley. Oblivious to his own suggestion in this sentence, however, Jones J has already determined the question which it was not necessary for him to determine.

While quoting passages which he thought supported his general conclusion (although most of them do not), Jones J ignored other passages which should have suggested to him that he should not be so ready to conclude that communications with a member of Parliament are never protected. He might have been cautioned by McPherson JA's acceptance in *O'Chee v Rowley* of the proposition that "threats of proceedings being taken against his informants had the effect of discouraging them from providing further information about Mr Rowley's activities, and so of restricting the senator's ability to pursue the subject in the House", and the same justice's reference to the American courts' acceptance of the principle that court processes are capable of having a "chilling" effect on legislative activity by hampering the ability of the legislature "to attract future confidential disclosures necessary for legislative purposes" (1997 150 ALR 199 at 212 and 214). That reference might have led Jones J to the conclusion, in the judgment cited by McPherson JA, that allowing legal processes to reach evidence "that Congress *had not prepared itself* [emphasis added] …. certainly would 'chill' any congressional inquiry; indeed, it would cripple it" (*Brown and Williamson Tobacco Corp v Williams*, 1995 62 F 3d 408, at 417 and 419). He might also then have discovered that information-gathering for legislative purposes, including information-gathering from constituents, has been held to be protected (*United Transportation Union v Springfield Terminal Railway Co.*, 1990 132 FRD 4, and the order of 15 March 1989 made in that case).

Analysis of the judgment therefore leaves us simply with the finding that an informant is never protected in communicating with a member of Parliament, and with a collection of quotations which do not support such a conclusion.

I would be pleased to provide any future assistance to the committee in its examination of this matter.

Yours sincerely

(Harry Evans)

APPENDIX B

AUSTRALIAN SENATE
COMMITTEE OF PRIVILEGES

Rowley v. Armstrong

OPINION

I am asked to advise the Committee of Privileges about the interlocutory judgement of Jones J. of the Supreme Court of Queensland in the defamation action between Michael Rowley as plaintiff and David Armstrong as defendant. These proceedings were one of the subjects of the Committee's 67th Report delivered in September 1997 and adopted by the Senate on 22nd September 1997.

2. The applications decided by Jones J. involved three issues, only one of which is material for consideration by the Committee of Privileges. The two presently irrelevant issues involved the defendant's contention that the action should be struck out by reason of the plaintiff's want of prosecution, and the answering claim by the plaintiff that he should be permitted to take a fresh step in the action. Although the facts and law appropriate to these two issues were obviously critical to the judge's decision and reasoning, and are crucial as between the parties to the action, I make no further comment about them because they do not raise issues of the kind which would concern the Committee. However, their existence does serve to emphasize the interlocutory and arguably obiter nature of James J.'s conclusions about the third issue, which is of concern to the Committee.

3. That issue arose because the defendant contended that the action should be struck out on the ground that it was an abuse of process in light of his argument that the communication

in question was to then Senator O'Chee and was protected by parliamentary privilege so that pursuit of the action would amount to a contempt of the Senate.

4. On 12th April 2000, Jones J. delivered his reasons for dismissing the defendant's application, including on the ground that there was no abuse of process by reason of claimed parliamentary privilege. The Committee has received a request from Mr. Armstrong, the unsuccessful defendant/applicant, for help in meeting the costs of a proposed appeal against this interlocutory decision. I note that the Committee's 67th Report concluded, at [2.49], by explicitly contemplating that the proceedings *Rowley v. Armstrong* would proceed to an "*outcome*". The effect of the interlocutory decision by Jones J. is that the case can proceed. In practical terms, therefore, the result of his Honour's recent decision is to permit proceedings to continue which the Committee and the Senate contemplated would continue - albeit after a delay somewhat longer than I would have regarded as reasonable.

5. The Committee may well feel concerned about Jones J.'s approach to the issue which raised parliamentary privilege, given that his Honour's reasoning both ignores as a matter of consideration and contradicts as a matter of conclusion the Committee's 67th Report. That Report adopted, at [2.2] and [2.4], views expressed by the Clerk of the Senate to the effect that the *Parliamentary Privileges Act 1987* rendered the protection of parliamentary privilege available for some categories of "*communications of information to senators by other persons*". By contrast, the Queensland judge has concluded, at [34], that it followed *"clearly enough*" from certain citations to which I will shortly turn *"that an informant in making a communication to a parliamentary representative is not regarded as participating in 'proceedings in Parliament' and therefore the provisions of the Parliamentary Privileges Act do not apply*".

6. It must be stressed that the issue before Jones J. was whether the proceedings should be stopped in their tracks as an abuse of process. It was not an occasion when a final or binding conclusion on any issue of fact or law could be determined. Indeed, his Honour reflected that quality of the interlocutory application before him, when he immediately followed the conclusion I have quoted in 5 above by the comment, at [35], that this Committee's ruling upon the questions raised by Senator O'Chee did not in any way affect the need *"for the Court to determine the question of liability in circumstances of any claim of privilege which the defendant is entitled to raise*", in a context which clearly contemplates that these matters are yet to be determined and will therefore be determined only in a final hearing, at the trial of the action.

7. Although there may be some ambiguity involved in his Honour's reference to *"privilege"*, the better view is that all he has purported to do, or could do, was to decline to hold that the proceedings were an abuse of process, the abuse being constituted by the supposedly inevitable success of a parliamentary privilege argument. In my opinion, rejection of the defendant's contention that the proceedings were an abuse of process certainly does not amount to a finding that the parliamentary privilege argument is bound to fail. (I hold this view, notwithstanding the capacity in some cases, and in appropriate circumstances where e.g. the facts are virtually uncontested, for a court to determine matters of law - even difficult matters of law - on a virtually final basis for the purposes of determining whether proceedings would be (technically) an abuse of process on the ground that they are bound to fail by reason of some critical issue of law. Clearly enough, Jones J. did not proceed to take that course.)

8. For these reasons, and quite apart from the defects of consideration and conclusion to which I will now turn, the interlocutory judgement of Jones J. in *Rowley v. Armstrong*,

delivered on 12th April 2000, is unlikely to be regarded as adding anything appreciable to the jurisprudence of parliamentary privilege.

9. As Jones J. correctly observed, at [19], the argument about parliamentary privilege turned on the provisions of sec. 16 of the *Parliamentary Privileges Act*. That Act, by its long title, sets out *"to declare the powers, privileges and immunities of each House of the Parliament…* " a verbal formulation which is plainly designed to invoke the provisions of sec. 49 of the *Constitution.* The power of the Commonwealth Parliament to enact the provisions, especially those of sec. 16 to which I next turn, is well grounded in sec. 49 and can no doubt extend incidentally by means of placitum 51 (xxxix.). It is also clear that the purpose of sec. 5, and I advise its effect as well, is to ensure that the Parliament did not by its 1987 statute lose any of its Constitutional privileges, which were stipulated by sec. 49 to be those of the House of Commons in Westminster in 1901. In short, except by express provision, the Act does not detract from any of the House-of-Commons-equivalent privileges of the Senate.

10. At least, it is clear that this is the intended purpose of sec. 5 of the Act. I reserve, as not presently relevant, the fundamental question whether any legislation substantively or substantially affecting any of the privileges of the Senate can be enacted without thereby, and by that fact, removing the House-of-Commons equivalence. That argument, which turns on the phrase *"and until declared shall be …*", in sec. 49 of the *Constitution*, awaits another day: cf. *R. v. Richards; ex parte Fitzpatrick and Browne* (1955) 92 C.L.R. 157 at 168. In any event, in my opinion the effect of sec. 5 of the Act is to give statutory force to the sec. 49 pre-declaration privileges, subject only to express provision *"otherwise*" in the Act.

11. It is necessary to note the unsatisfactory provisions of sub-sec. 16(1) of the Act before passing to the critical provisions of sub-sec. 16(2). Perhaps the opening words of sub-sec. 16(1) signal the uncertainty of its endeavour: in any event, its effect seems to be that Article 9 of the *Bill of Rights* is supposedly applied to the Parliament including its Houses and thus the Senate, but as such is to have the effect of the other provisions of sec. 16 *"in addition to any other operation*". I suspect these provisions will have a troublesome application in future circumstances. Fortunately, I do not believe that sub-sec. 16(1) will have that effect in this case, because on any view Article 9 does not expressly address words or acts done *"for purposes of or incidental to*" the business of the Senate, and thus the terms of sub-secs. 16(2) and (3) govern the position. It is for these reasons that it becomes, in my opinion, inappropriate to focus the relevant enquiry upon the position in Westminster as at 1901.

12. The provisions of sub-sec. 16(2) of the Act pivot on the notion of *"the transacting of the business of a House…* ". This is the definitional framework within which the expression *"proceedings in Parliament"* is defined by sub-sec. 16(2). Its definition commences by the expression *"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…*". It is the words to which I have given emphasis in this quotation which determine the issue which will eventually be before the Supreme Court of Queensland at the final trial of the action in *Rowley v. Armstrong*, and which were fundamental to the interlocutory issue considered by Jones J.

13. The expressly non-exhaustive examples of words and acts within this definition of *"proceedings in Parliament*" include para. (c), viz. *"the preparation of a document for purposes of or incidental to the transacting of any such business*". In my opinion, the antecedent of the demonstrative adjective *"such*" in that phrase includes the kind of business referred to in paras. (a) and (b) of sub-sec. 16(2), as well as the quintessentially Parliamentary

business of debate on proposed legislation, questions, and statements by Members on matters of public importance.

14. As accepted by Jones J., and as found in the Committee's 67th Report, the communications by Mr. Armstrong to Senator O'Chee, for which Mr. Rowley now sues Mr. Armstrong in defamation, were made for the purpose of Senator O'Chee using that information *"in Senate proceedings*". The proceedings in question included a question of a Minister representing a relevant Minister, a speech on the adjournment and a further question (see the 67th Report at [1.7] and [1.8]).

15. In my opinion, on the basis of this finding by the Committee, there is no doubt that the communication by Mr. Armstrong to Senator O'Chee must be treated by all courts in Australia as being *"proceedings in Parliament*" for the purposes of sub-sec. 16(3) of the Act.

16. I interpolate that the provisions and reasoning referred to in 11 and 12 above sufficiently demonstrate that the preposition *"in*" used in that phrase cannot be taken literally as meaning events occurring inside the Chamber of the Senate or in its traditional precincts. I further interpolate that there can be no doubt about the subjection of the Supreme Court of Queensland to the provisions of sec. 49 of the *Constitution* and sec. 16 of the Act, given covering cl. 5 of the *Constitution Act* and sec. 109 of the *Constitution*.

17. In my opinion, the reasoning of Jones J. fails to engage with these critical matters of statutory interpretation. His Honour's approach can be mapped as follows. He starts by extracting the relevant provisions of sub-secs. 16(2) and (3) of the *Parliamentary Privileges Act* (at [19]). He irrelevantly refers to the judicial doctrine of reticence in relation to the activities of the other arms of government (at [21] and [22]). He briefly touches on the recent

decisions of the Queensland Court of Appeal in *Laurance v. Katter* [2000] 1 Qd. R. 147 (decided in 1996) and *Rowley v. O'Chee* [2000] 1 Qd. R. 207 (decided in 1997), noting his view that it was *"not necessary to re-canvass the issues decided in each of those cases*" (at [23]).

18. It is regrettable that Jones J. passed over those authorities in this fashion, given the centrality of sub-sec. 16(3) of the Act to the former decision and the centrality of sub-sec. 16(2) of the Act to the latter decision - and the centrality of both those provisions to the question before his Honour. In *Laurance v. Katter*, over the powerful dissent of Fitzgerald P., which in my respectful opinion properly found and applied the law, Pincus J.A. held that sub-sec. 16(3) was unconstitutional in its claimed application to the defamation action considered in that case, and Davies J.A. more narrowly construed the Article 9 notion of impeaching or questioning parliamentary proceedings than the learned President construed it. There was thus no majority for the non-application of the protection of the Act in relation to communications with a Senator for the purposes of the Senator participating in proceedings inside the Chamber. Unfortunately, Jones J. does not explain how, if at all, he applied any part of the split majority reasoning in *Laurence v. Katter* to support his own conclusion.

19. As to *Rowley v. O'Chee*, again over the powerful dissent of Fitzgerald P. on certain important aspects, the actual result of the reasoning and decision of McPherson J.A. and Moynihan J., to some extent also supported by the learned President, emphatically accepted the extension by sub-sec. 16(2) of the Act to cover communications broadly similar to those in question in the proceedings considered by Jones J. It is very difficult to understand how Jones J. felt able to confine his consideration of the matter to the quotation extracted, at [33], from McPherson J.A.'s reasoning at [2000] 1 Qd. R. 224.41 - 225.8. However, it is obscure, to put it mildly, what *"the very issue*" was considered by Jones J. to be, which he thought was

dealt with by that quoted extract - which deals in unexceptionable manner with two matters of substance, first the presently irrelevant matter of the sufficiency of evidence that a threatened breach of privilege interfered with the Senator's ability to pursue a subject in the House, and second the equally presently irrelevant matter of the privilege pertaining to Parliament rather than to the Senator or his informants.

20. To return to the map of Jones J.'s reasons. Following this unproductive reference to the authority noted in 17 - 19 above, his Honour turned to cite an English decision, viz. *Rost v. Edwards* [1990] 2 Q.B. 460 at 478, to no particular effect (at [24]). The passage quoted from that authority manifestly does not inform the interpretation of sub-sec. 16(2) of the Act, and does not draw definitional lines which may have been persuasive for the case before his Honour. It is, nonetheless, immediately following that citation where his Honour concluded that Mr. Armstrong's *"act of communicating with the Senator was not 'a parliamentary proceeding' as that term is contemplated by the statute …*" (at [25]). It is simply not possible, to that point in his reasons, to descry how the authorities cited by him, or other reasoning, led to that conclusion.

21. The difficulty continued (at [27]), when his Honour described Article 9 of the *Bill of Rights* as the *"starting point*" and cited four decisions, three of which concerned Westminster and one of which concerned the Westminster equivalent in New Zealand, and none of which moved from the historical genesis in Article 9 to the present statutory expression in sub-sec. 16(2) of the Act. The quotation from the reasons of the Court of Appeal (of England and Wales) in *Hamilton v. Al Fayed* [1999] 1 W.L.R. 1569 at 1585H illustrates the difficulty in this part of Jones J.'s reasons, not least because the Court of Appeal, whose judgement was delivered by Lord Woolf M.R., cast some doubt (without any decision) on the authority of

Rost v. Edwards - specifically on Popplewell J.'s approach to the definition of *"proceedings in Parliament*".

22. And in *Hamilton v. Al Fayed* itself, it was decided that an inquiry and report by a Commissioner, who was not a Member of Parliament amounted to proceedings in Parliament including for the purposes of Article 9. There is no exploration by Jones J. of how that expansive definition supported his conclusion. Of course, in my opinion, an English interpretation of Article 9 in an English case is not authority which has any particular usefulness in construing the special words of sub-sec. 16(2) of the Act, which very overtly extend beyond the words of Article 9.

23. Next, Jones J. quoted two passages from textbooks, the first from the 21st edition of *Erskine May*, at 133, commencing with the assertion that the protection of parliamentary privilege was not *"afforded to informants … who … provide information to members*" (at [28]). It is very clear that this esteemed work of authority was not opining, and could not be taken as opining, on the meaning of the words in sub-sec. 16(2) of the Act which explicitly extended the definition of *"proceedings in Parliament*", being the critical phrase which provides the touchstone for the protection given by Parliamentary privilege. This first citation is therefore quite inadequate to support Jones J.'s conclusion.

24. The second textbook citation by Jones J. has nothing whatever to do with the issue before his Honour. It consists (at [29]) of anodyne generalizations about certain privileges, and neither constitutes authority nor persuasive opinion on the question before his Honour. I intend no disrespect to Professor Fleming, its author (the work being his famous *Law of Torts*, 7th edition), it being crystal clear that the passage could not have been written with anything like the provisions of sub-sec. 16(2) of the Act in mind.

25. Finally, in the set of *"references*" from which Jones J. said his conclusion followed *"clearly enough*" (at [34]), his Honour cited and quoted relatively extensively from the decision of Allen J. at first instance in the Supreme Court of New South Wales, *R. v. Grasby* (1991) A. Crim. R. 419. This is a decision about the privileges of the Houses of the New South Wales Parliament, and is thus manifestly not an authority about sub-sec. 16(2) of the Act. Nothing in the reasons of Allen J. touches on the relevant statutory issue argued before Jones J. I am at a loss to understand how this was considered the precedent which justified the most extensive quotation in his Honour's reasons.

26. For all these reasons, there are profound weaknesses in the reasoning of Jones J. In my opinion, for the same reasons, his Honour's conclusion on the ambit of Parliamentary proceedings for the purpose of considering the question of Parliamentary privilege under the Act is fatally flawed, and of no weight whatever as an authority.

27. It is, sometimes, an appropriate response to a very weak judicial decision to ignore it, confident in the expectation that it will not affect the body of doctrine. I am tempted to this view in relation to *Rowley v. Armstrong*. However, in my opinion the egregious deficiencies in the decision should be addressed by an appellate court not least because the conclusion about sub-sec. 16(2) is so clearly wrong and may thus mislead in other proceedings.

28. On the hearing of an appeal, it is likely that proper doctrine would be upheld, by vindication e.g. of the reasoning adopted by the Committee in its 67th Report, being reasoning which accords with the Queensland Court of Appeal approach in *Rowley v. O'Chee*. This result would considerably strengthen the intended effect of sub-secs. 16(2) and (3), including lifting the chilling effect of uncertainty from would-be informants to Members of Parliament. On the other hand, the Court of Appeal may not regard the matter as one where the

proceedings should have been dismissed as an abuse of process - but this is not a matter which I will further consider.

29. Finally, since the decision of Jones J. in *Rowley v. Armstrong* there has been delivered the very interesting decision of the Full Court of the Supreme Court of South Australia, sitting a bench of five, in *Rann v. Olsen* [2000] SASC 83. Nothing in the main reasons of their Honours (particularly those of Doyle C.J.) affects the conclusions I have reached and expressed above about *Rowley v. Armstrong.* The particular issue in *Rann v. Olsen* is sufficiently different from that in *Rowley v. Armstrong* to prevent its direct application in support of my opinion. Nonetheless, there is tangential support for my views in the South Australian authority, and no contradiction.

30. The issue generally is one which, in my opinion, would attract the interest of the High Court, were an unsuccessful party to an appeal to seek special leave to appeal further to the High Court, unless the decision turned on the mundane question of an abuse of process, as opposed to the law of Parliamentary privilege.

FIFTH FLOOR,

ST. JAMES' HALL.

28th June 2000 Bret Walker