Chapter 2

Statutory Secrecy Provisions and Parliamentary Privilege

The first principle – the supremacy of parliamentary privilege

2.1 The law of parliamentary privilege protects proceedings in Parliament from being questioned or impeached in any place outside of Parliament. The principle has a long and consistent history. It took its first statutory form in 1689 in article 9 of the Bill of Rights. It was inherited by the Commonwealth Parliament in 1901 through section 49 of the Australian Constitution. The principal has been since codified in section 16 of the *Parliamentary Privileges Act 1987*.[1]

2.2 As a result of this principle, the Houses and committees, members and witnesses of the Parliament are able to operate without their proceedings being questioned or interfered with in any way. Any statutory provision which seeks to limit this freedom is therefore fundamentally obnoxious to this general principle.

2.3 It would only be in the rarest and most extraordinary of cases that the Parliament would decide to set some limit on its own operations, and legislate so as to limit itself in some way.

The status of statutory secrecy provisions

2.4 It has long been acknowledged that statutory secrecy provisions have no application to the operations of the Houses of Parliament or their committees unless there are express words to the contrary. The committee examined the impact of statutory secrecy provisions in the former National Crime Authority (NCA) Act in its 36th report.[2] In a difficult case the committee found that members of the NCA, senior lawyers working at the highest levels of a statutory authority which had a direct relationship with a parliamentary committee, had attempted to prevent another of their members giving evidence to the parliamentary joint committee on the NCA in the mistaken belief that the secrecy provisions of the NCA Act overrode the protections and requirements of parliamentary privilege. At the time of this case, the issue was explored in a number of opinions, the history and outcome of which is covered in detail in the submission to this inquiry by the Clerk of the Senate.[3]

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1 Dr R. Laing, *Evidence*, pp 1&2.

2 Privileges Committee, 36th Report, *Possible Improper Interference with a Witness and Possible Misleading Evidence before the National Crime Authority*, June 1992.

3 Dr R. Laing, Clerk of the Senate, *Submission 1*, pp 1-4.

2.5 That only a statutory declaration can affect the powers, privileges and immunities of the Commonwealth Houses was the view expressed in 1985 in a joint opinion by the then Attorney-General and the then Solicitor-General as follows:

> Whatever may be the constitutional position, it is clear that parliamentary privilege is considered to be so valuable and essential to the workings of responsible government that express words in a statute are necessary before it can be taken away. … In the case of the Parliament of the Commonwealth, s.49 of the Constitution requires an express declaration.[4]

2.6 Section 49 of the Australian Constitution provides as follows:

> **49 Privileges etc. of Houses**
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> The powers, privileges and immunities of the Senate and of the House of Representatives, and of the members and committees of each House, shall be such as are ***declared*** by the Parliament , and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth. (*Emphasis supplied*).[5]

2.7 What is required is an express statutory declaration that a provision is intended to affect the powers, privileges and immunities of the Senate and the House of Representatives before it can be effective. "The Federal Parliament has therefore unrestricted authority to define and declare its powers, privileges and immunities."[6]

2.8 Recitations of the settled nature of the principle are also to be found in all of the standard manuals of parliamentary practice, including Odgers, McGee and Lovelock & Evans:

> Parliamentary privilege is not affected by provisions in statutes which prohibit in general terms the disclosure of categories of information...Statutory provisions of this type do not prevent the disclosure of information covered by the provisions to a House of the Parliament or to a parliamentary committee in the course of a parliamentary inquiry. They ... do not prevent committees seeking the information covered by such provisions or persons who have that information providing it to committees.[7]
>
> In general, a statutory secrecy provision cannot be taken as applying as a matter of law to prevent the disclosure of information to the House or a committee unless this is one of the necessary intentions of the provision.[8]
>
> In general terms, statutory secrecy provisions in New South Wales have no effect on parliamentary privilege, although that is not to say that members of parliament should not consider seriously claims by witnesses that they

4 Quoted in Evans, Harry (ed), *Odgers' Australian Senate Practice*, 12th Edition, 2008, p.51.

5 *Australian Constitution*, s.49.

6 Quick & Garran, *The Annotated Constitution of the Australian Commonwealth*, p.506.

7 *Odgers' Australian Senate Practice*, 12th Edition, p.51.

8 McGee, *Parliamentary Practice in New Zealand*, 3rd Edition, p.436.

> cannot answer a question due to statutory secrecy provisions which prohibit the disclosure of particular information.[9]
>
> It is a fundamental principle that the law of parliamentary privilege is not affected by a statutory provision unless the provision alters that law by express words.[10]

The problem of statutory secrecy provisions

2.9 As the committee found in its 36th report, there is a widespread perception throughout the public service that statutory secrecy provisions limit the information that public servants can provide to parliament and its committees.[11] This is clearly incorrect, but the pervasiveness of this view can frustrate legitimate attempts by parliamentary committees to obtain the information they require to conduct their inquiries.

2.10 The potential scale of the problem has been demonstrated in the recent report by the Australian Law Reform Commission, entitled *Secrecy Laws and Open Government in Australia*, which included a comprehensive survey of existing secrecy laws in Australia.[12]

2.11 In a submission to the committee, the ALRC advised:

> The ALRC undertook a comprehensive mapping exercise to catalogue the secrecy provisions currently on the federal statute book. The ALRC identified 506 secrecy provisions in 176 pieces of legislation, including 358 criminal offences.[13]

2.12 It is this large and wide-ranging body of secrecy provisions in Commonwealth statutes, and the potential for an argument to be made out in relation to each one of them that it should be extended to apply to the giving of information to the Parliament, which is of potential concern in inhibiting the operations of the Houses and their committees.

Are there any statutory limitations on the powers, privileges and immunities of the Parliament?

2.13 A small number of provisions in Commonwealth law expressly limit the powers, privileges and immunities of the Parliament in certain circumstances.

2.14 One example of these provisions is subsection 37(3) of the *Auditor-General Act 1997*:

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9 Lovelock and Evans, *New South Wales Legislative Council Practice*, p.81.

10 Lovelock and Evans, *New South Wales Legislative Council Practice*, p.515.

11 Privileges Committee, 36th Report, *Possible Improper Interference with a Witness and Possible Misleading Evidence before the National Crime Authority*, June 1992.

12 Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report no.112 (2009).

13 ALRC, *Submission 7*, p.2.

Sensitive information not to be included in public reports

(3) The Auditor-General cannot be required, and is not permitted, to disclose to:

(a) a House of the Parliament; or

(b) a member of a House of the Parliament; or

(c) a committee of a House of the Parliament or a joint committee of both Houses of the Parliament;

information that subsection (1) prohibits being included in a public report.[14]

2.15 In her evidence to the committee, the Clerk of the Senate referred to the history of this provision and its origin in a recommendation of the former Public Accounts Committee to strengthen the independence of the Auditor-General as an officer of the Parliament, free from direction by any other party including the Parliament itself.[15] Other examples include subsection 439(5) of the *Migration Act 1958* and subsection 8(3) of the *Inspector-General of Taxation Act 2003*, both of which safeguard the independence of particular operations by excluding the possibility of parliamentary direction. None of these provisions could be characterised as a secrecy provision.

2.16 The provisions in the Tax Laws Amendment (Confidentiality of Taxpayer Information) Bill 2009 are the only provisions known to the committee which attempt to limit the information that officers may provide to committees. They are also the only provisions known to the committee which create offences for providing evidence to parliamentary committees. It is certainly the case that oversight committees established by Parliament to monitor the operations of certain intelligence, law enforcement or corporate regulatory bodies have functions and terms of reference limited by statute, but such provisions can be distinguished from those in the bill which are directed at limiting the conduct of individual officers in their dealings with Parliamentary committees.

2.17 The problems which the committee has identified with the provisions are examined in the next chapter.

14 *Auditor-General Act 1997*, ss37 (3).

15 Clerk of the Senate, *Submission 1, pp1-2.*