

PARLIAMENTARY PRIVILEGE

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Enid Campbell

Parliamentary Privilege

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[165] Australian parliaments have some remarkable powers and privileges. Among them, varying from place to place, are powers to imprison without fair trial and without appeal, to expel members by a majority vote, and to punish criticism of parliament. In a Dickensian touch, standing orders of some parliaments even prescribe fees to be paid by their prisoners for the privilege of being arrested, transported to gaol and fed in custody.²

Only disuse saves the most extreme of these powers from the widespread condemnation they deserve. Media lawyers might be reassured to know that the Victorian Legislative Assembly hasn't arrested a newspaper publisher since 1899, but it ordered the detention of four in the nineteenth century, and its powers haven't changed since. The House of Representatives' three month imprisonment of a newspaper proprietor and editor in 1955 is better known. The most recent prisoner of parliament was Brian Easton, sent to gaol by the Legislative Council of Western Australia in 1995 for failing to comply with an order to apologise for drawing up a misleading petition.

The daily reality of parliamentary privilege is less striking. The immunities that protect MPs' freedom of speech, and the rules and practice of parliamentary inquiries, are more important in practice than the little used penal powers. MPs can't, of course, be sued for what they say in parliament, but their protection goes further. Records of

¹ Law School, The University of Melbourne.

² Queensland, *Standing Rules and Orders of the Legislative Assembly*, s o 322; South Australia, *Standing Orders for Regulating the Public Business of the House of Assembly*, s o 77; Tasmania, House of Assembly, *Standing Orders and Rules*, s o 427. See also Victoria, *Standing Orders of the Legislative Council*, s o 10.09.

their debates can't be used in court, except to show the mere fact that something was said there (to show that it is protected by privilege, for example) or that something happened there (that someone was present or a document was tabled, for example).

Enid Campbell documents this little known and often archaic branch of law in her book. She is the leading Australian authority, the author of an earlier [1966] book on the topic and many scholarly articles.³ *Parliamentary Privilege* adds to a literature that has already benefited from a major book by Gerard Carney (which couples parliamentary privilege with the related topics of qualifications of MPs and members' ethics), new editions of the standard works on parliamentary practice, and the gradual accumulation of parliamentary committee reports on the state of the law and options for reform.⁴

Careful elucidation of complexities and difficulties is the great strength of *Parliamentary Privilege*. The privilege of freedom of speech dominates the first half of the book, which investigates, among other things, the scope of the immunity (does it cover MPs' correspondence, for instance?), the permissible use of parliamentary records, the use and abuse of parliamentary self-regulation, and the citizens' right of reply now allowed in Australian parliaments. Members' limited immunity from being compelled to attend court receives some welcome attention. Unfortunately the discussion of the related topic of MPs' immunity from arrest in civil causes omits *Witham v Holloway*;⁵ by classifying all proceedings for contempt of court as criminal in nature, it may leave no room for the immunity to operate.

Relations between parliament and the executive branch of government, and between parliament and the courts, have long been sources of tension in the law of parliamentary privilege. Professor Campbell gives parliamentary inquiries a chapter of their own and explores the powers of committees to extract evidence from

³ Enid Campbell, *Parliamentary Privilege in Australia* (1966).

⁴ Gerard Carney, *Members of Parliament: Law and Ethics* (2000); Harry Evans (ed), *Odgers' Australian Senate Practice* (10th ed, 2001); I C Harris (ed), *House of Representatives Practice* (4th ed, 2001); United Kingdom, Parliament, Joint Committee on Parliamentary Privilege, *Report*, 1999, Parl Paper no HL 43 and HC 214 (1998–99); Queensland, Legislative Assembly, Members' Ethics and Parliamentary Privileges Committee, *Report on Inquiry into Communications to Members, Members' Representations to Government and Information provided to Members*, Report No 60 (2003).

⁵ (1995) 183 CLR 525.

unwilling governments or public servants. Here as elsewhere, the book comprehensively covers federal, State and territory law, and includes the complications of intergovernmental immunities and constitutional limitations.

Academic writers on the law naturally give special attention to uncertainties in the law and gaps in the authorities, but the number of important unresolved issues in parliamentary privilege is particularly doleful. Parliament's power to compel governments to produce information is an example. One reason is the reluctance of parliamentary committees to test the limits of their powers over government witnesses. Another is a theme that runs through *Parliamentary Privilege*: the limits on the power and willingness of the courts to review parliamentary proceedings. The small number of decided cases is a distinctive feature of the law of parliamentary privilege, one that makes past incidents, reports and opinions particularly important even for writers on 'black letter' doctrine.

At its worst, parliamentary privilege combines disturbing clarity on points of law that are obviously unjust (such as the power of some parliaments to imprison for nebulous offences and without due process) and obscurity on points of considerable importance (such as the powers of parliamentary committees to obtain evidence from government). Professor Campbell is subtle and cautious on the question of reform, but it is an inevitable theme. One of the book's most appealing features is its gentle questioning of things that defenders of parliament's privileges may take for granted. Does each house of parliament actually *need* to be able to imprison people? Does parliament need to be able to expel its own members? Or might it be better to leave these matters to the courts? The discussion is tentative, in keeping with the judicious tone of the book, but the questions are fundamental ones.

Australian parliaments have reformed their privileges in some ways. In 1987, the Commonwealth parliament gave up its power to expel members and put some limits on punishment for contempt of parliament. At the same time, though, it confirmed a wide interpretation of its privilege of freedom of speech. The *Parliament of Queensland Act 2001* (Qld) included provisions along roughly similar lines.

[167] Meanwhile, the implied freedom of political communication has effects on parliamentary privilege and contempt that the courts are yet to fully explore. As *Parliamentary Privilege* explains, the implied freedom should protect both MPs, speaking in parliament, and their critics. This presents special difficulties in defamation cases. If an MP sues for defamation, the defendant may want to use statements made by the plaintiff in parliament as evidence (of the truth of an imputation, for instance). Or an MP may want to use such evidence, as a plaintiff or as a defendant.

The Supreme Court of South Australia has held that the *Parliamentary Privileges Act 1987* (Cth) validly prevents such use, notwithstanding the implied freedom.⁶ The resulting potential for injustice is reduced to some extent by a discretion for the trial judge to order a stay of proceedings, on the grounds that the exclusion of evidence makes a fair trial impossible.

The courts are still to decide what effect the implied freedom has on parliament's powers to punish for contempt (including contempt by publication, as in the *Bankstown Observer* case in 1955), to regulate its own proceedings and to expel members. On these and other issues, Professor Campbell's book provides impressively lucid and knowledgeable guidance.

⁶ *Rann v Olsen* (2000) 76 SASR 450.