Members of Parliament: law and ethics

Gerard Carney
Chapter 6

Freedom of speech

Introduction

Probably the most significant parliamentary privilege is the freedom of speech enshrined in art 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.

Article 9 declared what had probably been established at law by the House of Lords decision in Elliot's Case. The freedom of speech conferred refers to three activities within parliament: a speech, a debate and its proceedings. The essence of this privilege is that no liability attaches to what a member says or does in a speech, a debate or in parliamentary proceedings. Other principles derive from art 9 including, for example, the restriction on the scope of judicial review of parliamentary proceedings. Moreover, members cannot be compelled to give evidence of parliamentary proceedings without the leave of their House.

The rationale for the actual freedom of speech enjoyed by members is that it is an essential privilege in order for members and hence each House to perform their parliamentary functions. Although not sufficiently appreciated, the clear implication from this immunity is that members remain accountable to their own House and hence to the electorate for what they say and do within the protection of this privilege. The responsibility of each House to regulate its own members is clearly stated by Erskine May:

1 CJ (1667-87) 19; LJ (1666-75) 166.
3 Chubb v Salomons (1854) 3 Car & K 75; 175 ER 469, cited by Gibbs J as the Royal Commissioner appointed to inquire into and report on certain matters relating to members of the Police Force and the National Hotel, Pettie Bight, Brisbane (10 April 1964) a ruling on parliamentary privilege in Appendix F at 180 and following, and later as Gibbs ACJ in Sankey v Whitlam (1978) 142 CLR 1 at 37.
Article IX preserves the authority of both Houses to restrain and even punish their Members who, by their conduct, offend the House.

Correspondingly, each member is under a duty ‘to refrain from any course of action prejudicial to the privilege’. This was affirmed by Mr Speaker Sneddon in the House of Representatives in 1979:

The privileges of the House are precious rights which must be preserved. The collateral obligation to this privilege of freedom of speech in the Parliament and the essential complementary privileges of the House will be challenged unless all members exercise the most stringent responsibility in relation to them.

A recent example of a member being called to account by her House was the action taken by the NSW Legislative Council in relation to allegations made under privilege by Mrs Franca Arena MLC that the Premier, the Leader of the Opposition and a judge appointed as a royal commissioner had conspired to suppress the names of alleged paedophiles. Pursuant to legislation enacted by the NSW Parliament, the Legislative Council authorised the Governor to establish a special commission of inquiry into her allegations, waiving parliamentary privilege except that enjoyed by Mrs Arena herself. This inquiry found that her allegations were completely without foundation. Subsequently, a statement of regret by Mrs Arena was accepted by the House.

Earlier, Mrs Arena had failed in her legal challenge to the inquiry. In refusing special leave to appeal to the High Court, Brennan CJ, Gummow and Hayne JJ recognised the important role of each House to hold their members accountable for exercising their privilege of freedom of speech:

A House of Parliament in which allegations are made has a legitimate interest in knowing, and perhaps a duty to ascertain, whether there is substance in allegations made by a member on a matter of public interest.

The Arena case demonstrates how this freedom has the potential to cause harm, especially to people’s reputations. That risk is to people’s independence for the deliberations of parliament, but it is the responsibility of each House to hold their members accountable for exercising their privilege of freedom of speech.

6 D Limon and W R McKay, above note 4, p 84.
8 See the Report of the Special Commission of Inquiry into Allegations made in Parliament by the Honourable Franca Arena MLC 7 November 1997 by the Hon J A Nader QC.
9 This statement was in terms similar to those of a specific apology previously demanded by the House.
10 See Minutes of the Proceedings of the Legislative Council No 54, Wednesday 1 July 1998 at 634-635.
11 Arena v Nader (1997) 71 ALR 1404 at 1405.
House to minimise that risk by taking action against members who abuse their freedom. Another safeguard is for a House to provide those who are adversely affected by a member’s speech with a right of reply. This affords those persons adversely referred to by a member in a House the opportunity to seek to have a reply published in Hansard. In according to a request, the House does not express a view on whether it agrees with the content of the reply. A right of reply has been adopted in several Australian parliaments, although it has been resisted in the United Kingdom.

A further restriction on the freedom of speech of members occurs by way of the rules of debate prescribed in standing orders. Typically, they are ‘directed primarily towards achieving orderly debate and good temper, not to restricting the subject matter of debate’. However, they prevent members, for instance, from referring disrespectfully to the Sovereign or her representatives, or from using offensive words against either House, other members and the judiciary. Imputations of improper motives and personal reflections against members are considered ‘highly disorderly’.

The Arena case prompts an inquiry into the present justification of this immunity. Without this freedom, it has been said that parliament would have developed into ‘polite but ineffectual debating societies’. Moreover, it has been regarded as the key to parliamentary supremacy over the Crown and its ministers. But are these concerns still relevant today? The main rationale for the immunity is that it is essential for securing the independence of parliament by ensuring the capacity of members to be informed of all points of view in resolving the policy and legislative

12 Commonwealth Senate (Privilege Resolution No 5 of 25 February 1988); House of Reps (August 1997); New South Wales Legislative Assembly (Motion November 1996) and Legislative Council (Resolution 15 November 1997); Queensland (Resolution of 18 October 1995, reintroduced on 11 October 1996); South Australia Legislative Council (Sessional Order March 1999); Tasmanian Legislative Council (Sessional Order 30 June 1999); Victoria (Resolution of the Legislative Assembly 4 November 1999 para (7)); WA Legislative Assembly (SO); ACT (Resolution May 1995). Corporations as well as individuals have been accorded the right to reply under the Senate’s Privilege Resolution No 5 which merely refers to persons: see Privileges Committee recommendation on 21 October 1999 referred to in the Department of the Senate Procedural Information Bulletin No 137 at 4. A right of reply is expressly accorded corporations in Queensland.

13 Note that the 1999 UK Joint Committee Report on Parliamentary Privilege recommended against this right given the risk that a reply is seen as passing judgment on a member and that those referred under privilege might feel obliged to seek to reply for fear of being seen to accept the allegation (paras 220-221).

14 Report of the Joint Committee on Parliamentary Privilege (UK, 1999) at para 188.

15 House of Reps SO 74.

16 House of Reps SO 75.

17 House of Reps SO 76.


19 As above.
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issues put before them in parliament. An environment is created in which members of parliament are entirely free to canvass their views without fear of being unfairly challenged outside parliament by the executive or by the people through the courts or other tribunals. Despite executive dominance of the parliament arising through the party system, the parliament has thereby retained its capacity to criticise the executive. Moreover, the investigatory role of parliamentary committees would be severely hampered without freedom of speech for their witnesses.

This chapter examines the range of activities which fall within the scope of freedom of speech, concluding that clarification is required. It also considers the effect of the freedom on the admissibility of evidence in legal proceedings. This aspect is concerned with art 9's prescription that parliamentary proceedings cannot be 'impeached or questioned' outside parliament. How far this protection extends is the subject of an intense judicial debate which has yet to reach the High Court of Australia. This debate calls for a careful assessment of the justification of the freedom in contemporary Australia. That assessment should have regard to the undiminished standing of the freedom for over 300 years — a testimony to both the respect which it has earned and the indulgence it has enjoyed from those it protects. But more significant will be the balancing of competing public interest factors to arrive at a freedom which protects the operation of parliament with minimal impact on the administration of justice and individual rights.

As for 'waiving' freedom of speech, the accepted position is that neither a member nor a House has the capacity to waive the art 9 freedom because it is a statutory provision. Support exists for maintaining this position to avoid the possibility that a capacity to waive the freedom might be politically abused.

Scope of freedom of speech: nature of activities

The freedom of speech in art 9 of the Bill of Rights is confined to three activities: speeches, debates and the proceedings of parliament. While the nature and scope of the former two activities are fairly clear, that is not the case with parliamentary proceedings. At the core of these proceedings are, of course, the proceedings of parliamentary sittings — the speeches and debates, as well as the passage of legislation. Also included are the tabling of motions and amendments to motions or bills and the tabling, asking and answering of questions to ministers and other members. A register of members' pecuniary interests might also attract the privilege.

20 See Prebble v Television New Zealand Ltd [1985] 1 AC 321 at 335 (PC).
21 See H Evans (ed), Odgers' Australian Senate Practice (9th ed) Department of Senate Canberra 1999, pp 67-68. This is also the position under the Parliamentary Privileges Act 1987 (Cth); Hamsher v Swift (1992) 33 FCR 545. See also Report No 26 of the Queensland Members' Ethics and Parliamentary Privileges Committee, First Report on the Powers, Rights and Immunities of the Legislative Assembly: its Committees and Members (January 1999) at para 4.2.1.
22 See above at para 4.2.4.
23 Contrast Rost v Edwards [1996] 2 WIR 1280 at 1293 per Popplewell J holding the House of Commons register not privileged.
The proceedings of parliamentary committees including the evidence given by any person to those committees are also covered, as are those who present petitions to parliament. The principal difficulty arising from the generality of the expression 'proceedings in parliament' is to define its outer limits and, in particular, the activities associated with speeches, debates and proceedings which are also entitled to freedom of speech. Responsibility for determining the scope of the privilege in this respect lies squarely with the courts or parliament and not with either House.

It is clear that members are not protected by the privilege in respect of all their parliamentary duties when performed outside parliamentary proceedings. However, the closer the relevant activity is connected to the proceedings of parliament, the easier it is to argue that it should be protected by the privilege. If the activity relates to the member's constituency duties only, it is unlikely to fall within the scope of the privilege. What is important is the degree of connection to parliamentary business. In this context, two categories of communication may be considered: (i) communications between members, or between a member and a minister; and (ii) communications between members and constituents or other persons.

(i) Communications between members or between a member and a minister

Only those communications between members, or between a member and a minister, which have a close relationship to parliamentary business are protected. Such communications include any discussion of drafts of oral questions, questions on notice, or motions, and any discussion of draft speeches to be made in the House. Discussions between members in parliamentary party meetings (or caucus) on legislative matters are unlikely to be protected.

On the other hand, communications between a member and a minister in relation

25 Lake v King (1667) 1 Wms S 131; Halden v Marks (1996) 17 WAR 447.
26 The typing of a statement to be made by a member in parliament is covered: Holding v Jennings [1979] VR 289.
to constituency matters have an uncertain status. In the Strauss Case,\textsuperscript{30} the House of Commons refused by a narrow vote of 218 to 213 to accept the report of its Privileges Committee that a letter written by Mr Strauss MP to a minister which was critical of the London Electricity Board was protected by parliamentary privilege.\textsuperscript{31} It is suggested, however, that privilege attaching to a communication between a member and a minister on a constituency matter is justified given the efficiency, discreteness and utility of such a communication when parliament is not sitting.\textsuperscript{32} Also of uncertain status are informal meetings held between members of parliamentary committees and even formal meetings of parliamentary committees convened outside the precincts of parliament.\textsuperscript{33}

All these forms of communication described so far, except that in the Strauss case, were recognised as entitled to protection by the Commonwealth Joint Select Committee on Parliamentary Privilege in its 1984 Report.\textsuperscript{34} In recommending the adoption of a statutory provision to extend the scope of 'proceedings in Parliament' to cover these communications, the Committee confined the following recommended provisions to defamation proceedings.\textsuperscript{35}

(1) That the Parliament adopt an expanded definition of proceedings in Parliament in the following terms — That without in any way limiting the generality of the 9th Article of the Bill of Rights or the interpretation that would otherwise be given to it, for the purposes of a defence of absolute privilege in actions or prosecutions for defamation the expression 'proceedings in Parliament' shall include:

(a) all things said, done or written by a Member or by an officer of either House of Parliament or by any person ordered or authorised to attend before such House, in or in the presence of such House and in the course of the sitting of such House and for the purposes of the business being or about to be

\textsuperscript{30} Report from the House of Commons Committee of Privileges HC (1956-57); HC Debates 591 (8 July 1958).


\textsuperscript{33} 1999 Report of the UK Joint Committee on Parliamentary Privilege at paras 5.24 and 5.25. Contrast \textit{Re Quellet (No 1)} (1967) 67 DLR (3d) 73 at 85.

\textsuperscript{34} PP 219/1984.

\textsuperscript{35} PP 219/1984 at para 5.29. In formulating the recommended provisions, the Committee acknowledged the assistance gained from the recommendations of the 1967 House of Commons Report on Parliamentary Privilege and the 1976-1977 recommendations of the Privileges Committee which reviewed those 1967 recommendations (\textit{Third Report from the Committee of Privileges: Recommendations of the Select Committee on Parliamentary Privilege} HC 417 (1976-77)).
transacted, wherever such sitting may be held and whether or not it be held in the presence of strangers to such House: provided that for the purpose aforesaid the expression ‘House’ shall be deemed to include any committee, sub-committee or other group or body of Members or Members and officers of either or both of the Houses of Parliament appointed by or with the authority of such House or Houses for the purposes of carrying out any of the functions of or representing such House or Houses;

(b) questions and notices of motion appearing, or intended to appear, on the Notice Paper, and drafts of questions and motions which, in the case of draft questions, are to be put either orally or as questions on notice, and in the case of draft motions, are intended to be moved, and draft speeches intended to be made in either House, provided in each case they are published no more widely than is reasonably necessary;

(c) written replies or supplementary written replies to questions asked by a Member of a Minister of the Crown with or without notice as provided for in the procedures of the House;

(d) communications between Members and the Clerk or other officers of the House related to the proceedings of the House falling within (a), (b) and (c).

These recommendations have been given substantial effect by the Parliamentary Privileges Act 1987 (Cth) which is examined below. Although an exposure draft of the Report had included a provision to accord privilege to the Strauss situation, this was deleted from the Final Report. The Committee preferred to make no recommendation on this situation given the need for compelling reasons before further eroding the protection of reputation by an extension of absolute privilege.36

Finally, it should be noted that a communication from a member within the precincts of the House does not attract the privilege of freedom of speech. This was firmly established by the 'Zircon affair' in the House of Commons.37 In 1987 an attempt was made by several members of that House to screen a film in one of its meeting rooms, despite BBC agreement not to screen it because of the danger it posed to national security by revealing details of a secret defence project, codenamed 'Zircon'. Moreover, the High Court had granted an injunction against one of the producers of the film, Mr Duncan Campbell, from revealing directly or indirectly any details of the Zircon project. After unsuccessfully applying for an injunction to prevent the members from screening the film, the Attorney-General requested the Speaker to issue an order prohibiting the film's screening. This the Speaker was reluctant to do until advised on Privy Counsellor terms of the threat to national security.

The subsequent report of the Committee of Privileges of the House of Commons condoned the action taken by the Speaker. The Committee found no breach of privilege arose as a result of the ban on the film. The privilege of freedom of speech was quite

36 At para 5.22.
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properly limited by the Committee to the debates and proceedings in Parliament. It did not extend to activities occurring simply within the precincts of Parliament, such as the screening of a film in one of the rooms of the House of Commons. \[38\]

(ii) Communications between members and constituents or other persons

It has been held that correspondence between a member and a constituent, even on a matter of parliamentary business, is not protected by freedom of speech as a ‘proceeding in parliament’. \[39\] While it may not seem unreasonable to regard the provision of information for the purpose of a parliamentary speech or debate to be incidental to the parliamentary functions of a member, the wide ranging circumstances in which such information may be provided preclude absolute immunity attaching to such communications as a general rule. Distinctions might otherwise have to be drawn between information supplied to a member voluntarily or at the member’s request, information which is relevant or irrelevant, and information which is actually used or not by the member. Appreciation of such difficulties may explain the lack of support for the extension of the privilege to this situation.

Another explanation is that defamatory communications between a constituent and a member are likely to attract the protection of qualified privilege. This defence, which may be defeated by proof of malice, requires that the person making the defamatory statement has an interest or duty in making it and that the persons to whom it is made have a corresponding interest or duty in receiving it. This defence has recently been expanded by the High Court in 

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Lange v Australian Broadcasting Corporation\[40\] to conform to the implied freedom of political communication in relation to government and political matters. This unanimous decision overturned the special constitutional defence recognised earlier by a majority of the Court in Theophanous v Herald and Weekly Times Ltd. \[41\] Instead, the Court expanded the common law defence to cover a person who mistakenly honestly publishes a defamatory imputation in relation to a government or political matter to a large audience. \[42\]

Consideration now needs to be given to the statutory definition of ‘proceedings in parliament’ adopted by the Commonwealth and Queensland parliaments.

\[38\] Zircon Report at paras 16 and 35.


\[40\] (1997) 189 CLR 520.

\[41\] (1994) 182 CLR 104.

\[42\] See (1997) 189 CLR 520 at 574: the defendant must establish reasonable grounds for ‘believing that the imputation was true, took proper steps, so far as they were reasonably open, to verify the accuracy of the material and did not believe the imputation to be untrue’.

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Statutory definition: ‘proceedings in parliament’

A statutory definition of ‘proceedings in parliament’ is provided in s 16(2) of the Parliamentary Privileges Act 1987 (Cth). This definition is intended, ‘in addition to any other operation’, to declare the position under art 9 of the Bill of Rights 1689. Section 16(2) provides:

‘proceedings of Parliament’ means 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, and, without limiting the generality of the foregoing, includes:

(a) the giving of evidence before a House or a committee, and evidence so given;
(b) the presentation or submission of a document to a House or a committee;
(c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
(d) the formulation, making or publication of a document including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

Although the precise scope of this statutory definition is not readily apparent, it still provides some guidance. By limiting it to ‘the transacting of the business of a House or of a committee’, the recommendations of the Commonwealth Parliamentary Privilege Report are adopted. Thus, communications between members or between a member and a minister on a constituency matter unconnected with parliamentary business are not covered by this statutory definition. This accords with the view ultimately taken by the House of Commons in the Strauss case. However, s 16(2) appears to cover communications between members and constituents or other persons where they are ‘for purposes of or incidental to the transacting of the business of a House or of a committee’. The scope of s 16(2) has been considered by the Queensland Court of Appeal in O’Chee v Rowley where Senator O’Chee was sued for defamation in respect of a radio interview he gave on commercial fishing of marlin in protected fields in North Queensland. The Senator asked a question in the Senate on the issue prior to the...
interview and thereafter made a speech in the House. In proceedings for discovery, he claimed that 43 documents relevant to the proceedings were privileged under s 16(2) on the basis that they ‘were created, prepared, brought into existence or came into [his] possession for the purposes of or incidental to the transacting of the business of the Senate’. The trial judge, Williams J, classified these documents generally as comprising: letters addressed to the Senator; reports prepared for other persons on long line tuna fishing in marlin waters; a diary note by the Senator of an ‘attendance on constituent’; letters exchanged between the Senator and another member of Parliament; and notes of telephone conversations made by the Senator.

Williams J applied48 to s 16(2) the traditional view of the general law espoused in Erskine May49 and adopted by Allen J in R v AI Grassby50 that no parliamentary privilege attaches to communications between informants and members in circumstances where the member is asked to raise a matter in Parliament. No privilege arose whether the member actively sought the document to raise in parliament or whether it was simply provided in the hope that it would be raised there. However, this narrow approach to the operation of s 16(2) was rejected on appeal to the Queensland Court of Appeal.

A majority of Fitzgerald P and Moynihan J agreed with the reasoning of McPherson JA for allowing the appeal but their Honours required further particulars by supplementary affidavit before concluding that the documents were privileged under s 16. Only McPherson JA was prepared to accept their privileged status on the basis of the particulars already provided. Subject to these evidentiary requirements, the majority agreed with McPherson JA that all those documents written by the Senator, comprising diary notes, file notes of attendances and conversations and letters, were documents within ‘proceedings in Parliament’ in s 16(2)(c) having been prepared for the purpose of or incidental to the transaction of Senate business (that is, the question he asked in the Senate and the subsequent debate).51 As for those documents sent to the Senator, these only fell within s 16 once ‘the member or his or her agent does some act with respect to [them] for the purposes of transacting business in the House’.52 Such an act might be ‘procuring, obtaining or retaining possession’ of documents for the purpose of being sufficiently informed on a topic before raising it in parliament. Hence, unsolicited mail may become privileged if the member ‘elects to keep it for purposes of transacting business of a House’.53 As well, other documents dated

47 See 67th Report of the Senate Committee of Privileges, Possible Threats of Legal Proceedings against a Senator and Other Persons PP141/1997 which found contempt of parliament had occurred in so far as a threat of legal proceedings had been made against a person for providing information to Senator O’Chee which he used in a parliamentary speech.
48 Unreported judgment of 18 April 1997 at 8.
49 D Limon and W R McKay (eds), above note 5, p 128-129.
51 (1997) 150 ALR 199 at 208-209.
52 At 209.
53 At 209.
subsequent to the matter being discussed in the Senate are not necessarily incapable of being privileged given that they may have been generated in anticipation of further parliamentary debate — even if they are produced two to three months after the last Senate discussion.\(^{54}\) On the interpretation of ‘proceedings in Parliament’ in s 16(2), McPherson JA concluded:

> By s 16(2) of the 1987 Act proceedings in Parliament include the preparation of a document for purposes of or incidental to the transacting of any business of a House. More generally, such proceedings include all acts done for such purposes, together with any acts that are incidental to them. Bringing documents into existence for such purposes; or, for those purposes, collecting or assembling them; or coming into possession of them, are therefore capable of amounting to ‘proceedings in Parliament’.\(^{55}\)

The next issue was whether requiring the production of these documents within s 16(2)(c) was to question or impeach ‘the preparation’ of these documents for the purpose of transacting the business of the Senate — this being the effect of engrafting the definition in s 16(2)(c) onto art 9. His Honour concluded that this was so, in that disclosure would impair their preparation retrospectively.\(^{56}\) Finally s 16(4), which specifically prevents a court or tribunal from admitting a document or oral evidence taken in camera by a House, was held not to define exhaustively the position on the production of documents in legal proceedings.

Queensland has also attempted to define ‘proceedings in Parliament’ in s 3 of the Parliamentary Papers Act 1992 (Qld) in terms substantially identical to those of the Commonwealth definition. The only differences are that the Queensland definition expressly refers to proceedings of an inquiry held under the authority of the House (ss 2 and 3(3)) and includes documents ‘laid before’ as well as presented or submitted to the House, a committee or inquiry (s 3(3)(d)).\(^{57}\)

**Conclusion on activities covered by the freedom**

There appears to be no basis for regarding the current undisputed scope of the privilege of freedom of speech in relation to the speeches, debates and proceedings of parliament as other than an essential and necessary right on the part of all members of parliament to speak freely, without fear of outside legal challenge, on any matter on which they feel it their duty to speak in the public interest. Whether this privilege should be qualified in relation to criminal acts occurring within the scope of parliamentary proceedings is considered in Chapter 8.

\(^{54}\) At 209-210.

\(^{55}\) At 215.

\(^{56}\) At 210.

\(^{57}\) There appears to be no difference between having a document laid before, presented, submitted or tabled before a House.
Although the original rationale for this privilege was to protect members from executive interference, the prospect today of interference from any person or body outside of the legislature is just as significant. The various functions of a modern parliament — in particular, those concerned with the review of government policy and action and those of an investigatory kind — reinforce the need for freedom of speech. Given the practical control the executive has over parliament, there is now, just as there was in the 17th century, good reason for protecting members for what they might say during the course of parliamentary proceedings; otherwise, their capacity to criticise government action, and to review and investigate matters of public interest, would be severely affected.

At least two issues present themselves in relation to the scope of this freedom. The first is to clarify those circumstances in which the freedom arises. The second is to decide whether any further restrictions ought to be placed on the exercise of this freedom. Each of these issues is dealt with in turn.

(i) Width of privilege

The rationale for any widening of the scope of the privilege must be to ensure members are able to perform their parliamentary functions of review and investigation in relation to any matter of public interest. Accordingly, each of the following situations requires clarification.

- Communications between a member of parliament and a minister
  The extension of parliamentary privilege to communications between a member and a minister, if they are concerned with parliamentary or constituency matters, can be supported on at least two grounds: first, it enables a member to disclose information on a restricted basis to the appropriate minister, instead of having to make a public statement in the course of parliamentary proceedings; secondly, a member is able to pursue the matter with the minister while parliament is not sitting.\(^{58}\)

- Communications between members of parliament
  Communications between members concerning draft speeches and motions ought to be protected, since they are incidental to the proceedings of parliament.\(^{59}\) Other communications between members in relation to constituency or other matters should be protected only if this is necessary in order for members to perform their parliamentary and constituency functions.

- Communications between a member of parliament and a constituent
  As regards communications between members and constituents or other persons, it is difficult to isolate those which are necessary for members to receive for the purposes of their parliamentary and constituency functions. The solution is offered


\(^{59}\) Recommended by the Commonwealth Joint Select Committee Report on Parliamentary Privilege at para (a) quoted earlier.
by the Queensland Court of Appeal in O’Chee v Rowley which confers protection only on those communications which are acted on by the member for the purpose of transacting business in the House.

Whatever scope is agreed on for the privilege of freedom of speech, it must be defined as accurately and as clearly as possible. Unless this is done, the rationale for according such protection, namely, the facilitation of open discussion and criticism of issues by members of parliament is eroded by the uncertainty which members will feel about their legal position.

(ii) Further restrictions on the exercise of the freedom

Having considered the reach of the privilege, are there any further restrictions other than those outlined above which should be considered? The confidentiality attaching to committee proceedings and the operation of the sub judice convention are the two most significant restrictions on the privilege of freedom of speech recognised and enforced by parliament. Both of these restrictions are examined in Chapter 9 which discusses the duty of confidentiality.

Apart from those restrictions, the privilege provides absolute protection from all civil and criminal proceedings. Whether it should do so in relation to criminal acts occurring within the scope of parliamentary proceedings is considered in Chapter 8. Also of concern is whether this immunity should extend to matters of national security. This issue was considered in the United Kingdom by the Zircon Report which acknowledged that a conflict exists between the public interest in maintaining freedom of speech in parliament and the public interest in protecting national security. All of the options to protect national security by restricting freedom of speech by legislation, by resolution of the House or by standing orders were rejected on the basis that they were unacceptable in principle and/or ineffective. The 1999 Report of the Joint Committee on Parliamentary Privilege acknowledged that "it is self-evident that members should willfully divulge classified information in the House only in the most exceptional circumstances and after long and careful thought".

Whatever scope is given to the privilege of freedom of speech, its conferment of almost absolute immunity can only be justified if the privilege is exercised responsibly and reasonably. As a privilege, it relieves a member from the invidious task of predicting beyond doubt whether or not a statement made under privilege is made in the public interest. On this basis, it is not a privilege which entitles a member to ignore all constraints whether of a moral or legal kind. Here again, the overriding standard to be observed is to act and serve in the public interest.

60 (1997) 150 ALR 199.
63 Report of the 1999 UK Joint Committee on Parliamentary Privilege at para 212.
Effect of freedom of speech: admissibility of evidence concerning parliamentary proceedings

A further difficult aspect of the freedom of speech provided by art 9 is to determine the extent to which reference to speeches, debates or proceedings is permitted in legal proceedings and for what purpose.\(^\text{64}\) It is proposed here to consider this issue both under the general law and under the *Parliamentary Privileges Act 1987* (Cth) with particular reference to defamation proceedings. The position in relation to criminal proceedings is considered in Chapter 8.

As the fundamental protection derived from art 9 is that no action (whether criminal\(^\text{65}\) or civil\(^\text{66}\)) may be brought against a member or a witness for what they have said or done in the course of parliamentary proceedings, a significant difficulty is whether the privilege also denies reliance on what is said in parliament, not as the basis of legal proceedings against that person, but in *support* of an action based on events occurring outside parliament.\(^\text{67}\) It is clearly accepted by all authorities that the proceedings of parliament may be referred to for the purpose of proving as a fact that certain events occurred in the course of those proceedings.\(^\text{68}\) For example, Hansard may be cited to establish that a member made a particular statement in parliament on a certain day. Even so, parliamentary practice has required the approval of the House before reference could be made to its proceedings for that limited purpose in court.\(^\text{69}\)

But the issue on which the authorities are divided is whether inferences and submissions can be made on the basis of the evidence of those proceedings, not for the purpose of imposing legal consequences on the member or witness, but simply in *support* of those proceedings whether brought by or against the member or witness. In *Church of Scientology of California v Johnson-Smith*\(^\text{70}\) Browne J held that art 9 precluded reference to parliamentary statements by a member to support the plaintiff's claim that the member's defamatory statements outside Parliament had been motivated by malice, thereby negating the member's claim of qualified privilege. His Honour\(^\text{71}\) accepted the Attorney-General's submission:

> that what is said or done in the House in the course of proceedings there cannot be


\(^{65}\) See *Ex parte Wason* (1869) LR 4 QB 573.

\(^{66}\) See *Dillon v Balfour* (1887) 20 Irish LR 600.


\(^{68}\) See *Church of Scientology of California v Johnson-Smith* [1972] 1 QB 522 at 527; *Munday v Astin* [1982] 2 NSWLR 369 at 373 (CA); *Rost v Edwards* [1996] 2 WLR 1280.

\(^{69}\) This requirement was abolished by the Senate in respect of its proceedings by Privileges Resolution No 10 (25 February 1988). On the practice of the House of Commons, see D Limon and W R McKay (eds), above note 5, p 94 fn 1.

\(^{70}\) [1971] 3 WLR 434.

\(^{71}\) At 437.
examined outside Parliament for the purpose of supporting a cause of action even
though the cause of action itself arises out of something done outside the House. In
my view this conclusion is supported both by principle and authority.

Two principles underlyng art 9 were relied on: first, '[t]he House must have
complete control over its own proceedings and its own members'; and second, 'a
member must have a complete right of free speech in the House without any fear
that his motives or intentions or reasoning will be questioned or held against him
thereafter'.

The authorities relied on were not on point factually but contain statements
supportive of a wide view of art 9 as precluding the questioning of statements made
in the course of parliamentary proceedings. In *Stockdale v Hansard*, Lord Denman
said 'that whatever is done within the walls of either assembly must pass without
question in any other place', while Patteson J observed 'that whatever is said or
done in either House should not be liable to examination elsewhere'. Reliance was
also placed on statements in *Ex parte Wison* especially that by Lush J: 'I am clearly
of opinion that we ought not to allow it to be doubted for a moment that the
motives or intentions of members of either House cannot be inquired into by
criminal proceedings with respect to anything they may do or say in the House.'
Little weight, however, ought to be given to this quote, for it contemplates
proceedings against a member for what the member has said or done in Parliament.

*Dingle v Associated Newspapers Ltd* was regarded as analogous in that Pearson J
denied reference to a select committee report, an extract of which was published as
part of an alleged libel, for the purpose of impugning it.

A wide view of the scope of the privilege has also been expressed in a series of
decisions in Australia. In *R v Turnbull*, a former State Treasurer was charged with
official corruption and his parliamentary statements were excluded. The purpose for
which the Crown wished to rely on them is unclear but Gibson J regarded the
privilege as protecting members from use being made of such statements. In

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72 At 437.
73 (1839) 9 Ad & E 1; 112 ER 1112.
74 At 114.
75 At 209.
76 (1869) LR 4 QB 573.
77 At 577.
80 This view was approved by the Court of Queen's Bench in *R v Secretary of State for Trade; Ex
parte Anderson Strathclyde plc* [1983] 2 All ER 233 which refused to refer to ministerial
statements made in Parliament which were relied on for an application for judicial review
of a decision made by the minister outside Parliament. On this point, Lord Browne-
Wilkinson in *Pepper v Hart* [1993] AC 593 at 639 said that it was wrongly decided.
82 At 83.
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Holding v Jennings\(^83\) Anderson J recognised:

> [I]t is clear law that no proceedings, either civil or criminal, may be taken against a member of Parliament for anything said or done by him in Parliament, and a member is not examinable outside Parliament concerning anything said by him in Parliament; see Ex parte Wason (1869) LR 4 QB at p 573; Bradlaugh v Gossett (1884) 12 QBD 271 at p 275; Stockdale v Hansard (1837) 9 AD & E 1; Dillon v Balfour (1887) 20 LR Ir 606; Blackstone, 1 Com 163; R v Craevey (1813) 1 M & S 273; Chubb v Salomons (1852) 3 Car & Kir 75 [emphasis added].

In Comalco Ltd v Australian Broadcasting Corporation\(^84\) Blackburn CJ considered the privilege as preventing 'the substance of what was said in Parliament to be the subject of any submission or inference'.

However, the wide view of the effect of the privilege espoused in Church of Scientology was rejected by Hunt J in R v Murphy.\(^85\) In that case his Honour permitted, for the purpose of testing their credibility, the cross-examination of witnesses on their prior statements made to a parliamentary committee. The case was the second of two criminal prosecutions brought against Justice Lionel Murphy for attempting to pervert the course of justice. The same ruling had been made by Cantor J in the first trial\(^86\) while also upholding the right of the Crown to cross-examine Justice Murphy on a written statement he had given to a Senate committee. Senate committees had been investigating allegations against the judge to ascertain whether an address for removal was warranted under s 72 of the Constitution. Before both trial judges, Counsel representing the Senate argued that such evidence was inadmissible by virtue of parliamentary privilege.

Hunt J confined the privilege under art 9 to preventing reliance on what is said in parliament or to its committees for the purpose of bringing an action against that person, not when the action was based on conduct occurring outside parliament and the evidence is used to establish a motive or intention. His Honour thereby confined the privilege to ensuring that no legal consequences are visited upon the witness for what was said in parliament or to its committees:

> I remain of the view that what is meant by the declaration that 'freedom of speech ... in parliament ought not to be impeached or questioned in any court or place out of parliament' is that no court proceedings (or proceedings of a similar nature) having legal consequences against a member of parliament (or a witness before a parliamentary committee) are permitted which by those legal consequences have the effect of preventing that member (or committee witness) exercising his freedom of speech in parliament (or before a committee) or of punishing him for having done so.

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\(^83\) [1979] VR 289 at 291.

\(^84\) (1983) 78 FLR 449 at 453.

\(^85\) (1986) 5 NSWLR 18 at 33-38.

Cross-examination going to the credit of a witness in curial proceedings — based upon the inconsistency between his evidence before a parliamentary committee and his evidence in court, or even upon the untruthfulness of the former — does not of itself visit legal consequences upon the witness, and neither (where the witness is a party) do the proceedings themselves visit such consequences upon him as a result of what he had said or done before the parliamentary committee. If, as a result of such cross-examination, the party to the proceedings is not believed by the tribunal of fact — and for that reason loses his case (or he is convicted) — that result is a consequence of what is seen by that tribunal to be the true facts given in evidence before them; it cannot logically be said to be a consequence of what the party had said to the parliamentary committee. To resort once more to the language of causation, what the party said to the parliamentary committee may possibly be thought to be the causa sine qua non, but it was not the causa causans of the loss of his case. The causa causans or the real cause of that loss is that the jury accepted the case against him and not his own case, perhaps by reason of his lack of credit — which may have been revealed by what he said to the committee, but which existed in any event.87

In support of the approach taken by Hunt J were earlier statements in Gipps v McElhone88 where a defamation action was brought against a member of the NSW Parliament in relation to comments he made about the plaintiff to another member outside Parliament. Martin CJ89 and Manning J90 indicated they were prepared to allow reference to subsequent parliamentary statements made by the defendant for the purpose of establishing malice to defeat the defence of qualified privilege. However, the judgments made no reference to parliamentary privilege. Subsequent support for Hunt J is found in the Full Court of South Australia in Wright and Advertiser v Lewis,91 which is discussed below in the context of defamation proceedings.

Since R v Murphy, a number of decisions in Australia have approved the principle of the Church of Scientology and rejected the ruling of Hunt J.92 In R v Jackson93 Carruthers J held evidence of what the accused had said in Parliament inadmissible for the purpose of establishing that he had lied to Parliament as corrobative evidence of official corruption. His Honour followed Church of Scientology and expressly declined to follow R v Murphy. Also, Beaumont J in Amann Aviation Pty Ltd v The Commonwealth,94 relying on s 16(3) of the Parliamentary Privileges Act 1987 (Cth), disallowed reference to what had been said in Parliament for the purpose of proving that the Commonwealth was not ready and willing to proceed with a contract and

88 (1881) 2 NSWR 18.
89 At 23.
90 At 25.
91 (1990) 53 SASR 416.
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hence was not entitled to terminate it. His Honour adopted a wide view of the privilege under the general law:

On behalf of the applicant it is submitted that the tender of the extract from *Hansard* does not offend s 16(3) because it is for the limited purpose of proving that the Senator made a statement in Parliament in which he admitted having the conversation alleged. It is true that, before the enactment of s 16, it was permissible to use *Hansard* for the limited, but non-contentious, purpose of proving that a member of Parliament was present in the House on a particular day. According to the memorandum explaining the operation of s 16(3)(c), this is still a legitimate approach. This would accord with the language of s 16 and with its apparent purpose, that is to say, that a member of Parliament should be able to speak in Parliament 'with impunity and without any fear of the consequences': per Gibbs ACJ in *Sankey v Whitlam* (1978) 142 CLR 1 at 25. Where, as here, the subject-matter of the passage from *Hansard* is contentious in that it is sought to be used to impugn the conduct of the Senator, in the context of a denial by the respondent of any impropriety, it is almost inevitable that the tender of *Hansard* would lead to an examination of the circumstances in which the Senator came to make the statement and that this would further lead to an attempt to assess the credibility of this evidence and to compare it with other evidence already given. Such an examination, in a contentious area, cannot be reconciled with the complete freedom of speech envisaged by the *Bill of Rights* and the Act.95

More recently, both the House of Lords in *Pepper v Hart*96 and the Privy Council in *Prebble v Television New Zealand Ltd*97 on appeal from the New Zealand Court of Appeal have accepted the decision in *Church of Scientology*. Only the Privy Council considered *R v Murphy* and regarded the reasoning of Hunt J as incorrect.98 The *Prebble* case is discussed below in the context of defamation proceedings.

Lord Browne-Wilkinson, who delivered the principal judgment in *Pepper v Hart*, rejected any suggestion in *Church of Scientology* that art 9 denied any reference to parliamentary speeches except for the purpose of what was said on a particular day.99 But his Lordship's rejection of the wide terms of the effect of art 9 in that case was only to allow reference to ministerial statements in Parliament to assist in the interpretation of ambiguous legislation — no support for the reasoning of Hunt J can be found in his Lordship's judgment. Indeed the following warning

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95 At 230-231.
96 [1993] AC 593. See also *Hamilton v Al Fayed* [2000] 2 WLR 605 (HL) where Lord Browne-Wilkinson (with whom the rest of the Court agreed) at 620 adopted the wide view of the freedom: 'The normal impact of parliamentary privilege is to prevent the court from entertaining any evidence, cross-examination or submissions which challenge the veracity or propriety of anything done in the course of parliamentary proceedings.'
98 At 333.
indicates acceptance of the wide effect of art 9 not to permit the questioning of the intentions and motives of members: 'No doubt all judges will be astute to ensure that counsel does not in any way impugn or criticise the Minister's statements or his reasoning.'

It seems to be suggested by Sir Clarrie Harders' that the ruling of Hunt J in R v Murphy and the principle from Church of Scientology are reconcilable: in other words, from the latter case there is the general principle that what is said in parliament cannot be used to support an action which is based on events occurring outside parliament, while the former case provides an exception to that principle so that what is said in parliament may be used to test that person's credibility in legal proceedings to which they are not a party.

Any reconciliation of R v Murphy and Church of Scientology appears dubious. The mere testing in court of the credibility of a witness who has given evidence to a parliamentary committee may have repercussions, even legal consequences, at a later time. There is the potential for conflict to arise between a House acting against a witness for contempt for misleading the House and the court taking action for perjury. And what of a witness in commercial proceedings who is a director of the company which is the subject of the proceedings? In these circumstances, principle and the weight of authority support Church of Scientology and its wide view of the privilege. However, as further difficulties arise with this wide view in relation to defamation proceedings brought by or against members, further assessment of that view is given below in relation to defamation proceedings.

Operation of the freedom in any other place out of parliament

Sir Edward Coke as quoted by Blackstone described the freedom of speech in these terms:

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whatever matter arises concerning either house of parliament, ought to be examined, discussed and adjudged in that house to which it relates, and not elsewhere [emphasis added].
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This passage highlights one factor seemingly overlooked in the judicial debate above: namely, that art 9 precludes the speeches, debates and proceedings of parliament from being impeached or questioned in any court or in any other place out of parliament. To confine the protection afforded by art 9 against the imposition of legal consequences on those who are engaged in parliamentary proceedings fails to give effect to the intention that other bodies apart from courts were to be precluded from questioning those proceedings. The immunity must extend beyond courts to

100 Sir C Harders, above note 86.
102 Contrast Olson J in Wright and Advertiser v Lewis (1990) 53 SASR 416 at 447.
any tribunal,\textsuperscript{104} including royal commissions,\textsuperscript{105} with power to summon witnesses. In so far as members of parliament or parliamentary witnesses are called before these inquiries, unless they are protected by art 9 in respect of their parliamentary statements, they are vulnerable to being questioned on their reasons, motives and even their sources of information in respect of those statements.

It is important to note that official inquiries are not precluded from investigating issues or even allegations raised in parliament, provided no reference is made to parliamentary statements nor any line of inquiry is taken in connection with those statements.\textsuperscript{106} Article 9 simply prevents the particular statements made in parliament from being examined as such, including any inquiry as to their undisclosed sources of information. This was obviously understood by Townley J in holding that a senator could not be compelled to answer questions before the Royal Commission into Certain Crown Leaseholds,\textsuperscript{107} which was established to investigate an allegation of corruption made in the Senate. As the Royal Commissioner, his Honour observed:

\begin{quote}
Whatever a member’s constituents may do or say to him for what he has said in Parliament it seems to me that he may not be compulsorily examined as to it by the Executive Government or by the courts.
\end{quote}

Investigation of the motives and intentions of members might also arise if they were to be interrogated by police or security personnel in respect of what they have said in parliament. Such a case arose in the United Kingdom in \textit{Sandys} case in 1938. Mr Sandys, a member of the House of Commons, wrote a letter to the Secretary of State for War advising that he had received information relating to British defence preparations. He was questioned by the Attorney-General and threatened with prosecution unless he revealed his sources of information. He was also summoned to appear before a military court of inquiry. The Select Committee on the \textit{Official...}

\begin{footnotes}
\item[104] Section 16 of the \textit{Parliamentary Privileges Act 1987} (Cth) declares the use of parliamentary proceedings in a court or tribunal, the latter being defined in s 3(1) to mean any person or body having the power to examine witnesses on oath.
\item[107] (1956) St R Qd 225 at 230.
\end{footnotes}
Secrecy Act found these actions against the member constituted a clear breach of privilege. A similar case arose in Australia in 1948 when Mr Fadden, then the Leader of the Country Party, was interrogated by security officers in his Parliament House office as to his informants for a statement he had made in Parliament.

Although it has been suggested that art 9 prevents the questioning of parliamentary proceedings by any person or body having the power to examine witnesses on oath, it should not be confined in that way, otherwise it allows executive interrogation by police or other investigators. This is not to suggest that members are not free to co-operate with police investigations into matters related to their parliamentary statements, but any co-operation is to be entirely voluntary.

In Western Australia, two royal commissions in the 1990s faced the difficulties which arise from a wide view of the freedom of speech. The first was the Royal Commission into Commercial Activities of Government and Other Matters (the WA Inquiry) in 1991 which unsuccessfully sought to negotiate with both Houses of the Western Australian Parliament to refer to evidence given to various parliamentary committees. The Report of the Royal Commission rejected the wide view of the privilege which prevents what is said in parliamentary proceedings from being referred to or questioned outside parliament, in particular, the Commission rejected the view that this wider protection is needed to ensure that witnesses co-operate in parliamentary inquiries, knowing that they cannot later be held accountable. In recommending a review of the freedom to permit parliamentary proceedings to be questioned outside parliament without imposing legal liability for what is said, the Commission observed:

We have no doubt that if it is understood by members of Parliament or persons appearing before a parliamentary committee, that they may be called to account for their parliamentary statements at a later time, they are more likely than not to speak honestly, although no less freely. To suggest otherwise is to equate the right to speak freely in Parliament with the right to be disingenuous. Such a proposition is fundamentally inconsistent with the right of all citizens to be governed in an open and accountable manner.

The difficulties with this view are: first, that it fails to define the parameters of the permissible external review; and second, it assumes that such a review will only be

109 See E Campbell, above note 18, p 43.
111 See the detailed account given of these negotiations in the Report of the Royal Commission into Commercial Activities of Government and Other Matters, 1992, Part I Vol 1 at 1.6.67-1.6.79.
112 At 5.8.5-5.8.6.
113 See rec 33 at 5.8.8.
114 At 5.8.6.
exercised responsibly, even though it is the possibility of unjustified executive interrogation which the wide view of the privilege guards against. And as the Report notes, there is no impediment to the general public (including the media) from questioning what has been said within the scope of the privilege. Far from being 'puzzling' (according to the Report), the obstacle to any official questioning of parliamentary proceedings is perfectly understandable given that it is an exercise of executive power.

The other royal commission in Western Australia to face the difficulty of art 9 was the Marks Royal Commission established in 1995. Its terms of reference endeavoured to avoid infringing art 9 by confining the inquiry to the circumstances preceding and following the presentation of a petition to the Legislative Council by the Hon John Halden MLC on behalf of Mr Brian Easton.

Mr Easton had been involved in divorce proceedings and the petition alleged that his ex-wife Penny Easton and her sister had given false evidence in those proceedings and that Penny Easton had been given confidential information by the then Leader of the Opposition, the Hon Richard Court MLA. Four days after presentation of the petition, Penny Easton committed suicide. On the basis of findings by a Select Committee of the Legislative Council that the petition was misleading and unfair, the House ordered Mr Easton to apologise. On failing to do so, he was imprisoned for seven days for contempt.

Meanwhile, the former Premier, Dr Carmen Lawrence, became embroiled in controversy over the extent of her knowledge of the petition before its presentation. Accordingly, the newly elected government of Richard Court appointed the Hon Mr K H Marks QC, a retired Victorian Supreme Court judge, as a royal commissioner 'to inquire and report on whether the circumstances and events preceding and following the presentation of [the Easton petition] involved conduct that was an improper or inappropriate use of executive power or public office or was motivated by improper or inappropriate considerations'.

This inquiry was unsuccessfully challenged in the Supreme Court of Western Australia: *Halden v Marks*. In response to the argument that the inquiry was empowered to infringe parliamentary privilege by investigating the events preceding and following the presentation of the petition, the Court refused to express an opinion on the matter for fear of 'intruding into the exclusive domain of Parliament to “determine for itself without review, what is contempt”'. Thereafter, Commissioner Marks ruled on various submissions of breaches of privilege. However, he was assisted by a ruling of the President of the Legislative Council of 16 May 1995 that '[a]lthough the presentation of a petition is as much a conference of managers, the preparation, including circulation, of a

115 At 5.8.5.
119 At 463, citing *Victoria Legislative Assembly Speaker v Glass* (1871) LR 3 PC App 566 at 573.
petition is not'. The royal commission’s report concluded that as Mr Halden had suggested to Mr Easton that he present the petition, he had acted improperly by ‘using Easton’s grievances and allegations for his own personal interests’. Professor Campbell rightly suggests that this finding questions Mr Halden’s motives for presenting the petition.

Parliamentary Privileges Act 1987 (Cth)

In response to the rulings of Cantor J and Hunt J in the Murphy trials, the President of the Senate introduced the Bill for the Parliamentary Privileges Act 1987 (Cth) which Odgers’ cites as ‘enacted primarily to settle a disagreement between the Senate and the Supreme Court of NSW’. While the 1987 Act endeavours to resolve the position at the Commonwealth level, it of course does not do so at the State level. Although reference has already been made to the definition of ‘proceedings in Parliament’ in s 16(2), s 16(1)-(5) must now be considered.

Parliamentary privilege in court proceedings

16 (1) For the avoidance of doubt, it is hereby declared and enacted that the provisions of article 9 of the Bill of Rights, 1688 apply in relation to the Parliament of the Commonwealth and, as so applying, are to be taken to have, in addition to any other operation, the effect of the subsequent provisions of this section.

(2) For the purposes of the provisions of article 9 of the Bill of Rights, 1688 as applying in relation to the Parliament, and for the purposes of this section, ‘proceedings in Parliament’ means 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, and, without limiting the generality of the foregoing, includes:

(a) the giving of evidence before a House or a committee, and evidence so given;
(b) the presentation or submission of a document to a House or a committee;
(c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
(d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

120 The Marks Royal Commission at 22.
121 At para 9.20(a).
123 H Evans, above note 21, p 34. Sir Clarrie Harders in his article, above note 86, was very critical of s 16 especially in denying the right to cross-examine witnesses for the purpose of testing their credibility.
(3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:
(a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
(b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
(c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

(4) A court or tribunal shall not:
(a) require to be produced, or admit into evidence, a document that has been prepared for the purpose of submission, and submitted, to a House or a committee and has been directed by a House or a committee to be treated as evidence taken in camera, or admit evidence relating to such a document; or
(b) admit evidence concerning any oral evidence taken by a House or a committee in camera or require to be produced or admit into evidence a document recording or reporting any such oral evidence, unless a House or a committee has published, or authorised the publication of, that document or a report of that oral evidence.

(5) In relation to proceedings in a court or tribunal so far as they relate to:
(a) a question arising under section 57 of the Constitution; or
(b) the interpretation of an Act;
neither this section nor the Bill of Rights, 1688 shall be taken to prevent or restrict the admission in evidence of a record of proceedings in Parliament published by or with the authority of a House or a committee or the making of statements, submissions or comments based on that record.

The terms of s 16(2) and (3) are extraordinarily wide in their practical effect. This was noted earlier in relation to the protection afforded communications with members of parliament: see O'Chee v Rowley. Another recent example of the difficulties which may arise from the width of s 16 is the Colston affair. In April 1997, allegations were made that Senator Mal Colston had made false claims for travel allowances. He was then the Deputy President of the Senate and an independent senator, having resigned from the ALP in 1996 after being re-elected a senator for Queensland. Statements in reply to these allegations were tabled in the Senate by the Senator and by one of his staff (in which she claimed responsibility for the mistaken claims). The Senator duly refunded approximately $6000 in allowances. When the staff member later retracted her statement, the Government referred the matter to the Federal Police for further investigation. At the same time, there were attempts in the Senate to establish an

124 (1997) 150 ALR 199.
inquiry by the Privileges Committee to decide whether the Senator had misled the House. The Government objected to such an inquiry in view of the obstacles likely to arise from s 16 in the police investigation and in any future prosecution.

Conflicting opinions were given by the Chief General Counsel of the Commonwealth, Mr Henry Burmester, and by the Clerk of the Senate, Mr Harry Evans, as to the appropriateness of a Senate inquiry operating concurrently with a police investigation. Two principal difficulties were identified by the Commonwealth’s Chief General Counsel: first, the inability in subsequent legal proceedings to cross-examine any witnesses on evidence given to a Senate inquiry (which was the very reason for the enactment of s 16); and secondly, the effect s 16(3) may have on any documentation submitted to such an inquiry. The latter difficulty arises from the definition of ‘proceedings in Parliament’ in s 16(2) which includes (b) the presentation or submission of a document to a House or a committee’. Literally, para (b) when read with sub (3) has an operation which is absurdly wide. In the context of the Colston affair, original travel documents submitted as evidence to a Privileges Committee inquiry might be incapable of being used in any legal proceedings by virtue of s 16(3)(b), for those documents would be tendered and used for the purpose of questioning the intention of any person, namely, Senator Colston. A similar difficulty arises under s 3(3)(c) and (d) of the Parliamentary Papers Act 1992 (Qld). Within the accepted rules of statutory interpretation, s 16(2)(b) needs to be confined to documents prepared for presentation or submission to the Parliament or to a committee.

The extraordinary width of s 16(3) of the Parliamentary Privileges Act 1987 (Cth) was implicitly acknowledged by the UK Joint Committee on Parliamentary Privilege in its 1999 Report. Although the Committee recommended the United Kingdom Parliament enact the same provision, it also recommended that it be qualified for ‘[i]n one respect the Australian statute may go too far’. The Report continued:

It is difficult to see how there could be any objection to the court taking account of something said or done in Parliament when there is no suggestion that the statement or action was inspired by improper motives or was untrue or misleading and there is no question of legal liability. We recommend that the prohibition be coupled with a proviso to the effect that the court may take such statements or conduct into account.127

In view of the apparent width of s 16, it is not surprising that challenges to its constitutional validity have been raised both judicially and extrajudicially. Beaumont J in Amann Aviation Pty Ltd v The Commonwealth128 upheld s 16(3) as merely declaratory of the general law and hence not an impermissible interference in the judicial function in violation of Ch III of the Constitution. On the other hand, Sir Clarrie Harders argued

127 At para 86.
that in so far as s 16 purported to deny the right to cross-examine witnesses on prior inconsistent statements, it was invalid for impermissibly interfering with the judicial function.\textsuperscript{129} He also argued that it infringed the right to cross-examination recognised in art 14(3)(e) of the International Covenant on Civil and Political Rights.\textsuperscript{130}

However, the most recent challenge to the validity of s 16(3) is that it needs to be read down so as not to infringe the implied freedom of political communication under the Commonwealth Constitution — at least in relation to the conduct of defamation proceedings. This view was expressed by Pincus and Davies JJA in the Queensland Court of Appeal in \textit{Laurance v Katter}.\textsuperscript{131} On the other hand, the South Australian Full Court in \textit{Rann v Olsen}\textsuperscript{132} rejected this view, upholding the validity of s 16(3). Before considering this issue further, the effect of freedom of speech on defamation proceedings both under the general law and under s 16 of the \textit{Parliamentary Privileges Act} needs to be considered in light of the above discussion.

**Effect of freedom of speech in defamation proceedings**

Where defamatory statements are made in a parliamentary speech, or as part of a debate or the proceedings of parliament or of its committees, art 9 precludes any action against those responsible for such statements whether a member of parliament or a witness appearing before a House or committee. Where defamatory statements are made by a member outside the ‘proceedings of parliament’, no privilege attaches to those statements.

It can be appreciated in view of the above discussion that difficulties may arise when defamation proceedings are brought on the basis of statements made outside parliament but in which one or more parties wish to refer to what has been said in parliament, such as occurred in the \textit{Church of Scientology} case.\textsuperscript{133} In particular, recent cases demonstrate the difficulties which arise when a member of parliament sues for defamation and wishes to refer to statements made in parliament to help establish the cause of action or where the defendant wishes to refer to such statements to establish a defence.

In \textit{Prebble v Television New Zealand Ltd},\textsuperscript{134} an appeal from the New Zealand Court of Appeal to the Judicial Committee of the Privy Council, the plaintiff, a former minister and member of the New Zealand House of Representatives, sued the

\begin{enumerate}
\item \textsuperscript{129} Sir C Harders, above note 86 at 140.
\item \textsuperscript{130} Sir C Harders, above note 86 at 142; art 14(3)(e) provides ‘In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: ... (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him.’
\item \textsuperscript{131} (1996) 141 ALR 447 (Qld Court of Appeal). Special leave to appeal to the High Court was granted but the matter was settled in May 1998.
\item \textsuperscript{132} [2000] SASC 83.
\item \textsuperscript{133} \textit{Church of Scientology of California v Johnson-Smith} [1972] 1 QB 522.
\item \textsuperscript{134} [1995] 1 AC 321.
\end{enumerate}
defendant for defamation in respect of a television programme which, according to
the plaintiff, accused him of being party to a conspiracy to sell off state owned assets
on unduly favourable terms in return for political donations. The program referred
to statements made in Parliament and the defendant wished to refer to those
statements to establish the truth of its accusations. In doing so, the defendant
wished to allege that the plaintiff had misled the Parliament by suggesting that the
Government did not intend selling off state owned assets.

The Privy Council upheld the view of the New Zealand Court of Appeal that art 9
freedom of speech prevented reference to what was said in parliament even in
defamation proceedings brought by a member where the defendant wished to refer
to the member's parliamentary statements only for the purpose of establishing a
defence. The Board acknowledged the conflict which arises in such a case but gave
paramountcy over the interests of the administration of justice to 'the need to
ensure that the legislature can exercise its powers freely on behalf of its electors, with
access to all relevant information'. In adopting a wide view of the privilege, the
Board emphasised the public interest in ensuring that members and witnesses
appearing before parliamentary committees are not inhibited.

The Board rejected both of the defendant's arguments which attempted to confine
the effect of the privilege. The first was based on the ruling in R v Murphy that the
privilege only precluded reference to statements made in parliament where legal
consequences were sought to be imposed against their maker. The Board regarded
this view of Hunt J as erroneous, noting that s 16(3) of the 1987 Act contained
'the true principle to be applied':

This view [of Hunt J] discounts the basic concept underlying article 9, viz. the need
to ensure so far as possible that a member of the legislature and witnesses before
committees of the House can speak freely without fear that what they say will later
be held against them in the courts. The important public interest protected by such
privilege is to ensure that the member or witness at the time he speaks is not
inhibited from stating fully and freely what he has to say. If there were any
exceptions which permitted his statements to be questioned subsequently, at the
time when he speaks in Parliament he would not know whether or not there would
subsequently be a challenge to what he is saying. Therefore he would not have the
confidence the privilege is designed to protect.

Moreover to allow it to be suggested in cross-examination or submission that a
member or witness was lying to the House could lead to exactly that conflict

At 336.

At 333, relying on 'the long line of dicta that courts will not allow any challenge to what
is said or done in Parliament' and that it was inconsistent with the Church of Scientology
case which had been approved by the House of Lords in Pepper v Hart (1993) AC 593 and
by Comalco Ltd v Australian Broadcasting Corporation (1983) 78 FLR 449, both of which held
'that it would be a breach of privilege to allow what is said in Parliament to be the subject
matter of investigation or submission'.

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between the courts and Parliament which the wider principle of non-intervention is designed to avoid. Misleading the House is a contempt of the House punishable by the House: if a court were also to be permitted to decide whether or not a member or witness had misled the House there would be a serious risk of conflicting decisions on the issue. 137

The second argument, that privilege only arose when the member was sued for defamation, was unsustainable since the privilege could not depend on who brought the proceedings. 138

The Privy Council disagreed with the decision of the South Australian Court of Appeal in Wright and Advertiser v Lewis 139 on which this second argument was based. In that case, the Court of Appeal refused to strike out particulars of a defence and interrogatories in a defamation action brought by a member of the South Australian Parliament in respect of a letter published in a newspaper which accused the member of making unfounded and defamatory statements in Parliament. The particulars of the defence and interrogatories which referred to the statements made in Parliament were challenged by the member as infringing parliamentary privilege. The Court rejected this challenge, holding that privilege could not be raised in a case brought by a member.

King CJ allowed reference to the parliamentary statements for the purpose of defending defamation proceedings brought by the member, for to hold otherwise would involve 'a gross distortion of the law of defamation'. 140 Nor would such reference inhibit the member's exercise of free speech in Parliament:

There can be no doubt that some of the more general expressions of the ambit of Parliamentary privilege found in the cases and in learned writings, if understood literally, would have the effect of precluding a defendant from justifying imputations on a Member of Parliament in relation to his statements and conduct in the Parliament. But the authors of those general expressions were not confronted with that particular issue and there does not appear to be any interest of Parliament or the public which warrants such a rule. Freedom of speech and deliberation in the Parliament is the primary value sought to be protected by parliamentary privilege. To accord to a defendant the right to defend himself against an action for defamation by proving truth, would not impinge upon such freedom. A member would not be inhibited in the exercise of free speech or of his Parliamentary duties by fear of legal consequences, because he would be aware that his actions and motives could not be examined in court unless he instituted the proceedings which rendered such examination necessary. Only the member's action in launching

138 It might also have been rejected since '[]the important public interest protected by such privilege is to ensure that the member or witness at the time he speaks is not inhibited from stating fully and freely what he has to say' — said in respect of the first argument at 334.
139 (1990) 53 SASR 416.
140 At 421-422.
proceedings alleging a false imputation could lead to an examination in court of the issue of the falsity of the imputation, and therefore of the member's statements and conduct. I cannot think of any other public or Parliamentary interest which could be impaired by such an examination in such circumstances.

I do not think that a defendant, so defending himself, can be regarded in any real sense as impeaching or questioning the freedom of speech, debates or proceedings in parliament as forbidden by art 9; nor can the courts be fairly regarded as doing so if they permit a defendant to so defend himself. It would not be sought to visit any legal consequences on the member, nor to examine his or her actions or motives except so far as that examination might be rendered necessary by the member's own action. The object would be merely to repel the accusation made by the member that a false imputation had been made against him or her. If parliamentary privilege operated to prevent a person, exposed to an action by a member for defamation, from defending himself by proving the truth of the criticism of the statements or conduct of the member, it would indeed be 'turned into an abominable instrument of oppression': Adam v Ward.141

White J expressly agreed with the judgment of King CJ but relied on two specific factors: (1) as in Adam v Ward, the member's action came 'out of the blue', without any preceding altercation between the parties; and (2) if reference were denied the defendant would be unable to disprove malice in order to maintain the defence of qualified privilege.142 Olsson J adopted the view of North P in News Media Ownership v Finlay143 that the privilege is no more than 'a shield of defence'.144 As noted earlier, his Honour regarded R v Murphy as not inconsistent with the principle from Church of Scientology.145

Both of the cases relied on in Wright and Advertiser v Lewis, the decision of the House of Lords in Adam v Ward146 and News Media Ownership v Finlay,147 were defamation actions brought by a member of Parliament in respect of criticism of his performance. Statements made by the member in Parliament, while noted to be protected by absolute privilege, were still used for the purpose of establishing the cause of action or for arguing the defence of qualified privilege — yet the issue whether such reliance infringed parliamentary privilege was not raised in either case.148

Since Prebble, the South Australian Full Court has revisited this issue in Rann v

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141 At 426-427.
142 At 431 and 432-433.
144 [1990] S3 SASR 416 at 447.
146 [1917] AC 369.
148 The reason for this was surmised by White J to be that it is up to the parties to raise the issue and not for the court to raise it: (1990) S3 SASR 416 at 430. This is, with respect, an unsatisfactory view, given the importance of the freedom of speech to the function of Parliament.
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Olsen which involved a defamation action brought by the Leader of the Opposition against the South Australian Premier for accusing him of lying to a Commonwealth parliamentary committee. While the Court confined itself to the position under s 16(3) of the Parliamentary Privileges Act 1987 (Cth), it was, at least in the leading judgment of Doyle CJ, more sympathetic to the position taken in Prebble than that in Wright and Advertiser v Lewis. Particular emphasis was placed on the need for the courts to respect the principle of non-intervention in relation to parliamentary proceedings. As well, the Court concluded that s 16(3) was a valid law despite burdening the implied freedom of political communication because it was reasonably appropriate and adapted to enhancing freedom of speech in parliament. Further consideration is given below to this finding in relation to the validity of s 16(3).

The harshness of the wide view of the privilege taken by the Privy Council in relation to defamation actions is alleviated in part by the court's ability in an appropriately extreme case to avoid injustice by staying the action. In Prebble, however, the order of the New Zealand Court of Appeal that the proceedings be stayed unless privilege was waived by the House of Representatives was reversed as the defendant was able 'to put forward the overwhelming majority of the matters upon which it relies in justification of the alleged libel'.

Assessment

The fairness of the approach adopted in Prebble is open to serious question given the obstacles it places in the path of the administration of justice. Even a stay of proceedings does not produce justice, as illustrated by the frustrated attempt in the United Kingdom of Mr Neil Hamilton MP to clear his name in defamation proceedings against The Guardian newspaper. Even if art 9 were intended to have this wide effect, a reassessment of the justification of this immunity for contemporary parliaments is clearly needed. This requires a balancing of the competing public interest factors: the due administration of justice and ensuring members (and so each House) are free to perform their parliamentary functions, particularly as both legislators and reviewers of the executive. It is difficult to see how the restrictions imposed on the admissibility of evidence and the risk of a miscarriage of justice are outweighed in every case by the protection accorded members' independence — especially when members themselves are precluded from relying on 'privileged' statements. Such criticisms have already been voiced by Professors Enid Campbell and Geoffrey Marshall. And yet, as noted earlier in

149 [2000] SASC 83
151 Hamilton v Hencke; Greer v Hencke (21 July 1995); Allason v Haines (14 July 1995).
152 E Campbell, above note 64. See also M Chesterman, 'Privileges and Freedoms for Defamatory Political Speech' (1997) 19 Adel LR 155-215 at 192-193.
this chapter, there is good reason for according the privilege a wider scope that that given by Hunt J in R v Murphy to ensure members and parliamentary witnesses are not subject to judicial and executive inquiry.

The difficulty in balancing these competing interests to resolve this issue encourages exploration of other options by statute. One approach is to allow each House to waive the privilege in appropriate cases, such as when a member or another person needs to refer to parliamentary statements to establish a defence. Members alone are unable to waive this privilege which is for the benefit of parliament and not simply its members, nor would it be appropriate to confer this discretion on them. Accordingly, the 1999 UK Report of the Joint Committee on Parliamentary Privilege recommended, in the light of Prebble, a statutory procedure for each House to waive privilege in legal proceedings provided no one is thereby subjected to a legal liability for what was said under privilege. This was suggested in substitution for the existing limited statutory right given to individual members to waive privilege in defamation cases provided by s 13 of the Defamation Act 1996 (UK). This option, of course, carries with it the danger of political abuse.

A more radical option is to confine the immunity to those cases where a member is subjected to a legal liability on the basis of what the member said or did in the course of parliamentary proceedings. This approach, adopted by Cantor J and Hunt J in the Murphy cases, depends on a distinction being drawn between using parliamentary statements to base a legal action and using them merely to support such an action. Although maintaining this distinction appears feasible, this option subjects the motives of members to judicial scrutiny. The traditional view is that this ought not to be allowed in order to enable them to perform their parliamentary functions. While this might in part be justified theoretically by the doctrine of separation of powers, it is based on the view that members only feel free to express their views if they realise they cannot be called to account anywhere except in the House. The Report of the WA Inc Royal Commission challenged this view on the ground that members and parliamentary witnesses are more likely to give truthful statements if they are liable to account outside the House. This argument ignores, however, the nature of the political process and the risks associated with making unfavourable statements. It also ignores the whole process of political accountability which operates swiftly — and at times with extraordinary force and effect — on those who mislead parliament.

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154 See the ruling given by the Speaker in 1952 (Cth Parl Debates, Vol 219, at 1991-3 and 2104-5); and Australian Broadcasting Commission v Chatterton (1986) 46 SASR 1 at 20 per Zelling ACJ.

155 HL Paper 43; HC 214 (1998-99), Recommendations 1-5, paras 60-90.

156 See Hamilton v Al Fayed [2000] 2 WLR 609 (HL) which allowed defamation proceedings to continue on the basis of Mr Hamilton's waiver of privilege. Without that waiver, a stay would have been ordered.

It seems that none of the options proposed is entirely satisfactory. A compromise is clearly required. It is suggested in the conclusion to this chapter that on balance the wide view of the privilege ought to be maintained in conjunction with a capacity on the part of each House to waive the privilege in appropriate cases.

Commonwealth Parliamentary Privileges Act and the implied freedom of political communication

These difficulties with the scope of art 9 identified in Prebble and Wright have recently been considered under s 16 of the Parliamentary Privileges Act 1987 (Cth) by the Queensland Court of Appeal in Lawrance v Katter158 and by the South Australian Full Court in Rann v Olsen.159 In the former case, a member of the Commonwealth Parliament was sued in defamation for saying outside Parliament on national radio and television that his allegedly defamatory statements made in Parliament were ‘backed up with the hardest of hard evidence’. The plaintiff wished to incorporate the member’s parliamentary statements with this statement made outside Parliament in order to establish defamation. The plaintiff demurred to the member’s defence which claimed that s 16 of the 1987 Act precluded reference to what he had said in Parliament.

On the basis of the above authorities, there appears to be little chance of success under the general law for incorporating the parliamentary statements as part of the allegedly defamatory statement.160 This is not simply using the parliamentary statements for the purpose of ‘supporting’ the action. Had the defendant actually repeated his parliamentary statements outside Parliament rather than merely referred to them, it is unlikely that those statements would be privileged.161 Nevertheless, two arguments have been put to support the privilege extending that far: first, the repetition of parliamentary statements outside parliament remain part of the proceedings of parliament and second, to deny privilege is in effect to question the identical statements made inside parliament under privilege. The first of these arguments was mentioned by Zelling ACJ in Australian Broadcasting Corporation v Chatterton where in obiter his Honour regarded arguable that privilege attached to the same statements made out’.162 Prior J disagreed, rejecting both of the arguments above.163 The

158 (1996) 141 ALR 447 (Qld Court of Appeal).
159 [2000] SASC 83.
160 Contrast the report of Gibbs J as the Royal Commissioner appointed to inquire into and report on certain matters relating to members of the Police Force and the National Hotel, Petrie Bight, Brisbane (10 April 1964) at 183-4 where he refers to the possibility of incorporating by reference to what was said under privilege.
161 See R v Abingdon (1793) 1 Esp 226 at 228, 170 ER 337 at 338; R v Creevy (1813) 1 M & S 273, 105 ER 102.
162 (1986) 46 SASR 1 at 18-19.
163 At 35-36. See also R v Lord Abingdon (1793) 1 Esp 226, 170 ER 337; R v Creevy (1813) 1 M & S 273, 105 ER 102.
same view was adopted by Lieff J in Stopforth v Goyer. The member may, however, rely on qualified privilege where publication is to a limited audience.

All members of the Court in Laurance v Katter acknowledged that s 16 of the 1987 Act was drafted in extraordinarily wide terms. In their view its terms, if taken literally, were capable of preventing a member from relying on his or her own parliamentary statements in order to prove the elements of a defamation action and of preventing a defendant in the same way from establishing a defence. Pincus JA posed the example of how untenable s 16 was in a case where a member is critical of someone under privilege and that person’s response is the subject of a defamation action brought by the member. The defendant is then unable to refer to what the member originally said of the defendant under privilege to justify the response. Of course, this is the position under the general law according to the Privy Council in Pobble, subject to the overriding qualification that in an appropriate case the action should be stayed.

While a majority of the Court (Pincus and Davies JJA) concluded that s 16(3) could not validly operate in that manner and so allowed (in part) the demurrer, Fitzgerald P in dissent upheld the validity of the provision despite the wide net it cast. In noting that s 16(3) may prevent a member from suing in defamation for even a malicious publication of known falsehoods concerning proceedings in Parliament, his Honour opined:

I do not find that particularly surprising or objectionable. Parliamentary ‘powers, privileges and immunities’ belong to Parliament ... not the individual members, and it is not unjust or unreasonable that the public interest which they are intended to serve has adverse consequences for parliamentarians as well as ordinary citizens who are without recourse for defamation published of them by a member of parliament in Parliament. Indeed, the defamed member of parliament at least has a public and absolutely privileged forum in which to respond to maliciously false defamation by an ordinary citizen, as well as the opportunity to achieve vindication by having the citizen punished by the material House for contempt.

(The final point in that quote requires correction, since under the Commonwealth’s Parliamentary Privileges Act libels on a House or its members no longer constitute contempt of parliament.)

However, the majority, noting also the difficulties for a defendant in such a case, confined the operation of s 16(3) to avoid that result. Davies JA derived from the context of s 16 an overriding requirement in s 16(3) that evidence concerning the proceedings of parliament would only be inadmissible ‘if that would impeach or

164 (1978) 87 DLR (3d) 373; compare Roman Corp Ltd v Hudsons Bay Oil & Gas Co Ltd (1972) 23 DLR (3d) 292, affirmed (1973) 36 DLR (3d) 413; Re Clark and Attorney-General of Canada (1977) 51 DLR (3d) 33.

165 (1996) 141 ALR 447 per Fitzgerald P at 480, per Pincus JA at 482, and per Davies JA at 488.

166 At 480.

167 Section 6.
question the freedom of proceedings in Parliament', observing this would also 'achieve
a satisfactory balance between the public interest in protecting the freedom of political
discussion and the competing public interest in protecting the freedom of speech in
Parliament which s 49 authorises'. 168 His Honour concluded that condition was not
satisfied in this case. Pincus JA took a different approach, reading down s 16(3) so as
not to apply to defamation proceedings in order to avoid infringing the implied
freedom of political communication under the Constitution. 169

Reference has already been made in Chapter 5 to the approach of Fitzgerald P in
dissent, rejecting the applicability of the implied freedom of political
communication to s 49. However, it was argued there that while the adoption by s
49 of the House of Commons privileges is not subject to the implied freedom, any
expansion of those privileges by statute and any exercise of a privilege must
accommodate the implied freedom. The position is therefore more difficult in the
case of a provision like s 16 if it declares and expands the scope of the House of
Commons privilege.

Once it is accepted that s 16 burdens the freedom of political communication by
precluding reference to parliamentary proceedings in support of any legal
proceedings, the critical issue becomes whether this expansion is reasonably
appropriate and adapted for giving effect to a legitimate public interest — namely,
the effective functioning and integrity of Parliament — and whether the burden
imposed is only incidental and not disproportionate. 170

This process was not followed by Pincus and Davies JJA in
Laurence v Katter. However, it was by Doyle CJ in Rann v Olsen who declined to follow either of their
interpretations of s 16(3):

I am conscious of the unattractive and potentially unjust nature of the result that s
16(3) produces in the present case. I have already identified the potential burden
upon freedom of communication. But I accept the high importance of freedom of
speech in Parliament, meaning that the truth of what is said in the course of
protected speech should not be subjected to legal challenge. I also accept the high
importance of the principle of non-intervention. I am conscious of the need to pay
appropriate deference to the judgment of Parliament as to the extent to which it
should go in protecting its powers, privileges and immunities.

... 

My conclusion that s 16(3) is valid rests also on the fact that in this respect
Parliament has pursued a legitimate objective, has chosen means in pursuit of that
objective that are appropriate, and have (sic) produced a burden on freedom of
communication generally that is unavoidable if the desired level of protection is to

168 (1996) 141 ALR 447 at 490.
169 At 486.
170 See Australian Capital Television Pty Ltd v The Commonwealth (1992) 177 CLR 166 at 142-
144, 157-162, 169.
be given to communications made in the course of proceedings in Parliament.\textsuperscript{171}

Judicial opinions are likely to differ when assessing s 16(3) in this way. On this approach, it is probable that Pincus and Davies JJA would arrive at a similar view to that expressed in \textit{Laurence v Katter}.  

\textbf{Conclusion}  

The position at common law in Australia is obviously unclear as to the scope of the immunity of freedom of speech in cases where reference is sought to be made to statements made under privilege for a purpose other than imposing legal liability on their maker. Such a reference seems to have been statutorily precluded in relation to the Commonwealth Parliament\textsuperscript{172} subject to the implied freedom of political communication.\textsuperscript{173}

It is a difficult task to decide what should be the appropriate scope of art 9 freedom of speech. No challenge is warranted to the immunity of members and witnesses from legal liability for what they say or do within ‘parliamentary proceedings’, except perhaps in relation to their criminal liability (which is considered in Chapter 8).\textsuperscript{174} The difficulty arises in justifying the extension of the immunity to prevent any reference to privileged statements or actions. The principal argument in favour of that extension is that such references call into question the motives and intentions of members and witnesses and thereby undermine their freedom to express views without fear of ever being called to account outside Parliament. The importance of creating this ‘fearless environment’ was emphasised by Gibbs ACJ in \textit{Sankey v Whitlam}:

\textit{[O]ne important reason for the privilege stated in art 9 is that a member of Parliament should be able to speak in Parliament with impunity and without fear of the consequences.}\textsuperscript{175}

Similarly, Lord Browne-Wilkinson in \textit{Pepper v Hart} observed:

\textit{Article 9 is a provision of the highest constitutional importance and should not be narrowly construed. It ensures the ability of democratically elected Members of Parliament to discuss what they will (freedom of debate) and to say what they will (freedom of speech).}\textsuperscript{176}

\begin{itemize}
\item \textsuperscript{171} [2000] SASC 83 at 187-188.
\item \textsuperscript{172} Section 16(3) \textit{Parliamentary Privileges Act 1987} (Cth).
\item \textsuperscript{173} See \textit{Laurence v Katter} (1996) 141 ALR 447 (Qld Court of Appeal).
\item \textsuperscript{174} See the 1999 UK Report of the Joint Committee on Parliamentary Privilege, para 167.
\item \textsuperscript{175} (1978) 142 CLR 1 at 35. At 35, his Honour specifically observed that no reference to the proceedings of Parliament was sought to found the charges or 'to support' them.
\item \textsuperscript{176} [1993] AC 593 at 538.
\end{itemize}
Another ground in support of according art 9 a wide operation is that members and witnesses can be pursued in ways other than by litigation. The possibility of being questioned by royal commissions and other forms of inquiry can be just as inhibiting as the possibility of legal proceedings — especially when such inquiries are usually instigated by the executive. Somewhat less persuasive is the argument that any conflict between parliament and the courts in relation to what has been said under privilege must be avoided to preserve the dignity and effective functioning of parliament.

How do these arguments rate against those advocated for narrowing the scope of art 9? The principal argument is that the interests of the administration of justice require that reference be made at times to what has been said under privilege, not for the purpose of impugning a member or witness for what is said or done there, but to resolve some other issue which has arisen in those proceedings. It is argued that this need to access relevant evidence, clearly evident in defamation cases such as Prebble, outweighs the benefit arising from the creation of a ‘fearless environment’. The restrictions flowing from a wide view of art 9 on the administration of justice especially in defamation and criminal proceedings provide significant support for that argument.

It seems that both the interests of the administration of justice and the freedom of speech of members and witnesses need to be accommodated. The Prebble approach is unsatisfactory because it favours the latter over the former. Whatever solution is devised, it will entail a compromise of both legitimate interests. It is suggested that a reasonable compromise is to maintain the wide view of art 9 while conferring on each House the power to waive the privilege in appropriate circumstances, particularly when required in the interests of the administration of justice.

This approach coincides with that recommended by the 1999 Report of the UK Joint Committee on Parliamentary Privilege for the UK Parliament. The Report recommended, as part of the statutory codification of parliamentary privilege in that country, provisions which affirm the wide view of art 9 given in Prebble but with each House having the discretion to waive the privilege when ‘justice so requires ... without damaging the interests of the House as a whole’ and without exposing anyone to the risk of legal liability. As noted earlier, the Report recommended that s 16(3) of the Parliamentary Privileges Act 1987 (Cth) be adopted with the qualification that the privilege not arise when ‘there is no suggestion that the statement or action was inspired by improper motives or was untrue or misleading and there is no question of legal liability’.

It may be that this qualification is best left to the discretion of each House, given the difficulty entailed in its drafting. On the other hand, this increases the possibility of political partisanship which is the obvious deficiency in the UK proposal. The

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177 The freedom of speech accorded witnesses appearing before parliamentary committees is a more recent extension of the privilege: CJ (1818) 389.
178 1999 UK Report of the Joint Committee on Parliamentary Privilege recs 1-5.
179 At para 76.
180 At para 86.
only protection suggested by the Joint Committee against this danger was the establishment of a committee of senior members to advise the presiding officer with guidelines where 'the general approach will be to waive privilege unless there is good reason for not doing so'. It seems that the risk of political partisanship is unavoidable unless either of the 'extreme' positions on art 9 is adopted — yet it is clear that a compromise is required. That is the task and challenge of parliament.

**Ethical obligations**

A legal explanation of the scope of the privilege of freedom of speech does not address the ethical duties of members in relation to their exercise or enjoyment of that freedom. Although Part III of this book explores these ethical duties, it is appropriate to mention here two particular duties which relate to the freedom of speech:

- not to abuse parliamentary privilege by raising trivial matters as a breach of privilege; and
- not to abuse the privilege of freedom of speech by making baseless attacks against others.  

In 1984, the Final Report of the Joint Select Committee on Parliamentary Privilege recommended that both Houses of the Commonwealth Parliament adopt at the commencement of each session the following resolution to remind members of their responsibilities when exercising their freedom of speech:

> That, in the exercise of the great privilege of freedom of speech, Members who reflect adversely on any person shall take into consideration the following:

- the need to exercise the privileges of Parliament in a responsible manner;
- the damage that may be done by unsubstantiated allegations, both to those who are singled out for attack, and to the standing of Parliament in the community;
- the very limited opportunities for redress that are available to non-Members;
- the need, while fearlessly performing their duties, to have regard to the rights of others;
- the need to satisfy themselves, so far as is possible or practicable, that claims made which may reflect adversely on the reputations of others are soundly based.  

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181 At pars 80.