4.1 Parliamentary Privileges

In the United Kingdom, the House of Commons Library Parliament and Constitution Centre has summarised Parliamentary privilege as having two essential components:

a) Freedom of speech, as guaranteed by Article 9 of the Bill of Rights 1689, and,

b) The exercise by Parliament of control over its own affairs, known technically as ‘exclusive cognisance’.¹

The definitions outlined above distinguish some important features of parliamentary privilege: privilege is seen to be essential to both enabling parliament to perform its duties and functions, and to maintaining parliament’s authority and independence from the executive.

Notwithstanding this, however, parliamentary privilege and particularly the potential for its abuse and misuse has been a contentious issue in academic commentaries on the subject, and subject matter for parliamentary committees themselves. Recent reviews by such committees, conducted in various jurisdictions, have investigated such issues as: whether citizens should be allowed a right of reply; whether the privilege of freedom of speech in parliamentary proceedings needs to be

qualified rather than absolute; and, whether privilege allows persons to be unjustly defamed.²

The powers, privileses and immunities of the U.K. Parliament develop in the context of the parliaments needs to assert its integrity, independence and authority against outside influence. The Privileges enjoyed by Parliament in U.K. may be summarized follows:

The privileges enjoyed by Parliaments in Westminster systems such as Australia, New Zealand, Canada, the United Kingdom and elsewhere are, in their origins,³ the products of an actual political struggle between the House of Commons and the Crown (and the House of Lords) in the United Kingdom. British precedent has significantly influenced the adoption of parliamentary privilege statutes and the application of privilege in Australia, as well as other jurisdictions that have embraced the Westminster model. For example, the Commonwealth of Australia and most Australian state jurisdictions, Canada and New Zealand have incorporated versions of Article 9 of the English Bill of Rights 1689 in

². Two significant reviews include the previously mentioned, United Kingdom, Joint Committee on Parliamentary Privilege (1999) Parliamentary Privilege – First Report, op. cit., (henceforth, UK Joint Committee Report (1999), and Australia, Commonwealth of Australia (1984) Joint Select Committee on Parliamentary Privilege, October, Canberra, Commonwealth of Australia. There are numerous examples of committee reports that address specific cases that have questioned such issues. These reports are readily available on most committee websites, such as the relevant committees in Victoria, the Commonwealth of Australia and the United Kingdom. Examples of the many reports published by committees that deal with specific cases include the following: Australia, Senate, Committee of Privileges (1997) Person referred to in the Senate – Dr Neil Cherry, no. 65, PP No. 48/1997 and Commonwealth of Australia, Senate, Committee of Privileges (2007) Person referred to in the Senate – Indonesian Forum for Environment, no. 132, PP No. 173/2007 (which determined that foreigners have right of reply); Commonwealth of Australia, Senate, Committee of Privileges (2002) Execution of search warrants in Senators’ offices – Senator Harris, no. 105, PP No. 310/2002 (concerning immunity of seized material). also Griffith (1997) op. cit.

some form or another. Article 9 states ‘That the freedom of speech, and debates or proceedings in Parliament, ought not be impeached or questioned in any court or place out of Parliament’.

For this reason it is important to examine House of Commons practice, for, while most Australian jurisdictions have passed their own legislation and developed their own practice in regards to parliamentary privilege, ‘the practice and precedents of the House of Commons are of continuing interest’ and have established the precedent followed in many parliaments influenced by the Westminster model.

### 4.1.1 Freedom of Speech and Debate

Article 9 of the English *Bill of Rights 1689* states ‘That the freedom of speech, and debates or proceedings in Parliament, ought not be impeached or questioned in any court or place out of Parliament’. Freedom of speech and debate is considered the single most important parliamentary privilege. Without this freedom and protection Members would be unable to perform their duties without fear of any consequences arising from what is said in debates. This freedom, Griffith and Ryle note, includes the freedom to make mistakes, since ‘[t]here would be no freedom of speech if everything had to be proved to be true before it was uttered’. Issues and tensions surrounding the use, abuse and misuse of

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4. At the time in which the Bill of Rights was made, the Julian calendar was in use. In referring to the Bill of Rights in this paper, the Bill of Rights 1688 is used interchangeably with the Bill of Rights 1689 as some sources quoted in this paper use the Julian calendar and some use the Gregorian calendar. While the Gregorian calendar, which replaced the Julian calendar, was adopted in some European countries as early as 1582, the Gregorian calendar was not adopted in England until 1752.


7. Blackburn & Kennon (2003) op. cit., p. 139. Not only is there an absolute privilege immunity for mistakes, but this also applies regardless of a Member’s motivations. This is an important distinction from the ordinary law of defamation where truth may be a defence for the ordinary person.
freedom of speech have been tested within parliaments, in law courts and in the public domain. While freedom of speech is seen as a fundamental component of parliamentary privilege, what is included in this protection and who is afforded this privilege is often uncertain. The Commonwealth of Australia has clarified what is meant by ‘proceedings in parliament’ in section 16(2) of the Parliamentary Privileges Act 1987:

…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.

Freedom of speech in parliament has been incorporated into Australian law as a matter of common law and also by statutes. The above definition is comprehensive and other jurisdictions frequently refer to the definition expressed in the Australian legislation.

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8. For example, in 2006 in the South Australian Legislative Council Democrats MLC Sandra Kanck made a speech on euthanasia in which she detailed a numbers of methods available to those wishing to end their lives, which was later censored and removed from the Hansard transcript. A. Marinac (2006) Shaking the foundations of parliamentary privilege, On Line Opinion, 18 September.


In many jurisdictions, such as in Britain and Australia, the definition of parliamentary privilege refers to ‘proceedings in parliament’ allowing for greater flexibility in extending the privilege to witnesses appearing before a parliamentary committee.\(^{11}\) In France however, the immunity is expressed as applying to Members of Parliament. Article 26 of the *French Constitution 1958* provides that:

No Member of Parliament may be prosecuted, searched for, detained or be subject to judgement on the basis of opinions or opinions expressed or votes cast by him in the exercise of his duties.

Despite the explicit protection of Members, court decisions in France have nonetheless recognised the protection of witnesses. Likewise, the *Constitution of the United States of America* applies immunity to Members, not to proceedings. Article I Section 6 of the United States Constitution provides that:

Senators and Representatives… shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

However, court decisions in the United States have interpreted this provision as conferring a wider immunity on Members with respect to participating in legislative activities.\(^{12}\)

While freedom of speech for Members is clearly protected within the chamber or committee rooms, Members are not immune from the ordinary laws of defamation with regard to words spoken outside of the chamber or committee rooms. Indeed, in an important development, recent court decisions have potentially enabled defamation actions to proceed on the basis that words uttered outside parliament may be actionable because they incorporated, by reference, the statements made in parliament under privilege.  

In his work on the Victorian Constitution, Greg Taylor states that the principal effect of Article 9 is that proceedings in parliament enjoy an absolute privilege, which cannot be waived. This privilege extends not just to actual debates in the Houses and the proceedings of committees, but to documents and oral statements used, or to be used, in connection with proceedings in parliament. Privilege extends to the matters covered in petitions, publication of matter to parliament while it is sitting, and the evidence of non-Members to parliamentary committees. In relation to drafts and notes prepared for and by Members for use in debate and for questions in the House, the UK Joint Committee Report stated that such material is protected under the same privilege and immunity that applies to speech and debate conducted in the House or parliamentary committees.

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13. This has come to be known as ‘effective repetition’, since it has been held that the Member had effectively repeated those statements, thereby opening himself or herself up to defamation actions. Buchanan v Jennings [2002] 3 NSLR 145; Buchanan v Jennings [2005] 1 AC 115. also Parliament of the Commonwealth of Australia, The Senate (2008) Effective Repetition, Committee of Privileges, 134th Report.


15. ibid., pp. 263-264.

16. Provided such material is not widely circulated. UK Joint Committee Report (1999) op. cit., para. 113; and, Gay (2010) op. cit., p. 3. The privilege also extends to drafts of evidence given by witnesses before parliamentary committees.
Importantly, absolute privilege is extended to the ‘Hansard’ record of parliamentary proceedings, including the proceedings of committees. The protection of parliamentary publications was firmly established in the United Kingdom with the *Parliamentary Papers Act 1840*, which was introduced in response to the case of *Stockdale v Hansard*. In that case it was found that papers published under House authority were not privileged.\(^{17}\)

### 4.1.2 Qualified privilege

While Members can be said to enjoy absolute privilege of freedom of speech and debate in relation to ‘proceedings in parliament’, not all communications engaged in or by Members have been defined as falling within proceedings in parliament. There has been considerable discussion concerning the types and occasions of communications engaged in by Members which may fall within qualified privilege, particularly in relation to Members correspondence with Ministers, and correspondence and communications between constituents and Members. The United Kingdom Parliament’s Parliament and Constitution Centre has described qualified privilege as ‘a legal concept extending well beyond the scope of parliamentary privilege’, the law of which is based primarily in case law.\(^{18}\) Qualified privilege exists where a person is not liable for an action of defamation if certain conditions are fulfilled.\(^{19}\)

### 4.2 Freedom from Arrest

While no immunity is afforded to Members in relation to arrest on criminal charges, parliamentary privilege does include freedom from

\(^{17}\) *Stockdale v Hansard* [1839] 9 Ad & E 1 (112 ER 1112); Gay & Horne (2009) op. cit., p. 2.

\(^{18}\) ibid., p. 3.

\(^{19}\) Including, that a person making a defamatory statement about someone else does so in good faith, and that the person making the defamatory statement and the person receiving the defamatory statement share a common duty or interest. Gay & Horne (2009) op. cit. for further discussion.
arrest and attendance before courts in civil matters. In the Australian context, section 14(1) of the *Parliamentary Privileges Act 1987* provides that a Member:

(a) Shall not be required to attend before a court or a tribunal; and

(b) Shall not be arrested or detained in a civil cause; on any day:

(c) On which the House of that member is a member meets;

(d) on which a committee of which that member is a member meets; or

(e) Which is within 5 days before or 5 days after a day referred to in paragraph (c) or (d).

Section 14(2) extends the above privileges to an officer of a House and section 14(3) extends the privilege of immunity from arrest or being detained in a civil case and not being required to attend before a court or tribunal to a person who is required on those days to attend before a House or a committee. Section 14(4) provides that, except as provided for in the above circumstances, a Member, an officer of a House and a person required to attend before a House or a committee has no immunity from compulsory attendance before a court or a tribunal or from arrest or detention in a civil cause by reason of being a Member or such an officer or person.

As noted in a report of the Commonwealth Joint Committee on Parliamentary Privilege in 1984, the privileges of parliament are ‘a mirror of the times when they were gained’. Australia is one of the few jurisdictions that have statutorily retained the provision of immunity from arrest in civil proceedings. The Commonwealth report stated:


{164}
When first established [immunity from arrest in civil proceedings] was of very great importance – especially in cases of imprisonment for civil debt – and “in early days it was the most frequent cause of the exercise of the House’s penal jurisdiction”. The immunity existed so the House could have the first claim on the services of its Members. Arrest in civil proceedings has mainly been abolished, and many would say that its continuing existence is an artifact of times long gone and that it now should be decently interred. But it still remains part of the law of Australia.

In the House of Lords freedom from arrest is set out in the Standing Orders and provides that ‘no Lord of Parliament is to be imprisoned or restrained without sentence or order of the House unless upon a criminal charge or for refusing to give security for the peace’. This privilege extends from forty days before until forty days after the session of Parliament.

4.3 Issue And Tensions

Given the history of the emergence of parliamentary privilege through a protracted political struggle, and the central role it plays in affording protection to Members, and in underpinning the independence of parliament, it is perhaps unsurprising that the actual exercise and practice of parliamentary privilege has been often fraught with conflict and uncertainty. Questions have been raised over the level and extent of the protection and immunities afforded to Members and to witnesses appearing before parliamentary committees. The rights, powers and

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immunities afforded to the parliament and to Members by parliamentary privilege have the potential to clash with the rights of members of the public on the one hand, and with the rights, privileges and operations of other branches of government on the other.

Thus, there have been concerns about the scope and extent of parliamentary privileges, whether these privileges should be qualified or absolute, and whether Members should be immune from suit or prosecution under the laws of defamation. In Australia and the United States, and more recently in the United Kingdom, issues have been raised with regard to the abilities of the judiciary and law enforcement officials to carry out their duties with respect to parliamentary privilege, such as in the execution of search warrants, the issuing of subpoenas and orders for discovery. Furthermore, there also exists a tension between the conflicting notions of executive privilege and parliamentary privilege. Some of these themes will be discussed below.

(a) Executive Privilege

Executive privilege refers to the powers exercised by members of the executive branch of government to withhold information when such disclosure of confidential communications would adversely affect the operations or procedures of the executive branch. There are several alternative names used to describe executive privilege depending on historical influence and the jurisdiction referred to in debates and in the relevant literature. For example, executive privilege is sometimes referred to as ‘Crown privilege’ in Australia and Britain. In the United States, when determining whether information should be admitted in legal

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24 For more information on parliamentary privilege and search warrants, subpoenas and orders for discovery Griffith (2007) op. cit., pp. 41-42, 36-42.
proceedings, law courts will sometimes refer to executive privilege as ‘public interest immunity’. 25

In Australia, the Senate has the power to require the giving of evidence and the production of documents. On 16 July 1975 the Senate resolved:

(1) That the Senate affirms that it possesses the powers and privileges of the House of Commons as conferred by Section 49 of the Constitution and has the power to summon persons to answer questions and produce documents, files and papers.

(2) That, subject to the determination of all just and proper claims of privilege which may be made by persons summoned, it is the obligation of all such persons to answer questions and produce documents.

(3) That the fact that a person summoned is an officer of the Public Service, or that a question related to his departmental duties, or that a file is a departmental one does not, of itself, excuse or preclude an officer from answering the question or from producing the file or part of a file.

(4) That, upon a claim of privilege based on an established ground being made to any question or to the production of any documents, the Senate shall consider and determine each such claim. 26

Despite this, Odgers’ Practice notes that:

While the Senate undoubtedly possesses this power, it is acknowledged that there is some information held by government which


ought not to be disclosed… While the Senate has not conceded that claims of public interest immunity by the executive are anything more than claims, and not established prerogatives, it has usually not sought to enforce demands for evidence or documents against a ministerial refusal to provide them but has adopted other remedies.\(^{27}\)

*Odgers’ Practice* states that this ‘has not been adjudicated by the courts and is not likely to be’.\(^{28}\) Indeed, several committees have likewise been unable to develop agreed procedures for determining the validity of claims for public interest immunity with most concluding that the question is a political, not a legal or procedural, one. *Odgers’ Practice* states, ‘There appears to be a consensus that the struggle between the two principles involved, the executive’s claim for confidentiality and the Parliament’s right to know, must be resolved politically’.\(^{29}\)

Evidently, this is a controversial matter, leading some to argue that executive privilege is unconstitutional, undemocratic and contrary to ideals of open government, freedom of information and the public’s right to know in order to make informed decisions about their representatives. On the other hand, others have argued that executive privilege is a necessary component of effective government for reasons of national security and the need for political leaders to receive candid advice. In addition, it has been argued that the disclosure of certain information may also not always be in the public’s interest.\(^{30}\)

The notion that the executive may have reason to exercise privilege in refusing to disclose certain documents (in protecting the operations of

\(^{27}\) *Odgers’ Practice* (2008) op. cit., p. 468.
\(^{28}\) ibid., p. 469.
\(^{29}\) ibid.
\(^{30}\) For works discussing executive privilege and these controversies, Members may want to consult the Further Reading section on executive privilege at the rear of this paper.
government) can certainly impede the ability of parliaments to scrutinise the operations of the executive. Nonetheless, *Erskine May* cites an observation made by a Commons committee in the seventeenth century that the privilege granted to parliament in regard of public service ‘must not be used for the danger of the commonwealth’.\(^{31}\)

A recent event in the Victorian Parliament demonstrated this tension between executive government and parliament. In 2007 the Victorian Government came into conflict with the Legislative Council when it refused to hand over a series of documents related to gambling, the allocation of public lotteries licences and the Victorian Commission for Gambling Regulation. The Attorney-General Rob Hulls wrote a letter on behalf of the Government advising the Council that the ‘executive government on behalf of the Crown makes a claim of executive privilege’.\(^{32}\) There have been numerous occasions in Victoria and in other jurisdictions in which conflicts between executive governments and parliaments have transpired over accountability and transparency and the competing rights both to obtain information and to withhold it. For further reading and discussion of issues concerning executive privilege Members may consult the list of references at the rear of this paper.

(b) Search Warrants and Subpoenas

As has been noted above, individual Members do not have immunity from arrest or imprisonment on criminal charges. However, the

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ability of law enforcement officials to execute search warrants, issue subpoenas and orders for discovery have been issues of contention with regard to the rights and immunities afforded to individual Members under parliamentary privilege. A number of court cases have addressed this issue, both in Australia and in jurisdictions overseas. One important question that has emerged has been the extent to which documents held in the possession of Members are privileged.  

In the United States, there has been recent conflict between the Congress and the executive with regard to privilege. In 2006, FBI officers searched the offices of Congressman William Jefferson, who was not present at the time to assert claims of privilege. The search warrant contained procedures for material seized to be assessed by officials to identify any material subject to privilege. Jefferson challenged the action in the District Court and sought an order to have the seized materials returned, which failed. On appeal, the Court of Appeal found that the compulsory disclosure of privileged legislative material to the executive had violated the speech or debate clause and that the Congressman was entitled to the return of documents found to be privileged (however, this did not apply to non-privileged documents).

Commenting on this event, Bernard Wright noted ‘this decision reflected the Appeal Court’s recognition of the privilege applying in respect of the Congress, but also of the validity of the executive interest in the administration of justice’.

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34. Jefferson was convicted on 11 of the 16 corruption charges against him on 5 August 2009 and was sentenced to 13 years for bribery on 13 November 2009.
35. Wright (2008) op. cit., p. 6. A poll conducted by the American ABC News found that the American public overwhelmingly supported the law enforcement’s searching of a Congress Member’s office. The poll found 86 per cent were in support of the FBI search. The methodology used by the ABC News poll was a random national sample of 1,044 adults contacted by telephone. ABC News (2006) ‘Poll: Americans Support Searches: Public Sides with FBI in Congress Search Issue’, ABC
There have been a few similar cases in Australia. Harry Evans, former Clerk of the Senate, cites a 1999 example where the Australian Federal Police raided a Senator’s office investigating alleged misuse of entitlements. The Senator challenged the legality of this on the basis that documents should be privileged which are closely connected with a Senator's participation in parliamentary proceedings.\(^{36}\) As mentioned above, parliamentary proceedings are defined in section 16 of the *Parliamentary Privileges Act 1987* as being ‘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’.

In this instance the Federal Court dismissed the application to defeat the warrants, suggesting that questions regarding parliamentary privilege and search warrants had to be determined between the House concerned and the executive.\(^{37}\) The ruling also stated that the issuing of search warrants was an administrative not a judicial act, and as such, was an executive act in aid of an executive investigation which did not, in itself, commence any judicial proceedings.\(^{38}\) Subsequently, the Senate appointed a person to receive the documents and divide the documents into those documents protected by privilege and those that were not. The privileged documents were returned to the Senator, while those assessed as not covered by privilege were handed to the police.\(^{39}\)


\(^{38}\) *Crane v Gething* and others [2000] FCA 45, 18 February.

\(^{39}\) also Griffith (2007) op. cit., p. 42. Griffith states, ‘In effect, the execution of search warrants, the issuing of subpoenas and orders for discovery process remain areas of uncertainty in the law of parliamentary privilege’.

\(^{39}\) also Gay (2010) op. cit., p. 16.
As *Odgers’ Practice* notes, Members do not have explicit immunity against subpoenas, search warrants or orders for discovery of documents, however the use before a court or tribunal of material obtained in this way is restricted by the law of parliamentary privilege.\(^{40}\)

A case with a somewhat different slant occurred recently in the British House of Commons. In November 2008, Conservative Member of Parliament Damian Green’s office and home were searched *without a warrant* and Mr Green was subsequently arrested on suspicion of ‘conspiring to commit misconduct in a public office’ and ‘aiding and abetting, counselling or procuring misconduct in a public office’. He was held for nine hours as part of an investigation into alleged leaks from the Home Office. Following this, the Speaker of the House of Commons announced that he would be developing a protocol which would require a warrant for any future search of a Member’s office or access to a Member’s parliamentary papers. This protocol was released by the Speaker on 8 December 2008.\(^{41}\)

The eight point protocol reiterated the convention that the Parliament was not a haven from arrest on criminal charges. At point three, the Speaker declared that, ‘In cases where the police wish to search within Parliament, a warrant must be obtained and any decision relating to the execution of that warrant must be referred to me’.\(^{42}\) In the circumstance where materials are seized under warrant, the Speaker reserved the right to ‘attach conditions to the police handling of any parliamentary material discovered in a search until such time as any issue of privilege has been resolved’. Furthermore, the execution of a warrant

\(^{40}\) *Odgers’ Practice* (2008) op. cit., p. 46.
\(^{42}\) ibid., p.
would not ‘constitute a waiver of privilege with respect to any parliamentary material which may be removed by the police’.\textsuperscript{43}

In April 2009 the charges against Mr Green were dropped. In announcing his decision the Director of Public Prosecutions stated that his decision made it unnecessary for him to resolve the question of the legality of the searches of Mr Green’s offices. The question of whether the material taken from Mr Green’s office was protected by parliamentary privilege was thus not tested in court.\textsuperscript{44}

4.4 Breach of Privileges and Powers to Punish Contempts

As Waugh points out, the special privileges possessed by parliament to ensure its smooth functioning include the power to punish interference or obstruction: ‘Such interference constitutes contempt of Parliament’.\textsuperscript{45}

Most Houses of Parliament have the power to punish contempts and breaches of privileges. In the British context it is argued that this power is important in giving credence to parliament’s authority and, as we’ve seen in the foregoing discussion, several authors on privilege have referred to parliament as constituting, and being invested with, the powers and immunities of a court. This sentiment has early expression in the House of Commons, with one Member in the late sixteenth century asserting the ‘court’ of parliament was above all other courts of the realm.\textsuperscript{46} Of course, the House of Commons has not operated as a judicial

\begin{footnotes}
\item[43] ibid., p. 10.
\item[44] ibid., p. 12.
\item[46] In a speech recorded in the Commons in 1593 it was said, ‘This Court for all its Dignity and highness hath priviledge, as all other Courts have; And as it is above all other Courts, so it hath priviledge above all other Courts; and as it hath priviledge and Jurisdiction too, so hath it also Coercion and Compulsion; otherwise the Jurisdiction is nothing in a Court, if it hath no Coercion.’ S. d’Ewes (1682) \textit{Journal of the House of Commons}, pp. 513-521. The Journals of Parliament can
\end{footnotes}
court as such (in the manner of the Privy Council of the House of Lords) for hundreds of years. Yet parliaments across the world assert their rights to independently adjudicate matters of contempt and breaches of privilege, and to apply sanctions.

In Australia, section 7 of the *Parliamentary Privileges Act 1987* (Cth) details the powers available to Houses in protecting their proceedings, which include imposing a penalty of imprisonment for a period not exceeding six months for an offence against that House (s. 7(1)), imposing the penalty of a fine not exceeding $5,000 for a person or $25,000 for a corporation (s. 7(5)) and authorising the issue of such warrants as are necessary for implementing the above (s. 7(8)).

The Victorian Parliament’s contempt powers are based on those of the House of Commons, and thus include the power to reprimand Members or non-Members, to suspend or expel a Member, and to imprison. However, the power to impose a financial penalty, as can occur in the Commonwealth Parliament (and in Queensland and Western Australia, also by statute) is less certain, given that the House of Commons has not imposed fines since 1666.47

Many commentators have noted that while the terms ‘breach of privilege’ and ‘contempts’ are often used interchangeably there is an important distinction.48 A breach of privilege is a contempt involving an infringement of the powers or immunities of parliament, such as where a parliamentary debate is brought into question during a court trial. More
broadly, a contempt of parliament can occur without an infringement of any specific power or immunity of parliament. For example, leaking Committee documents prior to their official tabling in parliament may constitute a contempt, however this might not be categorised as a breach of privilege since it may not infringe on any specific power or immunity of parliament. The range of activities that can constitute a contempt of parliament is significant.49

*Erskine May* describes a contempt as ‘any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any Member or officer of such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results’.50 The Commonwealth *Parliamentary Privileges Act 1987* describes contempt in section 4:

Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member’s duties as a member.

This power to punish contempts is discretionary and is equivalent to the power that courts possess in relation to punishing contempts of court.51 Furthermore, each House has the right to punish contempts. In *Erskine May* this means that each House may punish actions which:

…while not breaches of any specific privilege, obstruct or impede it in the performance of its functions, or are offences against its authority

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and dignity, such as disobedience to its legitimate commands or libels upon itself, its Members or its officers.\textsuperscript{52}

According to \textit{Odgers’ Practice} the rationale behind the power of Houses of Parliament and courts to punish contems ‘is that the courts and the two Houses should be able to protect themselves from acts which directly or indirectly impede them in the performance of their functions’.\textsuperscript{53} \textit{Odgers’ Practice} states that despite some contems being discussed as if they have been regarded as offences simply because they are affronts to the dignity of the Houses, acts judged to be contems in modern case law, from both the Senate and the British House of Commons, have been so judged because of their tendency to impede the performance of the functions of the Houses.\textsuperscript{54}

There have been a number of occasions in which parliaments, which possess the power to punish contems, have exercised that power, although the penalty of imprisonment has been rarely exercised since the nineteenth century. \textit{Odgers’ Practice} cites the example of the Australian House of Representatives imprisoning two persons, the owner and the editor of a Sydney newspaper, for three months in 1955 for attempting to intimidate a Member; and, a case in June 1999 where the Legislative Council of Western Australia imposed a fine of $1,500 on a public servant who failed to appear before a committee when summoned.\textsuperscript{55}

In April 2006 the New Zealand House of Representatives imposed a fine on a television company for the contempt of penalising a witness.\textsuperscript{56}

\textsuperscript{52} Erskine May (2004) op. cit., p. 75.
\textsuperscript{53} Odgers’ Practice (2008) op. cit., p. 62.
\textsuperscript{54} ibid., p. 63.
\textsuperscript{55} ibid., p. 72. also R. v Richards; ex parte Fitzpatrick and Browne (1955) 92 CLR 157.
\textsuperscript{56} Odgers’ Practice (2008) op. cit., p. 72. also New Zealand, House of Representatives Privileges Committee (2006) Question of Privilege on the Action Taken by TVNZ in Relation to its Chief Executive, Following Evidence he gave to the Finance and Expenditure Committee, Interim report of the Privileges Committee, April.
Waugh states that the most recent case of imprisonment in Australia for contempt of parliament was that of the Legislative Council of Western Australia in 1995, where the individual concerned failed to comply with an order.\(^{57}\) No one has been imprisoned for contempt of Parliament in Victoria since the nineteenth century. More recently, in 1969 the Legislative Council summoned two journalists to the bar of the Council to be censured for attacking witnesses to a committee inquiry.\(^{58}\) The most recent case of contempt in Victoria was a matter involving a law firm – the Mills Oakley case – which is discussed below.

Houses of Parliament also possess the power to discipline their own Members. In a paper written for the Australian Parliamentary Library, Campbell discussed some of the methods available for Houses of Parliament to deal with abuses of the privilege of free speech. Recognising that defamatory statements can generate extensive media publicity and cause considerable damage to individual reputations, Campbell noted that the Houses may suspend Members, may impose penalties on witnesses who have given false testimonies and may appoint a parliamentary committee to inquire into the truth of the accusations made under parliamentary privilege.\(^{59}\)

Another option available to redress particularly serious abuses of privilege may be for the House concerned to support a royal commission of inquiry. However, this option is fraught with difficulty. As Campbell notes, Article 9 has been interpreted as imposing restrictions on courts and royal commissions on the reception and use of evidence of parliamentary proceedings.\(^{60}\) Moreover, inquiries by royal commissions

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\(^{57}\) Waugh (2005) op. cit.

\(^{58}\) ibid.


\(^{60}\) ibid. The other issue of course is that royal commissions of inquiry are appointed by the executive.
into the truth of statements made under federal parliamentary privilege is expressly prohibited in section 16(3) of the *Parliamentary Privileges Act 1987.*

4.4.1 Right of Reply

Since 1988 the Senate has, by resolution, accorded a citizen’s right to reply, with the House of Representatives adopting a similar resolution in August 1997. After inquiry by the Committee of Privileges the reply may be incorporated in the parliamentary record. A similar framework is employed in the Victorian Parliament. Standing Order 227 of the Legislative Assembly and Standing Order 22.02 of the Legislative Council refer to citizen’s right of reply procedures.

The Legislative Council’s Standing Order 22.02 states that a person who has been referred to in the Council by name, or in such a way as to be readily identified, may make a submission in writing to the President requesting that he or she be permitted to incorporate an appropriate response in the parliamentary record. The applicant must claim that he or she has been adversely affected by reason of that reference. If the President is satisfied ‘that the subject of the submission is not so obviously trivial or the submission so frivolous, vexatious or offensive in character’ he or she may allow a response by that person to be published by the Council and incorporated in Hansard.

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In the Legislative Assembly, the Speaker, if satisfied that the submission is not trivial, will refer the submission to the Legislative Assembly Privileges Committee who will decide whether or not to consider the submission and will report any such decision to the House. In considering a submission, the Committee will not consider or judge the truth of any statements made in the House or the truth of the submission (SO 227(9)). The Committee may recommend that no further action be taken in relation to the submission or that a response by the applicant be published by the House or incorporated in Hansard.

In the 56th Parliament, at the time of writing, the Legislative Assembly’s Privileges Committee has considered the submissions of seven persons that have been made to the Speaker regarding Standing Order 227. The Privileges Committee met in private on each occasion. The Committee recommended that no further action be taken in respect of four of these submissions, but recommended in three cases that the response by a person referred to in the Assembly be published with the Committee’s report.\(^6\)

### 4.4.2 Parliamentary Privilege Immunity and Non-Members

An interesting case challenging the application of contempt of parliament occurred in Victoria during the 55th Parliament. The ‘Mills Oakley’ case, as it became known, required the Legislative Assembly’s

\(^6\) Victoria, Legislative Assembly Privileges Committee (2010) *Person Referred to in the Legislative Assembly: Ms Arnie Azaris*, August, Melbourne, Parliament of Victoria; Victoria, Legislative Assembly Privileges Committee (2010) *Person Referred to in the Legislative Assembly: Ms Julianne Bell*, August, Melbourne, Parliament of Victoria; Victoria, Legislative Assembly Privileges Committee (2010) *Person Referred to in the Legislative Assembly: Mr Rob Small*, May, Melbourne, Parliament of Victoria; Victoria, Legislative Assembly Privileges Committee (2010) *Person Referred to in the Legislative Assembly: Mr Brian Rule*, May, Melbourne, Parliament of Victoria; Victoria, Legislative Assembly Privileges Committee (2008) *Person Referred to in the Legislative Assembly: Mr Robert Larocca*, April, Melbourne, Parliament of Victoria; Victoria, Legislative Assembly Privileges Committee (2007) *Person Referred to in the Legislative Assembly: Mrs Belinda Clarkson*, November, Melbourne, Parliament of Victoria; and, Victoria, Legislative Assembly Privileges Committee (2009) *Person Referred to in the Legislative Assembly: Mr Dennis MacKinlay*, June, Melbourne, Parliament of Victoria.
Privileges Committee to consider whether the immunity afforded by parliamentary privilege extends to the communication of information to Members by other persons. 64 The issue related to a constituent, who had provided information to the then Member for Preston, Mr Michael Leighton, concerning an issue he had previously raised in the House. The constituent later received a solicitor’s letter threatening legal action against the constituent if the Member repeated certain allegations in the House. 65

In referring the matter to the Privileges Committee, Mr Leighton said:

I am moving this motion because there has been a clear and premeditated attempt to stop me from speaking in this House … [in] the Westminster system – indeed, in any parliamentary system – the right of elected members of Parliament to go into their chambers and to speak without fear or favour is one of the pillars of democracy. 66

The Speaker noted that while this particular question had not been fully determined by the courts or parliamentary practice the restriction of the provision of such information to a Member of Parliament for the use in the House ‘would significantly hamper Members in the performance of their duty’. 67 The report of the Privileges Committee referred to Erskine May, which states:

67. ibid., p. 291. For a discussion of precedents to this case, and the Mills Oakley case itself, A. Walsh (2009) Interference With Members Carrying Out Their Duties: Case Studies, ANZACATT Professional Development Courses and Seminars, 9 January, Norfolk Island, ANZACATT.
Protection is not afforded to informants, including constituents of Members of the House of Commons who voluntarily and in their personal capacity provide to Members information that has no connection with proceedings in Parliament. The special position of a person providing information to a Member for the exercise of his or her parliamentary duties has however been regarded by the courts as enjoying qualified privilege at law.\textsuperscript{68}

The Committee report stated that there was a reasonable expectation that such information would be used by Mr. Leighton ‘as part of his parliamentary duties and role as a Member’ since Mr. Leighton’s constituents ‘had a strong belief that Mr. Leighton would represent their views’.\textsuperscript{69} The Committee found that the provision of information by the constituent ‘to Mr Leighton for use in the House, as part of his role in representing his constituents, was a proceeding in Parliament and therefore protected by parliamentary privilege’.\textsuperscript{70}

The Committee found that there was a clear attempt by Mills Oakley Lawyers to interfere with the provision of information relevant to Mr Leighton’s parliamentary duties, and this was thus a breach of privilege. It also concluded that the intimidation was intended to prevent the constituent from communicating freely with his elected representative. The threat of adverse action against the constituent was viewed by the Committee as a contempt, ‘in cases where the threat is intended, or could be reasonably expected to have the effect, to prevent a member carrying out his or her duties as a member of the House.’\textsuperscript{71}

\textsuperscript{69} Victoria, Legislative Assembly Privileges Committee (2006) op. cit., p. 4.
\textsuperscript{70} ibid., p. 6.
\textsuperscript{71} ibid., p. 6.
The House resolved that the Speaker would place a prominent notice in the Law Institute Journal asserting the importance of parliamentary privilege and advising that the House will take whatever action it considers necessary to protect that privilege.72

4.5. The Courts and Parliament

While the nature of privilege can be described and generally agreed, matters of jurisdiction are more problematic. Judicial review of parliamentary privilege, and defining the role of the courts in respect of parliamentary privilege, have been described as the ‘most difficult’ aspects of parliamentary privilege.73 Carney states:

There is a lack of coherent principles to define precisely the jurisdiction of the courts, no doubt partly as a result of the paucity of cases where this issue has been raised. But even in those few cases where the issue has been decided, there has been a tendency not to articulate clearly the reasons for denying or accepting jurisdiction. When jurisdiction is denied, at times it seems that judges have been too willing to shy away from the spectre of a conflict between parliament and the courts.74

72. Victoria, Legislative Assembly (2006) Debates, 23 August, pp. 2961-2964, 2970-2986, 2986. A significant alleged breach of privilege also previously occurred in the Victorian Parliament concerning the actions by the then Leader of the State Opposition, the Hon. Jeff Kennett. The then Treasurer, the Hon. Tom Roper, wrote to the Speaker, referring the matter to be investigated, claiming that Mr Kennett had attempted to intimidate Members in the conduct of their duties and that this represented a breach of privilege. The Legislative Assembly Privileges Committee produced a report, tabled in June 1992, but did not make a finding on the matter due to differences of opinion amongst Committee members. Victoria, Legislative Assembly Privileges Committee (1992) Report on Complaint made by the Treasurer, June, Melbourne, Parliament of Victoria. also R. Mathews (2001) Mr Kennett’s Contempt: The Parliamentary Superannuation Ultimatum Affair of May, 1991, Australian Quarterly; May-June, pp. 7-12.
Correspondingly, *Erskine May* notes:

After some three and a half centuries, the boundary between the competence of the law courts and the jurisdiction of either House in matters of privilege is still not entirely determined. There is a wide field of agreement on the nature and principles of privilege, but the questions of jurisdiction which occasioned furious conflict in the past – usually between the Commons and the courts, but at times between the two Houses – are not wholly resolved.\(^{75}\)

As noted, the courts have generally favoured the principle of non-intervention in the context of parliamentary privilege, such as in *Prebble v Television New Zealand Ltd.*\(^{76}\) David McGee, former Clerk of the New Zealand House of Representatives notes:

In principle, therefore, parliamentary privilege may present issues on which the courts must rule in carrying out their duties. That is to say, an aspect of parliamentary privilege may become a justiciable issue before a court. However, it is of the nature of much parliamentary privilege that its object is to free the functioning of Parliament from judicial control. The resolution of justiciable issues of parliamentary privilege therefore requires that the courts do so in a way that is consistent with this ethos of non-intervention in parliamentary matters, for this ethos itself expresses the law.\(^{77}\)

The broad rule, derived from case law and cited by Griffith, is ‘that the courts will inquire into the existence and extent of privilege but not its exercise’.\(^{78}\) Indeed, Article 9 of the *Bill of Rights 1689* is fairly

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\(^{75}\) *Erskine May* (2004) op. cit., p. 176.

\(^{76}\) *Prebble v Television New Zealand Ltd* [1995] 1 AC 321.


proscriptive in regard to proceedings and explicitly states that proceedings should not be ‘impeached or questioned in any court or place out of parliament’. The UK Joint Committee Report notes that this legal immunity is ‘comprehensive and absolute’.\textsuperscript{79} Furthermore, \textit{Erskine May} states that this ‘prohibition is statute law and, unless there has been amending legislation, the protection it confers cannot be waived or not insisted upon by either House’.\textsuperscript{80}

Campbell states that Article 9 was important in establishing the independence of the Houses and the supremacy of parliament. However, it has raised questions over what can be regarded as proceedings in parliament.\textsuperscript{81} It also means that courts may have to exclude evidence which is ‘both relevant and vital to the issues before them’. This conflict between parliament and the courts is, as Campbell notes, largely unresolved through judicial channels. In fact, the 1984 Australian Joint Select Committee report on parliamentary privilege noted that the clashes between the Commons and the courts over the nature and extent of parliamentary privilege ‘has resulted in a jurisdictional no-man’s land in which both the courts and Parliament claim sovereignty’.\textsuperscript{82}

Over the centuries there have been many notable court decisions with regard to parliamentary privilege, addressing issues such as the interpretation and scope of privilege, absolute and qualified privilege, defamation, contempt, what constitutes ‘proceedings’ in parliament and breaches of privilege.

\textsuperscript{79} UK Joint Committee Report (1999) op. cit., executive summary.
\textsuperscript{80} \textit{Erskine May} (2004) op. cit., p. 77.
\textsuperscript{81} Also above discussion outlining the Commonwealth’s description of what constitutes proceedings in section 16(2) of the \textit{Parliamentary Privileges Act 1987} (Cth) (section ’Freedom of Speech in Debates’) and, Campbell (2000) op. cit., p. 13.
\textsuperscript{82} Australia, Joint Select Committee on Parliamentary Privilege (1984) op. cit., p. 25.
Relevant court cases have been extensively discussed in detail in *Erskine May, Griffith and Ryle*, Enid Campbell’s *Parliamentary Privilege* and in Gareth Griffith’s research papers, therefore interested readers should refer to these sources, especially the comprehensive Table of Cases included in *Erskine May.*

4.6 Party Discipline and Contempt of Parliament

Another issue to emerge concerning privilege is the potential for conflict between party cohesion and discipline and the principle of independence of Members of Parliament. Speaking about this potential conflict between parliamentary principles and political practice, Evans wrote about two particularly notable cases in the Senate.

The Australian Senate passed a series of resolutions in February 1988 concerning the right of Houses to punish contempts. These were intended to provide ‘general guidance’ and not derogate from the Senate’s power to determine that particular acts constitute contempts. These resolutions included the provisions that a person ‘shall not improperly interfere with the free exercise by the Senate or a committee of its authority, or with the free performance by a Senator of the Senator’s duties as a Senator’. A person shall also not interfere with witnesses giving evidence before the Senate or a committee or disturb the Senate or a committee while it is meeting.

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85. Resolution 6 in Australia, Senate (2009) *Standing Orders and Other Orders of the Senate*, June, Canberra, Senate Table Office, Parliament of Australia. also s. 4 and s. 12(2) of the Parliamentary Privileges Act 1987 (Cth).

Regarding the above resolutions, on 25 February 1988, Senator Haines, then Leader of the Australian Democrats, questioned whether requiring Members to sign a pledge, that makes them bound to vote according to the decisions of the causes, constituted a contempt of parliament. Senator Haines stated:

If these matters relating to privilege which constitute contempt are passed, does that mean that we either release all Labor Party Senators and Members from any contract they entered with the Labor Party, or do we move contempt proceedings against those people who have influenced them… into making those contracts? If so, whom do we charge with this contempt?... we are saying that no outside person – that is, no non-political party person – can act improperly in this way, can attempt to influence a Senator’s conduct as a Senator, can attempt to influence the way that Senator votes or speaks, either in this Chamber or on a committee.\(^{87}\)

Senator Haines’ concerns were not pursued further by the Senate. However, the broader issue of party discipline was tested in 2001 when Senator Tambling, a member of the Country Liberal Party of the Northern Territory and also a member of the government, having been appointed a Parliamentary Secretary, voted contrary to his party’s position.

In his commentary of the event, Evans noted that the Country Liberal Party had made it clear that he would be deprived of his preselection if he did not vote against the Bill before the Senate. Soon afterwards at a party meeting a motion was carried that Senator Tambling’s preselection be revoked. Evans noted that Senator Tambling

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‘had clearly been punished for his failure to accept a direction as to how he was to exercise his vote in the Senate’. The Senator raised his de-selection as a privilege matter under the procedures of the Senate and later took action in the Supreme Court of the Northern Territory. The President of the Senate noted that the Senate had not previously dealt with a case of party discipline as a possible matter of contempt. Speaking on the Privileges Committee report Possible improper influence and penalty on a senator, Senator McGauran stated:

At one end of the committee, we had the opinion that we could not find there was contempt of the Senate on this particular issue, given all the circumstances, because if we did we would have had every aggrieved senator who had lost their preselection queuing up at the door of the Privileges Committee, seeking a finding of contempt of the Senate and therefore seeking a reversal of that particular party’s decision.

Senator Tambling as to how he should vote and that a penalty was imposed on Senator Tambling in consequence of his vote in the Senate. However, the Committee report stated that while the actions of the NT Country Liberal Party were ‘ill-judged’, and considering that Senator Tambling reached a settlement with the Party, that contempt of the Senate should not be found.

4.7 Parliamentary Privilege in other Countries

4.7.1 Commonwealth

Under the Australian Constitution, the power and privileges of the UK House of Commons were adopted for both Houses of the

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91. ibid., p. 19.
Commonwealth Parliament at Federation in 1901. Section 49 of the Commonwealth of Australia Constitution Act states:

The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.\(^{92}\)

In 1987, the Parliament of the Commonwealth of Australia codified its privileges to reverse two judgements of the Supreme Court of New South Wales which restricted parliament’s privilege of freedom of speech.\(^{93}\) The judgements in question regarded whether witnesses who gave evidence before a parliamentary committee could then be examined on that evidence in the course of a criminal trial. The Senate argued that such evidence could be used for the purpose of establishing some material fact, such as the fact that a person gave evidence before a committee at a particular time but that the evidence could not be used for the purpose of supporting the prosecution or the defence.\(^{94}\)

The Parliamentary Privileges Act 1987 (Cth) was unique in being introduced by the President of the Senate. Section 16(1) states:

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

\(^{92}\) Originally, privileges were incorporated in Section 49 of the Commonwealth Constitution. Privileges were eventually given their own comprehensive legislation eighty years later with the Parliamentary Privileges Act 1987, following an inquiry by a Joint Select Committee. Campbell (2000) op. cit..


\(^{94}\) Ibid
have, in addition to any other operation, the effect of the subsequent provisions of this section.

As Odgers’ Practice notes, such terms were used because the Parliament ‘was not legislating to provide for its freedom of speech in the future, but declaring what its freedom of speech had always been’, therefore it intended to provide protection for past proceedings in Parliament. However, it was unable to affect court proceedings already commenced.⁹⁵

Another significant feature of the Commonwealth’s Act was that it defined what is covered by the expression ‘proceedings in Parliament’. This had ‘never been authoritatively expounded’ and caused some Senators to be concerned, at the time, that the legislation was unduly restrictive.⁹⁶

The most important provision in the Act, according to Odgers’ Practice, is that it defines the meaning of ‘impeached or questioned’, thereby preventing prosecution for proceedings in parliament. Section 16(3) also distinguishes proper and improper admission of evidence of parliamentary proceedings and states:

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;

⁹⁵. The Houses disclaimed the intention of legislating retrospectively in section 7 of the Parliamentary Privileges Act 1987: ‘without prejudice to the effect that article 9 of the Bill of Rights, 1688 had, on its true construction, before the commencement of this Act, this section does not affect proceedings in a court or a tribunal that commenced before the commencement of this Act’. Odgers’ Practice (2008) op. cit., p. 41.
(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.

As Evans notes, parliaments are usually reluctant to legislate for parliamentary privilege based on the concern that such legislation may unduly restrict the powers and immunities of the Houses of Parliament by tying them to precise legislative terms. \(^{97}\) Marleau and Montpetit note that it was thought better to rely on common law and the broad terms of old statutes, such as the Bill of Rights. \(^{98}\) For example, the United Kingdom parliamentary committees have conducted several reviews into the scope and application of privilege and have decided not to legislate the codification of privilege. \(^{99}\) The Clerk of the House cautioned against codification in the House of Commons Select Committee on Parliamentary Privilege as noted in its report in 1977:

It would be a mistake first and foremost because it would introduce an element of inflexibility into the manner in which the House upholds its privileges and punishes contempts. It is true that the House would be in no danger of abridging its privileges or powers by a mere resolution setting out the sort of cases upon which it normally proposed to act. But formulas which may appear precise and faultless at the time at which they


are drafted, may be found to be defective at a later stage owing to some undiscovered loophole or developments which could not be envisaged at an earlier stage. It would certainly seem undesirable to have to ask the House to amend its resolutions on privileges with any frequency.\textsuperscript{100}

\textbf{Victoria}

As the foregoing illustrates, to a significant extent parliamentary privilege in Australia is founded on Article 9 of the English \textit{Bill of Rights} \textit{1689}.

Legislation concerning parliamentary privilege in Australian jurisdictions often locates the privileges to be afforded to Members as defined by reference to the privileges at a particular time in the House of Commons. For example, section 19(1) of the Victorian \textit{Constitution Act 1975} makes specific reference to the privileges enjoyed at the House of Commons in 1855 as to be applied to the privileges and immunities that are to be enjoyed by Members of the Victorian Parliament. It is provided that:

The Council and the Assembly respectively and the committees and members thereof respectively shall hold enjoy and exercise such and the like privileges immunities and powers as at the 21st day of July, 1855 were held enjoyed and exercised by the House of Commons of Great Britain and Ireland and by the committees and members thereof, so far as the same are not inconsistent with any Act of the Parliament of Victoria, whether such privileges immunities or powers were so held possessed or enjoyed by custom statute or otherwise.

\textsuperscript{100} memorandum in United Kingdom, House of Commons, Select Committee on Parliamentary Privilege (1977) op. cit., p. xiv. However, courts in Australia and elsewhere have found the \textit{Parliamentary Privileges Act 1987} (Cth) to be declaratory of the privileges enjoyed by Parliaments in jurisdictions which rely on common law and statutes providing privilege in broad terms only.
Section 19(2) also provides the Victorian Parliament with the power to enact any legislation it sees fit in respect to the privileges, immunities and powers held and exercised by the Houses, committees and Members thereof. As Griffith states, section 19 ‘adopts and incorporates the customary, inherent and statutory sources of privilege into Victorian law.’\(^{101}\)

As noted by Carney, ‘this approach ensures local control of the privileges while avoiding the automatic adoption of changes introduced for the House of Commons which are not necessarily appropriate for the Australian parliament’.\(^{102}\) Taylor has noted that ‘the fact that the powers of the Victorian Houses are thus defined by reference to those of the House of Commons over a century and a half ago certainly strikes some as strange’.\(^{103}\)

While it might be odd ‘to have the privileges of Parliament defined by reference to the law of another country’, it does provide ‘a ready source of precedent and learning from a much larger jurisdiction’.\(^{104}\) This model of determining the scope of parliamentary privilege by fixing it by reference to the position in Britain at a particular date is also followed in many other Commonwealth jurisdictions, which, according to Taylor, has the effect of ‘making parliamentary privilege an area of law in which there is still a substantial degree not merely of similarity, but of identity’.\(^{105}\)

\(^{101}\) Griffith (2009) op. cit., p. 2.


\(^{103}\) Taylor (2006) op. cit., p. 259. Victoria’s position adopts the entirety of privileges as at the aforementioned day in Britain, which includes the abolition of the privilege of immunity from suit, which was abolished prior. ibid.

\(^{104}\) ibid., p. 260.

\(^{105}\) ibid.
Section 19A of the Constitution Act provides the Houses, committees and joint committees of the Parliament with the power to administer oaths to witnesses.\textsuperscript{106} In addition to the powers and immunities provided under section 19, the authority of the Houses of the Victorian Parliament to manage their own affairs, ‘severally and collectively’, is provided by section 43 of the Constitution Act. Section 72 authorises the Government Printer to publish the reports of debates in each House, while sections 73 and 74 provide protection for the publishers of parliamentary proceedings. The transmission and broadcasting of parliamentary proceedings is protected under section 74AA.

**Western Australia**

In 2004 the Constitution (Parliamentary Privileges) Amendment Bill 2004 defined and located the privileges of the Western Australian Parliament as those of the House of Commons as at 1989 in section 1(b) of the *Parliamentary Privileges Act 1891* (WA). This followed Western Australia’s previous position of an ambulatory provision of referring to its privileges as those privileges ‘for the time being held, enjoyed, and exercised by the Commons House of Parliament, or the members thereof’.\textsuperscript{107} This meant that any changes to parliamentary privilege adopted by the Commons would modify parliamentary privilege in Western Australia and was a matter of concern for the Western Australian Parliament given recent developments in the United Kingdom.

Following recommendations made by the Western Australian Procedure and Privileges Committee, the Western Australian Parliament decided to ‘peg’ their parliamentary privileges to those enjoyed by the

\textsuperscript{106} Evidence given before a Victorian parliamentary committee is protected under this section of the Constitution Act, and by the *Parliamentary Committees Act 2003*.

\textsuperscript{107} This provision, now repealed, was in section 1 of the Western Australian *Parliamentary Privileges Act 1891*. 

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House of Commons at 1 January 1989, thereby avoiding certain ‘undesirable changes’, as stated by the Committee, that were introduced by the Defamation Act 1996 (UK).  

**Queensland**

Queensland also had an ambulatory provision aligning the privileges of the Queensland Parliament with those of the House of Commons, until the Parliament of Queensland Act 2001 located the powers of the Queensland Legislative Assembly as those of the Commons at the establishment of the Commonwealth (1 January 1901) (section 39(1) of Parliament of Queensland Act 2001).

**South Australia**

In South Australia, section 38 of the Constitution Act 1934 locates the privileges as at 1856:

The privileges, immunities, and powers of the Legislative Council and House of Assembly respectively, and of the committees and members thereof respectively, shall be the same as but no greater than those which on the twenty-fourth day of October, 1856, were held, enjoyed, and exercised by the House of Commons and by the committees and members thereof, whether such privileges, immunities, or powers were so held, possessed, or enjoyed by custom, statute, or otherwise.

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108. Western Australia Legislative Assembly, Procedure and Privileges Committee (2004) Parliamentary Privilege and its Linkage to the UK House of Commons, Report No. 5, Western Australian Parliament, p. 6. It should be noted that under the Parliamentary Privileges Act 1891 the WA Parliament has the power to deal with contempt itself, or to refer the contempt to the Attorney-General for action (sections 14 and 15).
The Territories

The Northern Territory and the Australian Capital Territory both locate their parliamentary privileges as being those of the privileges of the Commonwealth’s House of Representatives. Section 4 of the Northern Territory Legislative Assembly (Powers and Privileges) Act 1992 defines the powers, privileges and immunities of its Assembly and of its Members, committees and officers as being the same as those of the House of Representatives of the Commonwealth. Section 24(3) of the Australian Capital Territory (Self-Government) Act 1988 (Cth) provides for the equivalent in the Australian Capital Territory. Norfolk Island does likewise in section 20 of the Norfolk Island Act 1979 (Cth). Subsequently, any changes made to the privileges of the House of Representatives flow directly to these territory legislatures.\footnote{109}

Tasmania

Tasmania and New South Wales differ in comparison to the other jurisdictions in that there is no comprehensive adoption of the privileges of the House of Commons. In Tasmania the Parliamentary Privilege Act 1858 confers on both Houses powers to summon witnesses and to punish specified contempts. The President or Speaker may issue a warrant for any person adjudged by the House to be guilty of contempt (s. 5), with the Tasmanian Act specifying that the Sheriff and other law enforcement officers are required to assist in the execution of any such warrant. Section 9 of the Parliamentary Privilege Act also specifies that doors may be broken open in executing such a warrant.

Matters published in the course of the proceedings of a parliamentary body are also subject to absolute privilege in section 27(1)

of the *Defamation Act 1957* (Tas) and the *Jury Act 2003* (Tas) exempts Members of Parliament from jury service. Interfering with Parliament and bribing or influencing Members are criminal offences in sections 70, 71 and 72 of the Tasmanian *Criminal Code Act 1924* (Tas).

**New South Wales**

In New South Wales there is no specific legislation defining the powers and privileges of Parliament, therefore the privileges ‘depend essentially on the principle of necessity’ and are founded largely on common law.\(^{110}\) Notwithstanding this, however, parliamentary privilege is protected in several Acts.\(^{111}\) Article 9 of the *Bill of Rights* as it was in force in England on 25 July 1828 is imported and adopted into New South Wales’ legislation by section 6 of the *Imperial Acts Application Act 1969*.

Parliamentary proceedings are also protected from legal action resulting from defamation cases in section 27 of New South Wales’ *Defamation Act 2005*. However, as Griffith notes, at common law the New South Wales’ Parliament has no power to punish for breaches of privilege or contempts.\(^{112}\)

In relation to Members of Parliament, the New South Wales’ Parliament has a self-defensive, or protective power, to discipline Members under the common law, but this power cannot be used punitively.\(^{113}\)

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\(^{111}\) For a full list of the Acts that, in some way, protect the proceedings of Parliament Griffith (2007) op. cit., pp. 9-16. Also Griffith (1997) op. cit. Griffith also provides a history into the debate surrounding privilege in NSW and notes that the case was made to legislate for a statutory privilege framework from as far back as the 1840s with several bills being introduced, the first of these in August 1856. Griffith (2007) op. cit., pp. 17-22.


4.7.2 Parliamentary Privilege in other Jurisdictions

This section provides a brief examination and comparison of parliamentary privilege in selected other jurisdictions.\(^{114}\)

New Zealand

Representative government was established in New Zealand by the New Zealand Constitution Act 1852. When the Parliament of New Zealand first met in 1854 it consisted of the Governor, a Legislative Council and a House of Representatives. The Legislative Council, which was an appointive, rather than an elective body, was abolished on 1 January 1951 leaving the New Zealand Parliament as a unicameral legislature.\(^{115}\) As with the UK House of Commons, the Speaker of the New Zealand House of Representatives lays claim to all the House’s privileges to the Governor-General at the beginning of every Parliament. The wording in Standing Order 23 is similar to the UK version and states ‘On being confirmed by the Governor-General as Speaker of a new Parliament, the Speaker, on behalf of the House, lays claim to all the House’s privileges; especially to freedom of speech in debate, to free access to the Governor-General whenever occasion may require it, and that the most favourable construction may be put on all the House’s proceedings’.\(^{116}\)


\(^{115}\) McGee (2005) op. cit.

A similar legal basis for parliamentary privilege as exists in many Westminster jurisdictions is applied in New Zealand with the ‘constitutional import’ of Article 9 into statute.\textsuperscript{117} In section 242 of the \textit{Legislature Act 1908} the privileges held by the British House of Commons in 1865 are deemed to be applicable in New Zealand (the \textit{Legislature Act 1908} re-enacted the \textit{Parliamentary Privileges Act 1865}). The Bill of Rights 1689 also forms part of New Zealand law by virtue of the \textit{Imperial Laws Application Act 1988}.\textsuperscript{118}

For McGee, parliamentary privileges have helped to define the type of legislature that New Zealand has, one that takes on an inquisitorial role rather than a wholly supportive or subsidiary role. Defining privileges early in the New Zealand Parliament’s history has meant that there was no inevitability to the evolution of the House’s functions.\textsuperscript{119} McGee notes:

Parliamentary privilege is an integral part of what the House of Representatives \textit{is}. Without those privileges, powers and immunities or if they had taken a different form, there would have been a different House.\textsuperscript{120}

McGee also notes that as the House ‘is master of its own proceedings and free of judicial control, the concomitant consequence of this freedom is that it is principally for the House to assert and enforce its own privileges’.\textsuperscript{121}

\begin{footnotes}
\begin{enumerate}
\item[120] ibid.
\item[121] McGee (2005) op. cit., p. 613.
\end{enumerate}
\end{footnotes}
McGee identifies several privileges that apply in New Zealand, such as freedom of speech and debate, exclusive control of the House’s own proceedings, control of reports of the House’s proceedings, control of the parliamentary precincts, power to inquire and to obtain evidence, power to administer oaths, power to delegate, power to punish for contempt and to discipline members, power to fine and to arrest, exemption from jury service, freedom from arrest, exemption from attending court as a witness and the right to have civil proceedings adjourned.\(^{122}\)

As in other jurisdictions, McGee notes that the role of the courts with regards to parliamentary privilege in New Zealand ‘tends to be oblique’.\(^{123}\)

**Canada**

Parliamentary privilege in Canada is similar to its parliamentary counterparts based on the Westminster model.\(^{124}\) The Canadian Parliament formally applied the privileges of the British House of Commons at the time of Confederation by the *Constitution Act 1867*, with the Preamble to this Act stating that ‘the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a Constitution similar in Principle to that

\(^{122}\). McGee also identifies control of access to the sittings of the House, exemption from liability for parliamentary publications, exemption from service of legal process, power to determine the qualifications to sit and vote in the House, freedom of access to the Governor-General and right to a favourable construction of the House’s proceedings as privileges applying in New Zealand. McGee (2005) op. cit.

\(^{123}\). ibid., p. 613.

of the United Kingdom’. Prior to Confederation, privileges were enjoyed by some of the colonies, such as Nova Scotia at its establishment in 1758, by common law because ‘the legislature had first call on their services and attendance’.

Parliamentary privileges were also incorporated into section 4 of the *Parliament of Canada Act 1875*, which states:

The Senate and the House of Commons, respectively, and the members thereof hold, enjoy and exercise

(a) Such and the like privileges, immunities and powers as, at the time of the passing of the *Constitution Act, 1867*, were held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof, in so far as is consistent with that Act; and

(b) such privileges, immunities and powers as are defined by Act of the Parliament of Canada, not exceeding those, at the time of the passing of the Act, held, enjoyed and exercised by the Commons House of Parliament of the United Kingdom and by the members thereof.

Section 5, relating to the judiciary states:

The privileges, immunities and powers held, enjoyed and exercised in accordance with section 4 are part of the general and public law of Canada and it is not necessary to plead them but they shall, in all courts in Canada, and by and before all judges, be taken notice of judicially.

Section 18 of the Constitution Act grants the Canadian Parliament the right to define its privileges by statute as long as these privileges do not exceed those enjoyed by the British House of Commons at the time of

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Confederation. The Canadian Parliament may also adopt legislation claiming new privileges provided that those privileges are also held by the British House of Commons.

Describing the relationship between Parliament and the courts, Speaker of the Canadian House of Commons the Hon. Peter Milliken, said:

We have parliamentary privilege to ensure that the other branches of government, the executive and the judicial, respect the independence of the legislative branch of government, which is this House and the other place. This independence cannot be sustained if either of the other branches is able to define or reduce these privileges. …The privileges of this House and its members are not unlimited, but they are nonetheless well established as a matter of parliamentary law and practice in Canada today, and must be respected by the courts. Judges must look to Parliament for precedents on privilege, not to rulings of their fellow judges since it is in Parliament where privilege is defined and claimed.  

The Speaker’s ruling, above, is echoed in New Brunswick Broadcasting Corporation v Nova Scotia (Speaker of the House of Assembly):

…courts may determine if the privilege claimed is necessary to the capacity of the legislature to function, but have no power to review the rightness or wrongness of a particular decision made pursuant to the privilege.  

Likewise, the *House of Commons Procedure and Practice* requests that courts defend the privileges of Parliament:

It is the prerogative of the House to determine how it will exercise these privileges and if it wants to insist upon them or not. Given that the privileges enjoyed by Parliament are part of the general and public law of Canada, the courts must judicially take notice of, interpret and defend these privileges as they would any branch of law.\(^\text{128}\)

**United States**

The privileges afforded the United States Congress have obvious similarities with the jurisdictions discussed above. However, there are some distinct differences, particularly as a result of their divergence from the British model and the unique historical milieu from which their legislatures have evolved. Nonetheless, the freedom of speech and freedom from arrest provisions, contained in the *Constitution of the United States of America* are very similar in wording to Article 9. Article 1 Section 6 of the United States Constitution provides that:

> Senators and Representatives... shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.


Regarding the power of Houses to arrest non-Members, a case in Newfoundland in 1842 established the powers of colonial legislatures as limited to self-protection when it was decided that the Newfoundland House of Assembly did not possess the power to arrest a person for a breach of privilege committed outside the House, as opposed to immediate impediments to parliamentary proceedings, such as disruptions in the gallery, *Kielly v Carson* [1842] 4 Moo PC 63.
Court decisions in the United States have interpreted this provision as conferring a wide immunity on Members with respect to participating in legislative activities. In the case of Congressman Jefferson, discussed above, the Court Of Appeal did recognise that the speech clause had been violated by the compulsory disclosure of privileged legislative material to the executive.

Differences in the practice and approach to privilege in the United States, as compared with some other jurisdictions, are evident when looking at Congress’ ability to punish contempts. While privilege in the United States is based on the Westminster practice of parliamentary democracy, the legislatures of the United States have developed their own distinctive constitutional structure. In early colonial times however, American legislatures did look to the English House of Commons and modelled themselves on its precedents and procedures.

These legislatures were particularly influenced by the political environment in which they evolved, developing a strong opposition to the Stuart monarchs and a deep-seated suspicion of executive authority. In illustrating the prevailing political sentiment in the early formation of contempt power, historian Jack Greene stated:

Colonial legislators had a strong predisposition to look at each governor as a potential Charles I or James II, to assume a hostile posture toward the executive, and to define with the broadest possible latitude the role of the lower house as “the main barrier of all those rights and privileges which British subjects enjoy.”

In discussing the circumstances that influenced the American founding fathers in developing the Constitution, Robert Spitzer cites the founders’ dissatisfaction with British rule, the political environment and the theoretical influences of ideas contained in works such as Montesquieu’s treatise *The Spirit of Laws* as being particularly influential.

Spitzer looked specifically at the relationship between the President and Congress, arguing that it was certain ‘fears’, fears which are both contrasting and opposing, which motivated the founders’ to include certain detailed provisions in the Constitution regarding the purpose and powers of an effective governing system. These fears helped shape and form their development of a governance model that incorporated separation of powers, a three-branch governmental system and a bicameral legislature.\(^{130}\) Spitzer identified four main fears in his discussion which are: the fear of a strong executive, the fear of a strong legislature, the fear of concentrated power and the fear of governmental paralysis.

Spitzer noted that, for the founders’, anti-executive sentiment, which had been an outcome of adverse colonial experiences, ran alongside a greater concern over domineering legislatures, which might be susceptible to corruption or pressure from special-interest groups. Article I of the Constitution, which addresses congressional powers is detailed and specific in limiting those powers, while Article II, which addresses presidential powers, is brief and vague. The United States Constitution sets out in Article II Section 1 that ‘The executive power shall be vested in a President of the United States’, however, as aforementioned, Article II makes no formal mention of powers related to

the withholding of information. The President is, however, granted powers of veto, by which he can influence Congress. Spitzer quotes judicial scholar Robert Scigliano who argues that the three-branch system of government was not designed to be equal and rather that the executive and judicial branches were fortified with defensive powers against the legislative branch.\(^{131}\)

Spitzer cites another reason for the curbing of the power of the legislature, noting that the founders ‘represented the cream of society… America’s political and social elite’ and were ‘frankly suspicious of any mechanism that facilitated direct popular control of the government because they considered the citizenry unqualified to make direct governing choices and feared that the citizenry might rise up and deprive the wealthy of their property…’\(^{132}\) To this end, only one of the four national governing institutions, the House of Representatives, was directly elected (the Senate was indirectly elected until 1913).

Furthermore, the principle of separation of powers was intended to ward off the potential abuse of power by one or more branch of government; nonetheless, this had to be balanced with the objective of encouraging government efficiency and effectiveness. Spitzer notes that the weakened position of the legislature in comparison to the executive and judiciary has meant that many battles have been referred to federal courts to defend Congress from disputes with the executive.

Post-independence, in 1821 the Supreme Court recognised Congress’ power to punish contempts in \textit{Anderson v Dunn}, ruling that such power was necessary to ensure Congress was ‘not exposed to every indignity and interruption that rudeness, caprice, or even conspiracy, may


\(^{132}\) Spitzer (1993) op. cit., p. 11.
mediate against it’.\textsuperscript{133} In 1857 Congress passed a law which made obstructing the work of Congress a federal crime carrying a punishment of up to one year imprisonment.\textsuperscript{134} In 1927 in \textit{McGrain v Daugherty} the Supreme Court described the Senate’s power of inquiry as ‘an essential and appropriate auxiliary to the legislative function’.\textsuperscript{135} The ruling stated:

Each house of Congress has power, through its own process, to compel a private individual to appear before it or one of its committees… This has support in long practice of houses separately, and in repeated Acts of Congress, all amounting to a practical construction of the Constitution.\textsuperscript{136}

In other cases the Supreme Court has described Congress’s power to conduct investigations as ‘inherent in the legislative process’ (\textit{Watkins v United States}).\textsuperscript{137} The Supreme Court has also explained that ‘The scope of [Congress’s] power of inquiry… is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution’ (\textit{Barenblatt v United States} quoted in \textit{Eastland v United States Servicemen's Fund}).\textsuperscript{138}

As the above cases illustrate, while there is no express provision in the Constitution or a specific statute authorising Congress’s power to investigate, the Supreme Court has firmly established that such power is

\begin{footnotesize}
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\item Allred v Dunn 19 U.S. (6 Wheat.) 204 (1821).
\item Statute 2 U.S.C. Section 192: Refusal of witness to testify or produce papers.
\item \textit{McGrain v Daugherty} 273 U.S. 135 (1927) pp. 174-75.
\item \textit{McGrain v Daugherty} 273 U.S. 135 (1927) p. 135. The Court further explained: ‘A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change… some means of compulsion are essential to obtain that [information] which is needed. All this was true before and when the Constitution was framed and adopted. In that period of inquiry, with enforcing process, was regarded and employed as a necessary and appropriate attribute of the power to legislate – indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may be effectively exercised.’ \textit{McGrain v Daugherty} 273 U.S. 135 (1927) p. 175.
\item \textit{Eastland v United States Servicemen's Fund} 421 U.S. 491, 504, n. 15 (1975) and \textit{Barenblatt v United States} 360 U.S. 109, 111 (1960).
\end{enumerate}
\end{footnotesize}
essential to its legislative function and ‘has been deemed implicit in the
Constitution’s grant to Congress of all legislative powers’.\textsuperscript{139}

Furthermore, while there are no statutory provisions allowing the
Houses to punish contempts, this power has been reinforced in case law.
As such, the House may ‘cite’ individuals for contempt by a resolution
reported from the affected congressional committee. If this resolution is
adopted by the relevant chamber, the matter is referred to a United States
Attorney for prosecution who may call a grand jury to decide whether or
not to indict and prosecute.\textsuperscript{140} The move to making contempt a criminal
matter has, in many ways, shifted the responsibility for punishing
contempts of Congress away from Congress itself and onto the courts.

While Rosenberg and Tatelman, from the Congressional Research
Service, note that this provision has not been intended to substitute the
‘inherent contempt’ power of both Houses, others have argued that it has
had an ‘insidious’ impact on Congress’ power to investigate.\textsuperscript{141} Chafetz
cites the example of the courts ruling that the then President Nixon did
not have to relinquish tapes to the Senate Select Committee as
demonstrating the ‘deleterious consequences’ for Congress of this shift.\textsuperscript{142}
Chafetz states:

In abdicating such matters to the courts, Congress has furthered the
perception that the courts are the sole repository of the republican virtue
of reasoned and impartial judgment. As the executive continues to make
expansive claims for its powers and privileges, and as courts continue to
position themselves as the “ultimate arbiters” of interbranch conflict,

\textsuperscript{139} also M. Rosenberg & T. Tatelman (2008a) Congress’s Contempt Power: A Sketch, CRS Report for
Congress, RL34114, Congressional Research Service, p. 1. also M. Rosenberg & T. Tatelman
Congress, RL34097, Congressional Research Service, p. 4.
\textsuperscript{140} Rosenberg & Tatelman (2008b) op. cit., p. 21. also Chafetz (2009) op. cit.
\textsuperscript{141} Rosenberg & Tatelman (2008b) op. cit. for a more comprehensive discussion of the ‘inherent
\textsuperscript{142} Rosenberg & Tatelman (2008b) op. cit., pp. 18-20.
Congress has ceded ground to both. Given that Congress is the most broadly representative branch, and given that a strong Congress would help check an increasingly strong executive branch, this development is unfortunate for the body politic.\footnote{143}{Chafetz (2009) op. cit., pp. 1155-1156.}

Likewise, Crenson and Ginsberg have argued that the Courts have actually served to reinforce presidential power and have been unwilling to fight Congress’ battles.\footnote{144}{‘How the Courts Reinforce Presidential Power’ (Chapter 8) in M. Crenson & B. Ginsberg (2007) \textit{Presidential Power: Unchecked and Unbalanced}, New York, W. W. Norton and Company.} They detect a change in American political life in which the power of Congress has waned and judges increasingly view ‘the executive as the only branch of government capable of managing the nation’s affairs’.\footnote{145}{Crenson & Ginsberg (2007) op. cit.}

Members interested in the tension between executive privilege and parliamentary privilege in the United States and elsewhere are advised to refer to the section preceding the bibliography listing further reading on executive privilege.\footnote{146}{The research of scholars Louis Fisher, Mark Rozell and Raoul Berger, who each espouse different viewpoints, may be of particular use to interested readers.}

While many issues prevail regarding the law of parliamentary privilege there is one area which is rarely contested, and that is the significance and centrality of parliamentary privilege to parliamentary democracies. Parliamentary privilege has long been considered essential in enabling parliaments to perform their functions as representative institutions, in creating effective legislation and in scrutinising government activity. As discussed in this paper, these privileges, which are an exception to ordinary law, are comprised of freedom of speech and debate, freedom from arrest, exclusive cognisance of the Houses, and the power of Houses to punish contempt. Immunities, belonging to individual Members acting in a collective capacity, such as freedom of speech, are
seen as protections that allow parliamentarians to perform their duties without fear of intimidation or constraint. The powers belonging to a House of Parliament to punish contempts and regulate its own constitution are, as noted in *Erskine May*, ‘for the protection of its own authority and dignity’.  

A perusal of the discussion made above reveals that the law and practice of parliamentary privilege is complex and many issues and tensions have arisen from its practice. Issues such as *sub judice*, search warrants and subpoenas, the power of Houses to punish contempts, citizen’s right of reply, immunity of non-Members and the scope of freedom of speech have, on occasion, brought parliaments in conflict with constituents and the executive and have resulted in numerous court cases. However, as Griffith notes, ‘Recent cases on parliamentary privilege may not point in any discernible direction or reveal any definite trend, turning as most of them do on the particular facts at issue’.  

The structure and practice of privilege in other jurisdictions has elucidated the conflicts and tensions that exist in maintaining an effective separation of power between legislatures, the judiciary and the executive. Centuries of developing statutory and procedural frameworks with regard to privilege have still left many uncertainties as to the role each arm of government is intended to perform. Presumably, the only certainty is that these ambiguities will continue to exist. Indeed, the idea that parliamentary privilege is a complex topic of which there are still persistent ‘grey areas’, some of which may never be resolved is echoed in the literature and resources examined throughout this paper, such as in *Erskine May*, Campbell and *Griffith and Ryle*. Governments based on the principle of separation of powers will inevitably encounter tensions in
striving to attain an ideal balance between accountability, transparency and effective governance.