PARLIAMENTARY PRIVILEGE RULES, UK?

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Introduction

While it is a well-established and fundamental principle in Australia, parliamentary privilege is often criticised, usually in situations where it has arguably been abused by the parliamentarians who rely on it. In a recent UK case, the principle has been challenged on the basis of its alleged incompatibility with the rights and freedoms of individuals.

In late December 2002, the European Court of Human Rights (ECHR) handed down its decision in *Case of A v The United Kingdom*,[1] in which a UK citizen argued that the absolute immunity afforded to UK parliamentarians by parliamentary privilege was a breach of her rights and freedoms under the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention). Among other things, the applicant, "A", argued that the immunity prevented her from taking legal action in respect of statements made about her in Parliament, in violation of her right of access to court under Article 6.1 of the Convention and her right to privacy under Article 8 of the Convention, as well as discriminating against her contrary to Article 14 of the Convention.

The ECHR ruled against A.

The facts

A lived with her two children in a house owned by the local housing association. The house was in the parliamentary constituency of Mr Michael Stern MP. In mid-1996, Mr Stern initiated a debate in the House of Commons on the subject of municipal housing policy and, in particular, on the performance of the local housing authority that owned A's house. In the course of his speech, Mr Stern referred specifically to A several times, giving her name and address and referring to members of her family. He suggested that A was "the neighbour from hell", implying that the incidence of burglary, drug crimes, vandalism, violence and other crimes in the area had increased since A and her family had moved in. He also stated that A's brother was currently in prison and had given A's address as his permanent address.

Shortly before the debate, Mr Stern issued a press release to several newspapers, subject to an embargo prohibiting disclosure until the precise time when his speech commenced. The contents of the press release were substantially the same as those of his speech. Both local and national newspapers carried articles the following day, consisting of purported extracts of the speech (although these were based upon the press release). The articles included photographs of A and mentioned her name and address. The main headline in one was “MP Attacks ‘Neighbours From Hell’” and, in another, “MP names nightmare neighbour”.

A was approached by journalists and television reporters asking for her response to Mr Stern’s allegations. Her comments were summarised in each newspaper the same day,

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although they were not given as much prominence. A subsequently received hate-mail addressed to her at the address. She was also stopped in the street, spat at and abused by strangers as “the neighbour from hell”. Eventually, A had to be re-housed and her children had to change schools.

A denied the truth of the majority of the allegations. At no point did Mr Stern ever try to communicate with her regarding the complaints made about her by her neighbours, nor did he ever attempt to verify the accuracy of his comments, either before or after the parliamentary debate.

Parliamentary privilege

A's only avenue of complaint was, through Mr Stern, to the Speaker of the House. The Speaker's representative advised A that Mr Stern’s remarks were protected by absolute parliamentary privilege, pointing out that "[s]ubject to the rules of order in debate, Members may state whatever they think fit in debate, however offensive it may be to the feelings or injurious to the character of individuals, and they are protected by this privilege from any action for libel, as well as from any other molestation." In short, A had no right of legal redress against Mr Stern, as he was absolutely protected by parliamentary privilege.

The relevant privilege emanates from Article 9 of the *Bill of Rights 1688*,[2] which states:

> ... the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.

The effect of the privilege was described in 1869, by Lord Chief Justice Cockburn, as follows:

> It is clear that statements made by Members of either House of Parliament in their places in the House, though they might be untrue to their knowledge, could not be made the foundation of civil or criminal proceedings, however injurious they might be to the interest of a third party.[3]

The law in the various Australian jurisdictions is essentially identical and also relies on Article 9,[4] though its operation in the Commonwealth sphere is also spelt out in the *Parliamentary Privileges Act 1987*.

What the Court found

The ECHR ruled that parliamentary privilege was an "essential constitutional principle", stating that it was "of utmost importance that there should be a national public forum where all manner of persons, irrespective of their power or wealth, can be criticised". It found that Members should not be exposed to the risk of being brought before the courts to defend what they said in the Parliament. The ECHR noted that similar principles applied in various other European Union jurisdictions.

Qualified privilege operated to protect any press coverage of the parliamentary debate, as long as the coverage accurately reflected what had occurred in the Parliament and as long as the publishers did not act maliciously.

In relation to the possibility that the privilege might be abused, the ECHR ruled that abuse of the privilege was a matter for internal self-regulation by the Parliament, not a matter for investigation and regulation by the courts.

The ECHR noted that the Speaker of each of the UK Houses of Parliament exercised control over debates and that each House had its own mechanisms for disciplining Members who deliberately made false statements in the course of debates. The Court noted that deliberately misleading statements are punishable by Parliament as a contempt. It also noted the existence of other avenues for a person to have corrected remarks made about him or her in the Parliament, such as petitioning the relevant House, through a Member.

Third party interventions were made in the case on behalf of the Austrian, Belgian, Dutch, Finnish, French, Irish, Italian and Norwegian governments. The ECHR concluded that the privilege available to parliamentarians in the UK was "consistent" with that available in other European states. Indeed, the Court found that the privilege available in the UK was, in fact, narrower than that available in some states, in that the privilege did not extend beyond statements made in the course of parliamentary proceedings.[5]

In the final analysis, the ECHR found that parliamentary privilege was of fundamental importance to the operation of the Parliament and that the disadvantage that it imposed on individuals was not disproportionate to that fundamental importance.[6] The Court conceded that the allegations against A were "extremely serious and clearly unnecessary in the context of a debate about municipal housing policy", noting that the repeated references to A's name and address were "particularly regrettable".[7] It concluded, however, that using the circumstances of a particular case to create exceptions to the immunity would "seriously undermine the legitimate aims pursued" by the immunity.[8] On that basis, A's claim failed.

A lone voice in dissent

Judge Loucaides, from Cyprus, was a lone dissenter in the matter. In disagreeing with the majority, His Honour stated:

> I believe that, as in the case of the freedom of the press, there should be a proper balance between freedom of speech in Parliament and protection of the reputation of individuals.

He noted that while the absolute privilege of parliamentarians had an ancient history, it was established when the legal protection of the personality of the individual was in its infancy and therefore extremely limited. While the latter had been greatly enhanced in the intervening period, the former had not. The implication is that parliamentary privilege has not developed with the times.

Judge Loucaides found that a balance needed to be achieved between the 2 competing principles, pointing to the balance that had to be achieved in the United States to ensure that the constitutional guarantee of freedom of speech was not allowed to become "a licence to defame" or "an obvious blueprint for character assassination".[9]

His Honour found that, on the facts of the present case, the absolute immunity was a **dis**proportionate restriction of A's right to access to a court, noting the following:

- the fact that the defamatory allegations, in which the applicant was named and her address identified, were (as the majority had found) "clearly unnecessary in the context of a debate about municipal housing policy";

- the severity of the defamatory allegations;

- the foreseeable harsh consequences for the applicant and her family, including even the publication of the photographs of the applicant and her children ;

- the (lack of) reaction of the MP to the letter from the applicant;
- the fact that the MP has never tried to verify the accuracy of his defamatory allegations and did not give the applicant an opportunity to comment on them before uttering them;

- the lack of any effective alternative remedies.

Judge Loucaides indicated that, even without these factors, he would support the view that the immunity was a disproportionate restriction on the right of access to a court because of its absolute nature, which precluded the balancing of competing interests.

In relation to the reference to similar privileges operating in other European states, His Honour noted that, in the majority, the privilege was not absolute, either because it did not apply to defamatory statements or because it could be lifted. He noted that, in the case of the Council of Europe, it could be waived by the country concerned.

What about Australia?

As already indicated, the law in Australia is much the same. The only difference is the existence in some Australian jurisdictions of mechanisms by which persons mentioned in parliamentary proceedings can seek to respond to incorrect or adverse statements made about them. As discussed in a recent newspaper article,[10] however, those mechanisms operate with differing levels of "success". As noted in that article, while the rights of redress are relatively accessible in the Senate, no-one has yet managed to make use of them in the House of Representatives.

The other issue is whether an Australian court would so readily have applied the immunity in this particular fact situation. Under the *Parliamentary Privileges Act 1987*, the privilege operates in relation to "proceedings in Parliament". That term is defined in subsection 16(2) of the Act as:

> 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:
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> (a) the giving of evidence before a House or a committee, and evidence so given;
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> (b) the presentation or submission of a document to a House or a committee;
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> (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.

While the privilege in the UK operates on the same concept (albeit that there is no legislated definition of the term), there is no indication in the judgment that the ECHR considered whether the privilege properly applied in this instance, given the acceptance that the newspapers prepared their reports on the basis of the embargoed press release, rather than what Mr Stern actually said in the House. There is surely a real issue as to whether the privilege extended to the press release. One would hope that, in a similar situation, an Australian court would be more rigorous in considering this issue.[11]

Those issues aside, as recent incidences have shown, parliamentary privilege is just as powerful a protection in Australia as it is in the UK. The ECHR has found that even the rights and freedoms given to European citizens by the Convention do not operate to threaten the protection afforded to parliamentarians. There are no such rights and freedoms available to Australian citizens, so it would appear that the privilege is impregnable here.

Endnotes

1 Available at www.echr.coe.int/Eng/Judgments.htm

2 Often referred to as the *Bill of Rights* ***1689***, with the explanation being that at the time the Act was passed, the Christian dating system began its years at Easter and the Julian Calendar was in use, which meant February was at the end of the year 1688. In 1752 Britain adopted the New Style Gregorian calendar and the beginning of the year was re-set at 1st January. This caused February at the end of 1688 (in the old dating system) to become February at the *beginning* of 1689 (in the new dating system). This is an explanation for the dating of the *Bill of Rights* as either 1688 or 1689. As the Commonwealth *Parliamentary Privileges Act 1987* refers to the *Bill of Rights 1688*, this article uses that version.

3 *Ex parte Watson* (1869) QB 573 at 576.

4 See Campbell, E, "Parliamentary privilege and judicial review of administrative action", (2001) 29 *AIAL Forum* 24 at 29 (note 1).

5 See paras 37-57 and 84-5 of the judgment.

6 See para 83 of the judgment.

7 Para 88 of the judgment.

8 Ibid.

9 Referring to the US decision of *Philadelphia Newspapers Inc v Hepps*, 89 L Ed 2d 783 (1986).

10 A Ramsey, "Getting the House in order for Christmas", *Sydney Morning Herald*, 21 December 2002, p 25.

11 There is a deal of discussion of this issue in various Australian decisions. Unfortunately, the authorities are (with respect) largely unhelpful in terms of assisting in working out just how far the term "proceedings in Parliament" extends. A recent decision that discusses some of these authorities is *In the matter of the Board of Inquiry into Disability Services* [2002] ACTSC 28 (10 April 2002).