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# Royal Commissions, Parliamentary Privilege and Cabinet Secrecy

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## Abstract

On 5 November 1992 Labor MLC, Mr John Halden, tabled a petition in the West Australian Parliament on behalf of Mr Brian Mahon Easton which implicated the then Opposition Leader and now Premier, Mr Richard Court, in the leakage of confidential information to Mr. Easton's estranged wife, Ms Penny Easton.

The petition was later found by a Parliamentary Select Committee to be false and misleading in material respects. The fallout from the "Easton Affair" as it has become known includes the suicide of Ms Easton, the imprisonment of Mr Easton for contempt of Parliament and the establishment of a Royal Commission by Mr Court into the circumstances surrounding tabling of the petition.

The validity of the Royal Commission's terms of reference have been challenged by the Federal Minister for Health, Dr. Carmen Lawrence, who was the Western Australian Premier at the time the Easton petition was tabled and the focus of the inquiry, on the ground that any public inquiry into the extent of her prior knowledge of the contents of the petition — a matter central to its investigation — inevitably involves breaches of parliamentary privilege and cabinet confidentiality.

Politicians under inquiry instinctively invoke the dual concepts of parliamentary privilege and cabinet confidentiality to prevent potentially embarrassing and politically damaging disclosures concerning their integrity.

In this regard, the Commissioners investigating the commercial activities of the Western Australian Government (the "WA Inc. Royal Commission") suggested that recent judicial interpretations may have extended the bounds of

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parliamentary privilege beyond the original intention and made the particularly pertinent observation that:

Whilst members of parliament may be free to speak their minds in parliament and should not be liable for comments made in such proceedings which would be actionable if made outside parliament because of their defamatory nature or otherwise, what they have said should not be treated for purposes associated with court and like proceedings as if it were never said. To provide such an immunity or privilege to such persons is indeed likely to encourage or at least facilitate a disregard for the truth by those to whom the protection is given. If it is understood by members they are called to account for their parliamentary statements at a later time they are more likely than not to speak honestly although no less freely.

As the discussion in this article shows, the extent to which politicians are protected from the forced disclosure of cabinet proceedings or the public investigation of the truth or otherwise of their parliamentary statements is not yet finally settled.

## The Parliamentary Privilege of Freedom of Speech

Parliamentarians in Queensland are presently entitled to the same powers, privileges and immunities as the members of the House of Commons in England<sup>1</sup> including the absolute freedom of speech in Parliament.

The "privilegium" of free speech was, however, not always enjoyed by the Commons and from the time of its first sitting in 1265 until the adoption of the Bill of Rights by William and Mary over 400 years later its members were held personally liable to prosecution and punishment for parliamentary conduct or speeches which offended the Crown.

Thomas Haxey<sup>2</sup>, a parliamentary clerk, for example, was condemned to death as a traitor for introducing a Bill in the Commons in 1397 demanding that King Richard II curtail the extravagant expenditures of his royal household and as late as 1684 Sir William Williams was fined £110,000 for permitting the tabling in Parliament of a publication defamatory of the Duke of York (later James II).<sup>3</sup>

The Commons first used its legislative power to protect its members as early as 1512 when it passed the *Privilege of Parliament Act* (Strode's Act) to invalidate a fine imposed on Richard Strode for introducing Bills designed to regulate the Cornwall tin industry<sup>4</sup> but did not formally demand royal recognition of its right to

1 Cf s 40A *Constitution Act 1867* (Qld).

2 GH Jennings *An Anecdotal History of the British Parliament* (3rd Ed) 1892 at 5.

3 (1684) 12 *State Trials* 1370.

4 Cited by Sir Clarrie Harders 'Parliamentary Privileges — Parliament v The Courts' (1993) 67 ALJ 109 at 113.

freedom of speech when the speaker, Thomas Moyle, petitioned King Henry VIII in 1540.<sup>5</sup>

Freedom of speech was finally guaranteed to both Houses of the English Parliament by Article 9 of the *Bill of Rights* 1688 which declares:

... That the freedom of speech in debates or proceedings in Parliament ought not to be impeached or questioned in any court or place outside Parliament.<sup>6</sup>

The object of the freedom according to Sir William Blackstone<sup>7</sup> is:

To protect ... members not only from being molested by their fellow subjects, but also more especially from being oppressed by the power of the Crown.

The provisions of Article 9 were incorporated into the law of Queensland upon separation.<sup>8</sup>

## The Ambit of the Privilege

### a) “Proceeding in Parliament”

Parliamentary privileges apply only to proceedings of the House itself and not to published reports of its proceedings or commentary by newspapers or others outside the Parliament. A select committee of the House of Commons in 1938 regarded the term “proceeding in parliament” wide enough to cover:

... both the asking of a question and the giving of written notice of such question and includes everything said or done by a member in the exercise of his functions as a member in a committee of either house as well as everything said or done in either House in the transaction of parliamentary business.<sup>9</sup>

Use of the term “parliamentary business”, unfortunately, tends to confuse rather than clarify but it has been interpreted in Canada to include:

... anything between members outside parliament closely relating to matters pending or expecting to be brought before the House.<sup>10</sup>

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5 D Mummery ‘Freedom of Speech in Parliament’ (1978) 94 LQR 276, 281, *Elliott’s Case* (1629) 3 State Trials 294.

6 1 W & M sess. 2, c.2.

7 Bla Comm I, 164.

8 Cf Sch. 1 *Imperial Acts Application Act 1984* (Qld) s.5.

9 HC 101 (1938–39) at V.

10 *R v Bunting* (1885) 7 Ontario Rep 563.

Accordingly, communications between one member and another which are outside the House but so closely related to some matter pending in the House may be protected by the privilege but defamatory comments made in casual conversation by members during the progress of a debate probably are not.<sup>11</sup>

In *Re: Parliamentary Privilege Act*,<sup>12</sup> William Strauss, a member of the House of Commons sent a letter to the minister responsible for the London Electricity Board informing him of serious allegations of mismanagement. The Chairman of the Board threatened to sue for defamation. Strauss claimed that the threat of suit infringed Art. 9 and his parliamentary privilege to communicate with his minister without penalty.

The Committee of Privileges agreed but sought the opinion of the Privy Council as to whether the Commons was precluded from punishing the chairman for contempt. The Privy Council expressly left the meaning of "proceedings in parliament" undecided but the dissenting opinion of Lord Denning treated both Strauss' letter and the minister's reply as a parliamentary proceeding.<sup>13</sup>

Members of Parliament have also been held not to be liable for civil or criminal prosecution for making or conspiring to make defamatory or seditious statements in debates<sup>14</sup> but the bribery of a member of parliament clearly is not a parliamentary proceeding.<sup>15</sup>

In *R. Grassby*<sup>16</sup> a former Labor Government Minister was charged with criminal defamation for supplying a libellous document to a sitting Member of parliament with the intention that the document be tabled. It was argued that the Bill of Rights applied and provided the accused with absolute immunity because the Member had received the document incidentally to the performance of his parliamentary duties. The trial judge rejected the contention as "fanciful" and adopted the following extract from TE May *Parliamentary Practice* (21st Ed.) 132, 133:

Although both Houses extend their protection to witnesses and others who solicit business in Parliament, no such protection is afforded to informants ... who voluntarily and in their personal capacity provide information to members ... whether such information is subsequently used in proceedings in Parliament being immaterial.

According to Halsbury's *Laws of England*<sup>17</sup> the term "proceeding in parliament" includes incidental or auxiliary matters which are proximately connected to the actual proceeding in parliament and Cabinet and Caucus discussions have been said to constitute a "proceeding in parliament" to the extent that they relate

11 Halsbury's, *Laws of England* 4th Edition Vol 34, 598; Erskine May (20th Ed) 94 *Parliamentary Practice*.

12 (1958) AC 331.

13 Locke *op. cit.* 83.

14 Exp. Watson (1869) LR 498 573; *Coffin v Coffin* (1808) 4 Mass. 1.

15 *McGuinness v The Attorney-General* (1940) 63 CLR 73.

16 (1992) A Crim R 351.

17 4th Ed Vol 34, 598 fn 6.

to parliamentary business<sup>18</sup> and the proceedings of a parliamentary committee are undoubtedly included within the term “proceedings in parliament”.<sup>19</sup>

The equal protection extended by the terms of Art. 9 to “freedom of speech and debates” on the one hand, and “proceedings in parliament”, on the other, implies that a “proceeding” is not a “debate” and must therefore include all events incidental to parliamentary speeches and debates, eg, accepting petitions or complaints from constituents and seeking and giving advice.<sup>20</sup>

It is, however, clear that remarks made outside the House and then repeated inside are not protected.<sup>21</sup> Conversely repetition of a defamatory parliamentary speech outside the House was not considered by Lord Ellenborough in *R v Creevy*<sup>22</sup> to be protected:

How can this be considered a proceeding in the House of Parliament? A member in that House has spoken what he thought material, and what he was at liberty to speak in his character as a member of that House. So far he was privilege: but he has not stopped there: but unauthorised by the House he has chosen to publish an account of that speech in what he was pleased to call a more correct form; and in that publication has thrown reflections injurious to the character of an individual: he was guilty of criminal libel.

In *Criminal Justice Commission v Nationwide News Pty Ltd* (1985) 74 A Crim R 569 Fitzgerald P accepted that a confidential report to the Speaker by the CJC was a parliamentary proceeding within the meaning of Art. 9 and held that its unauthorised publication by a newspaper constituted a breach of privilege punishable by the Parliament.

## b) Court or Place out of Parliament

Proceedings before a Royal Commission or other public inquiry apparently constitute “a place outside of parliament” within the meaning of Art. 9<sup>23</sup> either because it is comprehended by an extended interpretation of the term “court” or is sufficiently *ejusdem generis* to qualify as a “place”.

The ordinary rules of statutory interpretation require that the general meaning otherwise attributable to the word “place” be construed by reference to the preceding words, its context and intended object. Accordingly, its meaning is restricted to a class of legal or similar proceedings, including tribunals and inquiries but necessarily excluding other private or public forums, eg, the mass media.<sup>24</sup>

18 Campbell ‘Ministerial Privileges’ (1959) V TASVLR 263, 275.

19 *R v Murphy* (1986) 5 NSWLR 18; 23 A Crim R 349, 354.

20 Cf Maignot *Parliamentary Privileges in Canada* (1980) 91.

21 *R v Abingdon* (1794) 1 Esp. 226; 170 ER 337.

22 (1813) 14 Rev Rep 427, 431.

23 ‘Royal Commission into Certain Crown Leaseholds’ (1956) St R Qd 225, 229.

24 *R v Murphy, supra* n.19 at 349.

### c) Impeachment

Art. 9 guarantees absolute protection to members of parliament, both individually and collectively, against a civil and criminal liability which may otherwise arise from their parliamentary conduct or statements and its protection is not destroyed by "a claim of unworthy purpose".<sup>25</sup>

Accordingly, it was held in *Ex parte Wason*<sup>26</sup> that even deliberately misleading or deceptive statements made in parliament may not be impugned or impeached outside parliament.

Cockbourne J said:<sup>27</sup>

It is clear that statements made by members ... 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.

The tender of Hansard in curial proceedings in order to prove the fact that a particular statement was made or document tabled in Parliament<sup>28</sup> does not breach parliamentary privilege and the reports are therefore admissible as original evidence of the proceedings of the Legislative Assembly.<sup>29</sup>

However, any other use is obviously limited by Art. 9.

In *R v Grasse*<sup>30</sup> Allen J held:

Parliamentary privilege does not preclude evidence of what it is that Hansard records as having been said. What, at most, it precludes the Court from doing, so far as relevant, is subjecting what a member said in the House to scrutiny to determine or examine the member's motives, intentions, honest or truthfulness of what he said in other words to adopt the language of Art. 9 to impeach or question what he said.

The proper limits of the testimonial use of the contents of parliamentary debates and proceedings have been considered in a number of celebrated criminal cases involving allegations of misconduct against politicians.

In *R v Turnbull*<sup>31</sup> a former treasurer of Tasmania was charged with official corruption and successfully challenged the admissibility of former parliamentary statements against him on the basis of parliamentary privilege.

In *R v Murphy* an attempt was made by the prosecution to tum what the accused, a former federal Attorney-General, had said in Parliament any proceeding against him in a criminal trial for attempting to pervert the course of justice.

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25 *Tenney v Brandhove* (1950) 341 US 367, 376.

26 (1869) R 4 QB 573.

27 *Supra*, at 576.

28 *Munday v Askin* (1982) 2 NSWLR 369, 373.

29 Section 47 *Evidence Act 1977* (Qld).

30 (1991) 55 A Crim R 419, 432.

31 (1958) Tas R 10.

Hunt J concluded that:

It is ... quite wrong to assert ... that any challenge, any questioning, any discrediting or any disparagement of what is said in parliament or any attack upon it amounts to a breach of parliamentary privilege if it takes place in a court or similar tribunal, although conceding that such conduct does not amount to a breach if it takes place elsewhere.

What is meant by the declaration that 'freedom of speech ... in parliament ought not to be impeached or questioned in any court or place out of parliament' is, in my view, that no court proceedings (or proceedings of a similar nature) having legal consequences against a member of parliament (or a witness before a parliamentary committee) are permitted which by those legal consequences have the effect of preventing that member (or committee witness) exercising his freedom of speech in parliament (or before a committee) or punishing him for having done so.<sup>32</sup>

According to Hunt J, therefore, the credibility of a member or committee witness in legal proceedings may legitimately be impugned on the basis of parliamentary statements or testimony, eg, by inconsistency where the subject of the proceedings involves extra parliamentary conduct.

Hunt J expressly disagreed with the decision of Browne J in *Church of Scientology of California v Johnson Smith*.<sup>33</sup> In that case Hansard extracts tendered for the purpose of negating a fair comment defence in a libel action brought against a member of parliament were rejected on the grounds that parliamentary privilege extended to exclude evidence of parliamentary proceedings which was relied upon for the purpose of supporting another cause of action arising from conduct or statements outside parliament. (See too *Secretary of State for Trade and Others Ex parte Anderson Strath Clyde plc* 1983 2 All ER 233).

In *Australian Broadcasting Commission v Chatterton; Chapman v Chatterton*<sup>34</sup> parliamentary statements which were broadcast by the ABC were the subject of defamation proceedings and Zelling ACJ held that what had been said in parliament could not be used to render the member liable for the extra parliamentary publication.

In *R v Jackson*<sup>35</sup> the prosecution attempted to tender Hansard records of statements made by Jackson in parliament to support a case of bribery alleged against him. Carruthers J favoured the English decisions and expressly disapproved of the approach taken by Hunt J in *R v Murphy*.

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32 *Supra* 363.

33 (1972) 1 QB 522.

34 (1987) SASR 46.

35 (1987) 8 NSWLR 116.



Carruthers J held:

If I were to have allowed the tender of Hansard for these purposes against Jackson this would have necessarily involved an inquiry into his motives and intentions in that which he said in the House. Such an inquiry would in my view contravene Art. 9 by impeaching or questioning in this court debates or proceedings in parliament.<sup>36</sup>

Hunt J's reasoning has been followed in other recent civil and criminal cases including *R v Foord*<sup>37</sup> and *Wright and Advertiser Newspaper Ltd v Lewis*<sup>38</sup> where the Full Court held that the plaintiff, who was a member of the South Australian House of Assembly, could be questioned concerning statements he had made during parliamentary debates for the purpose of impugning his bona fides and motives without breaching his parliamentary privilege.

King CJ<sup>39</sup> said that if the debates could not be referred to for that purpose then it would mean that a member of parliament could sue for damages for defamation in respect of criticism of his statements and at the same time deny the defendant an opportunity of proving the truth or fairness of the criticism.

In *Campbell v Tameside MBC*<sup>40</sup> Lord Denning MR observed in relation to the analogous situation of confidential documents that if a witness goes into the witness box and gives evidence which is contrary to a previous (confidential) statement the public administration in the administration of justice outweighs the public interest in keeping the document confidential. He can be crossexamined to show that his evidence in the box is not trustworthy.

Royal Commissioners who have been expressly asked to inquire into the validity of statements made in Parliament have also construed Article 9 narrowly.

The extra parliamentary investigation of parliamentary allegations was directly involved in the Brisbane Line Royal Commission<sup>41</sup> which concerned a statement made by a Federal Minister during a censure motion against the Curtin Government that he was "... most reliably informed that one important report relating to the Brisbane line defence strategy is ... missing from the official files".

Mr Justice Lowe of the Victorian Supreme Court was commissioned to enquire into the Minister's allegation and, in particular, whether he had such information and the source of his information.

His Honour acknowledged the operation of the doctrine of parliamentary privilege but ruled that the inquiry into the main question, viz, whether or not the document was in fact missing did not involve any breach of Art. 9 and found that the Minister did not in fact have reliable information of the kind he asserted and that no document was ever missing from the official files.

36 *Supra* 482.

37 (1985) 20 A Crim R 267.

38 (1990) 50 SASR 416.

39 *Supra*, 421.

40 *Campbell v Tameside MBC* (1982) 2 All ER 791, 795.

41 'Privilege in Parliament' (1943) 18 ALJ 70.



Similarly, in 1976 an executive commission of inquiry in New Zealand<sup>42</sup> which was ostensibly established to enquire into an alleged breach of confidentiality of a police file relating to an opposition member of parliament reported that certain parliamentary statements were inconsistent with the truth.

Professor Campbell contends that:

To hold that article 9 of the Bill of Rights precludes inquiry by royal commission, the courts, or any other extra parliamentary body into the truth or falsity of allegations in parliament not only would be straining the meaning of that provision, but would be taking parliamentary privilege beyond its legitimate bounds. If such enquiries were prohibited, it would mean that anyone against whom criminal charges had been levelled in parliament could claim complete immunity from judicial inquiry into his conduct.<sup>43</sup>

Mummery<sup>44</sup> disagrees and argues that investigation of the integrity of parliamentary statements or conduct by extra parliamentary inquiry would be inconsistent with the very purpose of Art. 9 as identified by the Courts.

However, in *Adam v Ward*<sup>45</sup> the plaintiff had made accusations in Parliament against an army General for dishonesty and sued the secretary of an Army Council established to enquire into the truth of the allegations for defamation.

The House of Lords held that although the plaintiff was protected by parliamentary privilege against legal proceedings for what he had said in parliament he was not wholly immune from interrogation with respect to his allegations because otherwise:

... the absolute privilege of the House of Commons intended to safeguard the liberty of discussion would be really turned into an abominable instrument of oppression.<sup>46</sup>

Although the correctness of the narrow construction of Art. 9 has not yet been finally determined and the cases referred to have no binding effect in Queensland, the effect of Hunt J's decision in *R v Murphy* was recently rejected in the United Kingdom by the Privy Council in *Preeble v Television (New Zealand) Ltd*<sup>47</sup> and has been overridden at federal level in Australia by *Parliamentary Privileges Act 1987*.

Section 16(1) of the Act provides:

- (1) For the avoidance of doubt, it is hereby declared and enacted that the provisions of Article 9 of the Bill of Rights, 1688 apply in relation to the Parliament of the Commonwealth ...

42 Mummery *op. cit.* 277.

43 E Campbell *Parliamentary Privilege in Australia* (1956) 41.

44 *Op. cit.* 275.

45 (1917) AC 309.

46 *Supra* at 323 per Lord Dunedin.

47 (1995) AC 321.

- (3) In proceedings in any court or tribunal it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament by way of, or for the purposes of:
- (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in parliament;
  - (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person, or
  - (c) drawing or inviting the drawing of inferences or conclusions wholly or partly from anything forming part of those proceedings in parliament.

The prohibition in s.16 appears absolute and no provision is made for waiver.

## Waiver

In *Sankey v Whitlam*<sup>48</sup> Gibbs ACJ regarded the parliament privilege of freedom of speech as belonging to the House rather than the individual member and therefore could not subject to waiver by individual members.

In *Chubb v Salomons*<sup>49</sup> it was held that a Member could not be compelled to testify with respect to what he or another Member (*Plunkett v Cobbett* (1804) 5 Esp. 136; 170 ER 763) said during a parliamentary proceeding without leave of the House.

In the Queensland Crown Leaseholds Royal Commission<sup>50</sup> the Commissioner was required by his terms of reference to enquire into the validity of corruption allegations made in the course of a parliamentary debate.

The politician who made the allegations challenged the Commissioner's authority to interrogate him in relation to a privileged statement.

The Commissioner ruled that the witness:

... is not bound to answer whether he made the speech in question or any question as to his reasons for making it, as to information he possessed when he made it, or as to the identity of the person or persons from whom he had obtained such information unless he has the permission of the House and not even then if he objects to doing so.<sup>51</sup>

In *R v Grassby*<sup>52</sup> Allen J suggested that marginal breaches of privilege should, if not waived, be ignored and said:

It is not the concern of the Courts to be watchdogs to guard against some minor breach of parliamentary privilege of concern neither to the member involved, nor to the Parliament.

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48 (1978) 142 CLR 1, 36.

49 (1852) 3 Car & K 75; 175 ER 469.

50 (1956) St R Q 225.

51 *Supra*, 232.

52 *Supra*, 433.

## Cabinet Secrecy

Cabinet is a creature of convention with obscure origins and no recognised legal status.<sup>53</sup> It is, nonetheless, an essential part of the structure of government and, according to Blackburn CJ, the impairment of cabinet confidentiality without a very strong reason would be “... wanton destruction and the rejection of the fruits of civilisation”.<sup>54</sup>

Queensland Cabinet Ministers are traditionally sworn to secrecy but neither the terms of the oath nor the power to administer it have any known statutory prescription.<sup>55</sup>

In *R v Turnbull*<sup>56</sup> a former Treasurer of Tasmania was charged with official corruption in relation to a lottery license. Gibson J sustained a defence objection against the admissibility of evidence of business transacted in a cabinet meeting solely on the basis of the duty of confidence and the terms of the ministerial oath of secrecy.

Professor Campbell,<sup>57</sup> while otherwise applauding the ruling as “sensible and commendable” criticises its legal basis as “most unreal” and suggests that the duty of secrecy depends less on the terms of an oath or some other duty of confidence and more on “a working rule of Cabinet” government.

It is certainly difficult to justify the exclusion of evidence of the basis of an oath taken by a minister when neither private nor statutory oaths are treated with the same respect and it is unlikely that confidence alone provides a sufficient legal basis for withholding sensitive information from a court of law.

The following passage from Lord Ackner’s decision in *Campbell v Tameside MBC*<sup>58</sup> succinctly states the apparent legal position:

The private promise of confidentiality must yield to the general public interest, that in the administration of justice ‘truth will out unless by reason of the character of the information or the relationship of the recipient of the information to the informant and more importantly public interest is served by protecting the information ... from disclosure ...

Cabinet confidentiality is said to rest upon the necessity for ministers to be able to frankly and fully disclose and discuss sensitive policy matters in private and to foster the complimentary conventions of collective responsibility and government unity.<sup>59</sup>

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53 *R v Davenport* (1874) 4 QSCR 99.

54 *Whitlam v Australian Consolidated Press Ltd* (1987) 73 FLR 414, 421.

55 Cf. s.5 *Promissory Oaths Act* (1989) (Tas).

56 (1958) Tas SR 80.

57 E Campbell ‘Ministerial Privileges’ (1959) U Tas LR 271.

58 (1982) 2 All ER 791, 796.

59 *Commonwealth v Northern Land Council* (1991) 30 FCR 1, 17.

According to both Gibbs ACJ and Mason J<sup>60</sup> the public interest against disclosure of cabinet proceedings is underpinned by the doctrine of collective responsibility and not the ministerial obligation of secrecy which was also rejected as a factor of significant influence in determining whether or not production of state papers should be compelled.

A majority (6–1) of the High Court has also recently confirmed that:

... it is in the public interest that the deliberations of cabinet should remain confidential in order that the members of cabinet may exchange differing views and at the same time maintain the principle of collective responsibility for any decision which may be made. Although cabinet deliberations are sometimes disclosed in political memoirs and in unofficial reports on cabinet meetings, the view is generally been taken that collective responsibility would not survive in practical terms if cabinet deliberations were not kept confidential.<sup>61</sup>

In *The Commonwealth of Australia v John Fairfax & Sons Limited* Mason J<sup>62</sup> said:

... State papers are not protected from disclosure because they are confidential or because the minister has taken an oath not to reveal them. The question is whether the disclosure of the documents would be contrary to the public interest. Confidentiality is not a separate head of privilege, but may be a material consideration to bear in mind when privilege is claimed on the ground of public interest. (Cf. *Alfred Crompton Amusement Machines Ltd v Customs and Excise Commission (No. 2)* (1974) AC 405, 433 per Lord Cross of Chelsea.)

The Crown relied on the public duty of confidence in *Attorney-General v Jonathan Cape Ltd & Ors* to restrain the executors of a deceased former cabinet minister from publishing a series of books entitled *Diaries of a Cabinet Minister* recording recollections of cabinet discussions.

Lord Widgery CJ held that the principles of collective responsibility although honoured as often in the breach as in the observance, nonetheless imposed an enforceable obligation of confidence in the case of cabinet deliberations whenever premature disclosure tended to inhibit candid expressions of opinion in cabinet or to otherwise prejudice the public interest.

Pincus J, however, attached much less importance to the doctrine of collective responsibility in *Harbours Corporation of Queensland v Vessey Chemicals Pty Ltd*<sup>63</sup> and was clearly influenced by the institutionalised practice of controlled “leaking” of cabinet information by ministers when he ordered disclosure of commercial government documents.<sup>64</sup>

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60 *Sankey v Whitlam* (1978) 142 CLR 1, 96, 98.

61 *Commonwealth v Northern Land Council* (1993) CLR 405, 407.

62 (1980) 147 CLR 39, 52.

63 (1986) 67 ALR 100, 104.

64 *Supra* 103–104.

## Public Interest Immunity and Public Inquiries

Although legal or equitable notions of confidence are themselves incapable of ensuring cabinet secrecy the exclusionary evidentiary rule known as the doctrine of crown privilege or public interest immunity however may be invoked whenever necessary to protect cabinet deliberations from premature disclosure.<sup>65</sup>

The rule suppresses both primary and secondary<sup>66</sup> evidence of otherwise relevant information the revelation of which would tend to harm state or public interests.<sup>67</sup>

The immunity, of course, does not restrict or override statutory powers of investigation or relieve a summoned witness from attendance or requisitioned document from production but operates in the appropriate case to disallow evidence of protected information.

The nature and extent of the investigative and coercive powers of executive inquiries inevitably raises the question whether the immunity applies to their proceedings to the same extent as it does to court or related proceedings.

An executive proceeding in the nature of a public inquiry is not bound by the ordinary rules of practice or evidence and has statutory authority to "... inform itself in such manner as it thinks proper"<sup>68</sup> and to "inspect ... any document ... of whatever description ... produced" before it.<sup>69</sup>

It does not have the duty of a court to conduct its proceedings in public<sup>70</sup> and although its witnesses have the same protection as a curial witness they are not entitled to claim the traditional privilege against self incrimination or for any other reason to remain silent or refuse or fail to answer any relevant question (except where to do so would disclose a trade secret) or without "reasonable excuse" to produce relevant documents.<sup>71</sup>

Although it might be argued that the express "public interest" power to conduct private proceedings impliedly excludes public interest immunity the provisions<sup>72</sup> which extend "the same protection to a commission witness as a witness in a court action suggest otherwise.

In the Coombes Commission (1974) Commissioner Campbell decided that whether or not the Commonwealth equivalent<sup>73</sup> of s.14(3) was sufficient to apply the doctrine of crown privilege to a Royal Commission it may, in any event, apply

65 *R v Kingston* (1986) 2 Qd R 111, 125; *ANA Commission v Commonwealth* (1975) 132 CLR 582.

66 *Cooke v Maxwell* (1817) 2 Stark 183; 186; 171 ER 614, 615.

67 S McNicol *Law of Privilege* (1992) 375.

68 *Commissions of Inquiry Act* 1950 (Qld) s.17.

69 *Commissions of Inquiry Act* 1950 (Qld) s. 29.

70 *Commissions of Inquiry Act* 1950 (Qld) ss. 16–17.

71 *Commissions of Inquiry Act* 1950 (Qld) s. 14(1) (i) (ii).

72 *Commissions of Inquiry Act* 1950 (Qld) s. 14(3).

73 *Royal Commissions Act* 1902 (Cth) s.7(2).

as a matter of law to anybody having statutory power to compel testimony or production of documents.<sup>74</sup>

The House of Lords assumed that public interest immunity applied equally in “courts and tribunals” in *Science Research Council v. Nasse*<sup>75</sup> and its application was mutually conceded in *Aboriginal Sacred Sites Protection Authority v. Maurice*.<sup>76</sup>

Exactly the same public policies and legal principles which operate to require the exclusion of evidence in court proceedings on the ground that its disclosure would be contrary to the public interest apparently therefore apply *mutatis mutandis* to investigative or other executive proceedings.

The author of a recently published text on the law of privilege,<sup>77</sup> correctly, in my opinion, observes that:

The fact that the public interest requires certain documents to be withheld from forensic scrutiny and the secondary evidence of those documents must also be withheld in the public interest indicates that the whole doctrine of public interest immunity would be rendered nugatory if it were not also to apply to non-judicial forums. The rationale of public interest immunity applies with no less force to tribunals and other bodies outside the ordinary court system.

The proposition that the Crown is powerless to prevent a public inquiry from revealing the same secrets which a court would undoubtedly be restrained from disclosing is paralogical and unsustainable and yet it has to be conceded that there is something paradoxical in the notion that the executive would act so as to deprive its own creation of access to the very information it requires to perform its duty.

Perhaps the explanation lies in the fact that, at least with respect to a “class objection” public interest immunity, unlike a true privilege or duty of confidence, is not capable of waiver by the Crown or any other party even if it would be to its advantage to do so<sup>78</sup> and nor is it liable to be overridden by superior legal obligations and may, if necessary, be raised without Crown assent by any interested party including the court or other tribunal.

The theoretical possibility that the political interests of the executive may require the disclosure of the cabinet deliberations of, say, a former rival government which its public duty demands be kept secret<sup>79</sup> may also serve to explain the apparent incongruity mentioned above.

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74 LA Hallett *Royal Commissions and Boards of Inquiry* (1982) 116

75 (1980) AC 1028, 1071 per Lord Salmon.

76 (1986) 65 ALR 247.

77 McNicol *op. cit.* 381.

78 ‘Air Canada & Secretary of State for Trade No. 2’ (1983) 2 AC 394, 400.

79 Cf *Rogers v Home Secretary* (1973) AC 338, 400.

## Striking the Balance

The applicable principles are now universally accepted and were first authoritatively formulated by Viscount Simon in *Duncan v. Cammell, Laird & Co Ltd*<sup>80</sup> when the House of Lords refused to order discovery on the basis that disclosure of the subject documents (relating to a wartime submarine contract) would be injurious to the public interest:

The principle to be applied in every case is that documents otherwise relevant and liable to production must not be produced if the public interest requires that they should be withheld. This test may be found to be satisfied either (a) by having regard to the contents of the particular document, or (b) by the fact that the document belongs to a class which, on the grounds of public interest, must as a class be withheld from production.<sup>81</sup>

Those who make “class” claims rather than “contents” claims “... carry a heavy burden”.<sup>82</sup> According to Gibbs ACJ in *Sankey v. Whitlam*:

The fundamental and governing principle is the documents in the class may be withheld from production only when it is necessary in the public interest. In a particular case the court must balance the general desirability for documents of that kind should not be disclosed against the need to produce them in the interest of justice. The court will of course examine the question with special care giving full weight to the reasons for preserving the secrecy of documents of this class but it will not treat all such documents as entitled to the same measure and protection — the extent of protection required will depend to some extent on the general subject matter with which the documents are concerned. If a strong case has been made up for production of the documents in the court that their disclosure would not really be detrimental to the public interest an order for production will be made.<sup>83</sup>

The “very special circumstances” of the case viz, accusations of criminal conspiracy against a former Prime Minister and members of his cabinet and the vital significance of the documents to the prosecutor’s case were held to elevate the public interest in the administration of justice above its interest in maintaining the efficiency of the cabinet system of government and disclosure of the documents in question (which it should be noted did not relate to cabinet deliberations) was ordered.

Thus, it is clear that class documents are not immune from production unless their non-disclosure is necessary for the protection of the public interest and that public interest out-weighs all other public interests including the proper administration of justice.

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80 1942 AC 624.

81 *Id.*, 636.

82 *Sankey v Whitlam* (1978) 142 CLR 1, 92.

83 *Supra* 62.



In *Conway v. Rimmer*<sup>84</sup> Lord Reid favoured the non-disclosure of cabinet documents in circumstances where:

... such disclosure would create a fan of ill-formed or captious public or political criticism. Business of government is difficult enough as it is, and no government could contemplate with equanimity the inner workings of the government machine being exposed to the gaze of those ready to criticise without adequate knowledge of the background and perhaps with some axe to grind.

While recognising that government at a high level cannot function without some degree of secrecy Gibbs ACJ in *Sankey v. Whitlam* also observed that:

The object of the protection is to ensure the proper working of government and not to protect ministers ... of the crown from criticism however intemperate and unfairly based.<sup>85</sup>

The recorded minutes of cabinet discussions undoubtedly qualify as “the most sensitive communications” of government and by virtue of that rank may be thought to be presumptively, if not absolutely, immune from disclosure.

In *Re: Carey and the Queen*<sup>86</sup> the production of minutes and notes of cabinet meetings of a Canadian province were sought in a civil action for damages. White J held that documents relating to Cabinet proceedings were:

... presumed to be privileged under the doctrine of Crown privilege or public interest immunity **in the absence of special circumstances.**<sup>87</sup>

Similarly, in *Burmah Oil Co Ltd v. Bank of England*,<sup>88</sup> Lord Keith considered that:

The nature of the litigation and the apparent importance to it of the documents in question may in some cases demand production even at the most sensitive communications at the highest level.

More recently, the High Court of Australia affirmed that:

... there are extremely strong considerations of public policy weighing against the production (of documents recording cabinet deliberations upon current or controversial matters) regardless of how significant disclosure of their contents might be to the case of one side or the other in the proceedings in which the claim for immunity is raised.

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84 (1968) AC 910.

85 *Supra* 41.

86 (1982) 4 CCC (3d) 83.

87 *Id* 87.

88 1980 AC 1090.

Were it is established that a document belongs to a class which attracts immunity (ie, cabinet deliberations) the court will lean initially against ordering disclosure.

Significantly, executive inquiries are commissioned with a paramount duty to ascertain the truth of any referred matters and their proceedings are by definition inquisitorial. Court proceedings, on the other hand, involve an adversarial contest between interested parties and are not necessarily concerned with the discovery of absolute truth. It is for this reason that the former proceedings are not constrained by the rules of evidence to the same extent as the latter. The success of a public inquiry depends upon having unrestricted access to all material facts and information whereas court proceedings may be satisfactorily resolved on the basis of a partial presentation of the facts.

This difference of function and purpose arguably constitutes an extraordinary circumstance of the kind required to override the presumptive protection given by the law to cabinet records in executive and similar proceedings.

The doubts expressed by Pincus J in *Harbours Corporation of Qld v. Vessey Chemicals Pty Ltd*<sup>89</sup> concerning the validity of maintaining cabinet privacy in respect of policy matters which were later publicly debated in Parliament were noted but not endorsed by the High Court in *Commonwealth v. Northern Land Council*<sup>90</sup> where the principle of collective responsibility was overwhelmingly reaffirmed as the basic justification for protecting cabinet discussions against disclosure irrespective of the significance or otherwise of their actual contents. In that case, the inspection of documents discovered in a civil case containing official notes of Federal cabinet deliberations was resisted by the government on the grounds that it was contrary to the public interest for the contents to be disclosed. The majority members said:

In the case of documents recording the actual deliberations of cabinet only exceptional considerations would be sufficient to overcome the public interest in their immunity from disclosure they being documents with a pre-imminent claim to confidentiality.

Indeed, for our part we would doubt whether disclosure of the records of cabinet deliberations upon matters which remain current or controversial would ever be warranted in civil proceedings. The public interest in avoiding serious damage to the proper working of government at the highest level must prevail over the interests of the litigant seeking to vindicate private rights. In criminal proceedings the position may be different, thus, the necessary exceptional circumstances may exist in cases involving allegations of serious misconduct on the part of a cabinet minister or prime minister. *Sankey v. Whitlam* was such a case.

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89 *Supra* 104.

90 (1993) 67 CLR 405.

It follows that in our view it is only in a case where there are quite exceptional circumstances which give rise to a significant likelihood that the public interest in the proper administration of justice outweighs the very high public interest in the confidentiality of documents recording cabinet deliberations ...<sup>91</sup>

## Conclusion

Political accountability appears to demand that neither Art. 9 *Bill of Rights* nor the concept of Cabinet confidentiality is available to unscrupulous politicians to conceal the truth or protect vested interests by perverting the course of investigative proceedings and, if necessary, Parliament itself should intervene in order to ensure, or at least facilitate, the discovery of truth where that is the genuine and desirable object of the inquiry.

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91 *Supra* 408.