ANZACATT Parliamentary Law, Practice and Procedure Course
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Parliamentary privilege in the digital age: should privilege adapt to accommodate social media?

ABSTRACT

The privilege of freedom of speech allows parliamentarians to freely discuss and debate issues currently before the House without fear of legal repercussions. However, these privileges have not been without challenge over time, especially as methods of communication and technology have evolved.

As parliamentarians and parliaments increasingly move online to share information, new questions arise, calling into question the meaning and application of parliamentary privilege in the digital age. Social media, a product of modern technology, has become a platform on which parliamentarians and parliaments can share information and engage with the public. Has social media become an essential tool of parliament and its members? If so, should social media posts be protected by parliamentary privilege?

INTRODUCTION

In 2015, David Blunt, NSW Clerk of Parliaments, wrote that parliamentary privilege can best be understood as a set of immunities and powers in the context of the separation of powers: 'As a sword, parliamentary privilege enables the parliament to effectively hold the executive government to account. As a shield, parliamentary privilege prevents unnecessary incursions by the courts into proceedings in parliament.'[1] This article focuses on the 'shield' aspect, otherwise known as the privilege of freedom of speech, and determines whether modern communication methods have influenced its boundaries.

The boundaries of the immunity of freedom of speech have shifted from its traditional practice of applying only to what is said and written by parliamentarians and parliamentary witnesses in the course of parliamentary proceedings. It now extends, as a qualified privilege, to publishers who provide fair and accurate reports of parliamentary proceedings. With the advent of radio and video broadcast, the boundaries of privilege extended again to include broadcasts of parliamentary proceedings that are authorised by the House.

Today, many people consume news and information online, and most if not all parliaments and parliamentarians have social media accounts. This article explores parliaments' changing relationship with social media to disseminate information and engage with the public. It will explore the immunity of freedom of speech, and how the limits of this privilege have evolved alongside the introduction of new communications technology, such as radio and television. It will also consider the flexible definition of 'proceedings in parliament' and how social media might be considered within this context. Lastly, the article will present three case studies; two actual and one hypothetical, and the limits of the immunity of freedom of speech when considering each one. Social media has become a channel for parliaments and parliamentarians to disseminate information about parliamentary proceedings to the public, in much the same that print media does. It is difficult

[1]David Blunt, "Parliamentary Sovereignty and Parliamentary Privilege." *The Fundamentals of Law: Politics, Parliament and Immunity,* (2015): 1-2.

to see how fair and accurate reports of parliamentary proceedings do not attract some form of privilege, whether absolute or qualified, although likely the latter if any.

MODERN COMMUNICATIONS

Modern communication methods, such as social media services, have revolutionised parliament's way of sharing information. Today, reports about parliamentary proceedings aren't confined solely to print, rather now a multitude of platforms exist on which parliamentary information can be published and shared.

The nature of parliament is evolving, and parliamentarians are engaging regularly with their constituents, thanks to direct communication lines such as email and social media.[2] According to Charles Robert, when Principal Clerk, Chamber Operations and Procedure for the Canadian Senate:

> In addition to dealing with legislation seeking materially to improve the lives of fellow citizens, to enhance fundamental equality and to tackle unwarranted discrimination, parliamentarians are increasingly acting as ombudsmen and agents for their constituencies. An associated aspect of this was the view that Parliament itself, once seen primarily as a secretive or semi-private 'grand inquest of the nation', should be more publicly visible as the people's forum.[3]

Many parliaments maintain public websites, which are updated with information on parliamentary membership, bills, committee business, tabled reports and petitions and more. Many parliaments now authorise the use of teleconferencing for committee hearings and webcasting of the proceedings of the House.[4] And some are beginning to adopt the practice of video conferencing, particularly for the purposes of committee hearings.

Many types of communication, such as publications and broadcasts are protected by parliamentary privilege, because they are authorised by the House and report on or broadcast the proceedings of parliament. However, there is one area of parliamentary communications used in the digital age that remains a grey area: social media.

ENGAGING THE PUBLIC THROUGH SOCIAL MEDIA

There is no officially recognised definition of social media. A generally accepted definition describes social media 'as a set of online tools that are designed for and centred around social interaction.'[5] According to Beverley Duffy, Clerk Assistant Committee, NSW Legislative Council, and Madeleine, Director Table Office, NSW Legislative Council:

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[2]Charles Robert, "Parliamentary privilege: renewal and restoration." *The Table*, vol. 82 (2014): 33.

[3] Ibid, 33.

[4] Parliament of Australia. "Media Rules and Filming Applications." Available at: https://www.aph.gov.au/About_Parliament/Media_Rules_and_Filming_Applications; Legislative Assembly of the ACT. "Broadcasting Policy Framework and Guidelines." Available at: https://www.parliament.act.gov.au/__data/assets/pdf_file/0004/1036822/Broadcasting-Policy-Framework-And-Guidelines-July-2016-Published-version.pdf. Parliament of New South Wales broadcasting guidelines (via email).

[5] John Carlo Bertot, Paul T Jaeger and Derek Hansen, "The impact of policies on government social media usage: issues, challenges and recommendations." *Government Information Quarterly*, no. 29 (2012): 30.

> Most definitions of social media emphasise its interactivity: unlike the passive nature of the 'old' media such as newspapers and television, social media is a 'two way street,' which allows individuals to shift 'fluidly and flexibly between the role of audience and author.'[6]

The majority of successful social media services are free to use and widely accessible by any person with internet access, and can be used to publish and access information. Social media services include Twitter, Facebook, YouTube and Instagram, among many others.

Today, most if not all parliamentarians have social media accounts, and are active on Twitter and Facebook.[7] And most parliaments of Australia and New Zealand have active Twitter and Facebook accounts.[8] The frequency, timing and content of social media posts vary by parliamentarian. According to a report by the Commonwealth Committee on Procedure, parliamentarians' social media posts generally reflect 'current affairs or items of political significance to Member or their party, while others may relate to matters of person interest.'[9]

Overall, social media was considered by the Committee to 'benefit Members and their parliaments by broadening public perspectives about parliamentary procedure and widening democratic discussion and engagement.'[10] Similarly, a New Zealand Privileges Committee report found that social media is an 'essential tool' for engaging with the public, and that 'a healthy democracy relies on public participation, and all communication channels need to be fully used to promote the work that occurs in the House of Representatives.'[11]

According to a 2009 UK Parliamentary study, social media sites such as YouTube have value in reaching a wider audience, which is particularly useful for parliamentarians looking to connect with the younger constituents. According to the study, '[the] risk of not embracing these delivery methods are that it becomes ever harder to engage with the public as the perception grows that parliament is inaccessible and remote from the mainstream of public debate on the web.'[12]

NSW parliamentarians have been so successful at engaging with their constituencies through social media and other forms of modern technology, that a 2017 Parliamentary Remuneration Tribunal

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[6] Beverley Duffy and Madeleine Foley. "Social media, community engagement and perceptions of parliament: a cast study from the NSW Legislative Council," *Australasian Parliamentary Review,* no. 26(1) (2011): 201.
[7] Standing Committee on Procedure, House of Representatives, Parliament of Australia. *Use of Electronic Devices in the Chamber and Federation Chamber* (September 2014) 10.; Facebook pages for NSW Members of Parliament, VIC Members of Parliament and QLD Members of Parliament.
[8] At the time of writing, the following parliaments had active accounts on Twitter: Parliament of Australia, Parliament of NSW (each chamber separately), Parliament of Victoria, Parliament of Western Australia (each chamber separately), Parliament of the Northern Territory, Parliament of New Zealand, and Legislative Assembly for the ACT. The following parliaments have active accounts on Facebook: Australian House of Representatives only, Western Australia Legislative Council (only), Parliament of NSW, Commonwealth House of Representatives (only), Parliament of Victoria, Parliament of Tasmania, Parliament of New Zealand, and Legislative Assembly for the ACT.
[9] Standing Committee on Procedure, *Use of Electronic Devices*, p. 10.
[10] Ibid, pp. 10-11.
[11] Privileges Committee, Parliament of New Zealand. *Question of privilege regarding use of social media*, (September 2015) 7.
[12] United Kingdom House of Commons, *Review of the Management of Parliamentary Copyright*, House of Commons (2009) 25. via Val Barrett. "Publishing the Record of Parliamentary Proceedings." *Journal of Law, Information and Science*, no. 14 (2010): 109.

report determined there was sufficient evidence to allocate an additional full time staff member to each electorate office of the Legislative Assembly.[13]

In other words, posting to social media is an effective tool for information sharing and community engagement, and serves the public interest. But what are the risks associated with these services in the parliamentary setting?

Social media risks

There are some parallels between social media and traditional print media; both are designed to communicate information to an audience, and in many ways social media is treated similarly to its predecessor. The three major factors that differentiate social media from traditional print media are:

- Immediacy - information can be published on social media platforms 24/7 in the time it takes to click a single button, or tap a screen.
- Reach – as of its 3rd quarter in 2017, Facebook reported 2.07 billion active users[14] and Twitter reported 330 million active users.[15] Social media's reach and audience size is incomparable.
- Interactivity – unlike print media, social media has made user interactivity a key function of its platform. Information can be 'shared' or 'retweeted' in an instant, and posts and tweets provide a platform for comments and reactions from other users.

Legislative Assembly of Ontario Table Research Clerk, Joanne McNair, argues:

> Whatever concerns the committee may have had regarding how television broadcasts of parliament might magnify any potential abuse of freedom of speech by an MP, the reality is that this pales in comparison to the impact of social media.[16]

Indeed incorrect or damaging information shared to social media can reach a broad audience in a very short amount of time. Not only that, the damaging information can ''live' in databases and systems even when the information is withdrawn or corrected,' as noted by Bernard Wright, then Clerk of the House of Representatives.[17] While he was talking about the risks associated with modern technology generally, I think the same consideration can be given to risks associated with social media.

Although there are risks associated with publishing content to social media, parliaments recognise that it is here to stay. In 2012, the NSW Speaker Hon Shelley Hancock MP made a ruling which cautioned parliamentarians about the risks, but also emphasised that her 'comments yesterday were

[13] Parliamentary Remuneration Tribunal, Parliament of New South Wales. *Annual Report and Determination 2017* (May 2017) 19. Available at http://www.remtribunals.nsw.gov.au/parliamentary/prt-determinations.
[14] Statista, "Number of monthly active Facebook users worldwide as of 3rd quarter 2017." Available at https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/.
[15] Statista, "Number of monthly active Twitter users worldwide as of 3rd quarter 2017." Available at https://www.statista.com/statistics/282087/number-of-monthly-active-twitter-users/
[16] McNair, Joanne. *The Implications of Social Media for Parliamentary Privilege and Procedure,* 21.
[17] Wright, Bernard. "Patterns of change – parliamentary privilege." December 2017. Available at http://www.parliamentarystudies.anu.edu.au/pdf/publications/PSP02_Wright.pdf

not intended to imply a blanket ban [on electronic devices used to publish to social media], but rather to protect parliamentarians from inappropriate tweeting in Chamber.'[18]

Given the number of parliamentarians with active social media accounts, and the risks associated with publishing false or damaging information on these platforms, the question naturally arises: does parliamentary privilege protect parliamentarians from liability for content published on social media?

FREEDOM OF SPEECH: PURPOSE AND FRAMEWORK

The absolute privilege of freedom of speech is set out in Article 9 of the *Bill of Rights 1689* (UK), which provides:

> That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.[19]

Its purpose is to ensure parliamentarians are able to carry out their constitutional duties – to debate, inquire and legislate[20] - without outside interference from courts or the Crown. Parliamentary privilege originated in England so that parliamentary debate could occur without retaliation or interference from the Crown. It now protects legislative debate and proceedings from any outside interference, namely the Executive or courts of law. It is an extraordinary immunity described by the United Kingdom Joint Committee on Parliamentary as the 'single most important parliamentary privilege'.[21]

Critics argue that the original intent behind the privilege of freedom of speech is now irrelevant. High Court Barrister G.M. Kelly believes that modern parliaments do not face the same threats today:

> The regime of privilege inherited by present-day Parliaments was created in an age very different from our own. It responded to constitutional difficulties which, by and large have been overcome. Parliamentary victory over the Crown ensured that, for the purposes of the English constitution, a system of ascendance of the legislature was firmly entrenched, generally applauded and not much questioned.'[22]

However, freedom of speech is overwhelmingly accepted as crucial to the effective functioning of parliament around the globe. Erskine May's *Treatise* describes it as 'essential to every free council or

[18] The Hon Shelley Hancock MP, NSW Speaker of the Legislative Assembly, *Debates and Proceedings*, Hansard. 4 April 2012, p. 10689.
[19] Article 9, *Bill of Rights 1689* (UK)
[20] Griffith, Gareth. "Parliamentary Privilege: First Principles and Recent Applications," *Background Paper No 1/09*, (NSW Parliament, 2009), 6. Available at https://www.parliament.nsw.gov.au/researchpapers/Documents/parliamentary-privilege-first-principles-and-rec/BP%20-%20Parliamentary%20Privilege%202009.pdf
[21] Enid Campbell, *Parliamentary Privilege*. (Sydney: The Federation Press), 10.
[22] Kelly, G.M., "'Questioning' a privilege: article 9 of the Bill of Rights 1688," *Australasian Parliamentary Review 16*, no. 16.1 (2001): 68.

legislature'[23] and 'the most significant parliamentary privilege'[24] by Gerard Carney, an academic expert on parliamentary privilege.

Legislative framework for parliamentary privilege in Australian Jurisdictions

Australian jurisdictions have codified the immunities defined by Article 9, with the exception of New South Wales and Tasmania, which still rely on the common law definition. In 1987, the Commonwealth codified its privileges in section 16 (1) of the *Parliamentary Privileges Act 1987* (the Privileges Act), which 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 have, in addition to any other operation, the effect of the subsequent provisions of this section.

The Privileges Act defines 'proceedings in parliament' as:

> ...all words spoken and acts done in the course of, or for the purposes 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;
> (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.

Most of the Australian states have codified privilege, tying it back to the principles set out in Article 9, as they were applied in various years. For Victoria, section 19(1) of the *Victorian Constitution Act 1975* (Vic), draws on the principles set out in Article 9 as applied in 1855. In 2004, Western Australia set out its privileges in the *Constitution (Parliamentary Privileges) Amendment Bill 2004*, which defined privilege according to the 1989 House of Commons definition. Similarly, Queensland aligned its privileges with those defined by Article 9 in section 8 of *Parliament of Queensland Act 2001*. South Australia's definition of privileges is in section 38 of the *Constitution Act 1934*, and relies on the practice of privilege in the House of Commons as at 24 October 1856.

The Northern Territory, the Australian Capital Territory (the ACT) and Norfolk Island adhere to parliamentary privilege as set out, not in Article 9, but rather in the House of Representatives' Privileges Act. Any changes to the Privileges Act are therefore reflected in the following provisions for each of the territories: section 4 of the *Legislative Assembly (Powers and Privileges) Act 1992*

[23] Gordon, Sir Charles, ed. *Erskine May's Treatise on the Law, Privileges, Proceedings and Usage of Parliament*. (London: Butterworths, 1983), 77.
[24] Gerard Carney. "Freedom of Speech." In *Members of Parliament: law and ethics*, St. Leonards NSW, Prospect Media, January 2000.

(NT), section 24(3) of the *Australian Capital Territory (Self-Government) Act 1988 (*ACT), and section 20 of the *Norfolk Island Act 1979* (NSW) (NI).

In Tasmania and New South Wales, there is no specific legislation setting out the privilege of freedom of speech, instead both states rely on the common law definition. Although, in Tasmania, other privileges are defined in the *Parliamentary Privilege Act 1858* (Tas), *Jury Act 2003* (Tas) and the *Criminal Code Act 1924* (Tas). In New South Wales, the *Defamation Act 2005* confirms absolute privilege from liability for defamation for publications that constitute parliamentary proceedings. It also confirms qualified privilege from liability for defamation for authorised publications, and according to Griffin, protection for 'Members in those circumstances where parliamentary privilege does not apply, where what has been said or done is not a parliamentary proceeding' as long as the recipient has 'an apparent interest in the subject matter of the information concerned…'[25]

SCOPE OF 'PROCEEDINGS IN PARLIAMENT'

The scope of 'proceedings in parliament' is perhaps the most questioned aspect of parliamentary privilege, as it draws the boundary distinguishing what is and is not given the immunity of freedom of speech. However, there has been extensive debate about and consideration given to the limits of 'proceedings in parliament.'

Enid Campbell argues that while the purpose of section 16 of the Privileges Act was to clarify the definition of 'proceedings in parliament,' it may have expanded the meaning; giving it enough breadth that it may 'cover documents which parliamentarians have generated for the purpose of transacting parliamentary business.'[26] However, as evidenced by the 2009 United Kingdom (UK) parliamentary expenses scandal, there are limits to the application of privilege. And in the court's decision in *R v Chaytor*, Lord Phillips of Worth Matravers applied a 'test' of necessity, drawing a connection between the immunity and necessity to the functioning of parliament:

> In considering whether actions outside the Houses and committees fall within parliamentary proceedings because of their connection to them, it is necessary to consider the nature of that connection and whether, if such actions do not enjoy privilege, this is likely to impact adversely on the core or essential business of Parliament.[27]

Similarly, a UK Committee on Privilege found that the key to determining the scope of 'proceedings in parliament', is to apply a 'doctrine of necessity', a term used in the 2005 case of *Canada (House of Commons) v Vaid*, which requires that privilege be limited to areas where 'immunity from normal legal oversight is necessary in order to safeguard the effective functioning of Parliament.'

[25] Griffith, Gareth. "Parliamentary Privilege: Major Developments and Current Issues," *Background Paper No 1/07*, (NSW Parliament, 2007), 12-13.
[26] Campbell, *Parliamentary Privilege*, 15.
[27] R. v. Chaytor and others [2010] All ER (D) 19 (Dec); [2010] UKSC 52

Carney cautions that if the scope of parliamentary privilege is not 'kept narrowly defined' it risks going beyond its intended purpose, that is to protect members in carrying out their responsibilities – creating and reviewing legislation and holding the Executive accountable to the people.[28]

Bernard Wright notes that a functional understanding of 'proceedings in parliament' is necessary, and must account for 'activities taken in the course of or in connection with parliamentary proceedings,'[29] rather than a narrow or more definitive understanding that ties privilege to a geographical location, such as the Chamber floor.

Erskine May takes this further and notes that 'if future research establishes the validity of claims as to freedom of speech or the jurisdiction of Parliament which are not covered by this Article, they are not to be regarded on that count as excluded.' In other words, the term 'proceedings in parliament' is necessarily broad, in order to account for future needs of parliament to protect its freedom of speech. It is important to weigh May's words, when considering the Australian Commonwealth's Privileges Act, as it has gone one step further by defining 'proceedings in parliament'. Although still open to interpretation, it may place unintended restrictions on the application of privilege.

Whether to apply a broad and narrow definition to 'proceedings in parliament' seems to be irrelevant. Instead, the importance of the immunity lies with its functionality and its ability to protect members in performing their responsibilities – that of creating and reviewing legislation, holding the Executive to account, and representing their electorate and constituents.

Privileges' expanding boundaries

A series of landmark court decisions defined and expanded the limits of privilege consistent with the major technological advancements of the day. In *Stockdale v Hansard* the decision that publications authorised by the UK House of Commons did not attract parliament privilege led to the *Parliamentary Papers Act 1840* (UK), which conferred absolute privilege on authorised publications of parliamentary proceedings. In *Wason v Walter,* qualified privilege was conferred on reports on parliamentary proceedings as long as they were a 'fair and faithful report of the whole debate' attracted qualified privilege.[30] In his decision, Lord Chief Justice Cockburn said:

> It seems to us impossible to doubt that it is of paramount public and national importance that the proceedings of the Houses of Parliament shall be communicated to the public, who have the deepest interest in knowing what passes within their walls, seeing that on what is there said and done, the welfare of the community depends… Can any man bring himself to doubt that the publicity given in modern times to what passes in Parliament is essential to the maintenance of the relations existing between the government, the legislature, and the country at large?

[28] Gerard Carney. "Parliamentary Privilege – Part 3: Article 9: 'Proceedings in Parliament.'" *Australasian Parliamentary Review*, no. 32(1) (2017): 30-42.
[29] Wright, *Patterns of change*, 3.
[30] May, *Parliamentary Privilege*, 86. (see also: judgement of Cockburn CJ, Wason v Walter LR (1868-69) 4 QB 94)

In *Lange v Australian Broadcasting Corporation*, the boundaries of qualified privilege were extended again when the Australian High Court held that the public interest outweighed an individual's right to take civil action against publishers or broadcasters of parliamentary proceedings, thereby confirming qualified privilege for radio and television broadcasts of parliamentary proceedings.[31]

ARE SOCIAL MEDIA POSTS 'PROCEEDINGS IN PARLIAMENT'?

The rise in popularity of social media use amongst parliamentarians and its novelty has led to parliamentary committee inquiries about its place in parliament and how the current standing orders and privileges apply to new methods of communication. It is generally recognised by most parliaments that the remarks published to social media accounts are not part of the 'proceedings of parliament' and therefore 'may' not retain parliamentary privilege. However this is an area which has not yet been tested by a court of law.

In NSW, the Speaker of the Legislative Assembly, Hon Shelley Hancock MP ruled that 'tweets are not proceedings of Parliament' and as such 'do not attract parliamentary privilege and would be subject to the normal laws of defamation.'[32]

Similarly, a New Zealand Privilege Committees reported that remarks published on social media, 'including comments made from the Chamber' are not part of parliamentary proceedings. However, instead of advising that social media remarks do not attract privilege, the report advised that they may not be protected by parliamentary privilege.[33]

Although tabled before the advent of social media, the UK Parliamentary Committee on Privilege reported that 'one of the advantages of the 'doctrine of necessity' is that it ensures a degree of flexibility. The working practices of Parliament change, and our understanding of what is or is not subject to Parliament's sole jurisdiction needs to adapt and evolve accordingly.'[34] Should then the limits of parliamentary privilege be flexible and extend to content published on social media?

Duffy and Foley warn that there is uncertainty about the application of parliamentary privilege and online communications, and therefore possible risks associated with engagement between the public and parliamentary bodies through social media:

> The deliberative potential of social media will always be constrained in the parliamentary context. These constraints include the uncertainty surrounding the application of parliamentary privilege to online communication and the need to protect vulnerable participants from the possible negative consequences of involvement in the committee inquiry. Parliaments are also constrained by the need to ensure their reputations are not damaged by the use of such methods.[35]

[31] Barrett, *Publishing the Record*, 107.
[32] Hancock, *Debates*, 10689.
[33] New Zealand Privileges Committee, *Question of privilege* p. 8.
[34] United Kingdom Joint Committee on Parliamentary Privilege, *Parliamentary Privilege*, p. 9.
[35] Duffy and Foley, *Social media*, 199.

CASE STUDIES

Tweets from the floor of the Chamber

In November 2012, Martin Foley, a Member of the Victorian Legislative Assembly, published a tweet during Question Time, which questioned the ruling of the Speaker and cast aspersions on the Chair:

> speaker smith new low in abandoning any parliamentary standards in #springst by allowing sneaky Libs/Nats avoid scrutiny on #RyanTilleygate[36]

The following day, the Speaker sought an apology from Foley, on the basis that the tweet was a reflection on the Chair and therefore in opposition to the Standing Orders. Foley refused to apologise and was thrown out the Chamber. The event raised many questions amongst parliamentarians about how 'new technology was interacting with longstanding rules'.[37] The Speaker ultimately referred the matter to the Standing Orders Committee for further inquiry.

While the example above is not related directly to the scope of parliamentary privilege, it does raise a relevant line of questioning. If the Member had tweeted during Question Time about a person outside of parliament, which defamed their reputation, would parliamentary privilege have applied to the tweet? Does geographic location and timing matter when publishing to a social media platform? In other words, does the Member's tweet attract privilege if they are published when Parliament is sitting and/or the content is related to parliamentary proceedings?

The Standing Orders Committee found that 'members are not protected by parliamentary privilege for remarks made outside the Chamber. This includes comments made through social media…'[38] Similarly, the New Zealand Privileges Committee and the Speaker of the NSW Legislative Assembly also advised that social media is not considered a part of parliamentary proceedings, 'nor are they published under the authority of the House'[39], and therefore do not attract absolute nor qualified privilege.

Parliamentary privilege in relation to social media has not yet been tested in a court of law, so it is difficult to say with certainty what the limits might be in these instances. However, it is difficult to see how privilege may be used as a defence against defamation, if parliaments themselves are advising Parliamentarians that social media is not privileged.

Social media commentary

On 14 December 2015, the Victorian Parliament took to Facebook to advise that the Legislative Council had started accepting e-petitions. In the comments section of the post, a member of the

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[36] "MP booted from parliament over 'new low' tweet," Sydney Morning Herald, November 9, 2011, http://www.smh.com.au/national/mp-booted-from--parliament-over-new-low-tweet-20111109-1n6c3.html.

[37] Standing Orders Committee (VIC), *Report into use of social media*, p. 1.
[38] Ibid, p. 3.
[39] Committee on Privileges (NZ), *Question of Privilege*, p. 8. And Hancock, *Debates*, 10689.

public published an unrelated remark, alleging that major political parties take donations in exchange for favours.[40]

This situation demonstrates a common occurrence on social media known as 'trolling' - wherein a person uses the comments section of a social media post (or online news story) to publish content that is irrelevant to the original post, and which may also be defamatory in nature. Other organisations have faced similar issues in the comment section of their online publications.[41] This example again raises the question about the definition and limits of a 'proceeding in parliament.'

Parliamentary committees generally engage the public through the submissions process. This process allows the committee to review submissions made to an inquiry, and recommend redactions or changes as necessary to protect either the person submitting (contact details) or the integrity of the inquiry (submissions outside the terms of reference or inappropriate submissions).

Today, more and more committees are adopting social media strategies in an effort to enhance public participation in the committee process.[42] As evidenced in the Victorian example, committees do not have the ability to review or make recommendations about social media comments before they are published. Questions then arise about the committee's responsibility for managing comments or conversations that are attached to the social media post. Is the solution as simple as turning off the comments function of the social media post? Or should comments be considered on a case-by-case basis after they are published? And most importantly, are these types of comments privileged?

In 2009, Mary Harris, then Clerk of the New Zealand House of Representatives, and Robyn McLelland, Clerk Assistant (Table) of the Australian House of Representatives, raised the same issue in relation to committees posting inquiry information to chat sites in order to attract additional submissions.[43] Chat sites are different to social media platforms like Facebook and Twitter, mainly due to differences in audience size, given Facebook and Twitter have many more users than a chat room. However, Harris and McLelland raise a valid point, 'the distinction between publishing, broadcasting and communications technology is becoming blurred' which raises questions about the limits of parliamentary privilege.[44]

It is unlikely that comments published to parliament's social media posts pass *Vaid's* 'doctrine of necessity'. The comments are not essential to the functions of committees and do not replace the submissions process and therefore are not privileged. Of course, there has been no case law to draw precedence from concerning this specific situation. However, further consideration about

[40] Parliament of Victoria's Facebook page. Available at www.facebook.com/VicParliament/.
[41] Many media organisation face similar issues managing the comments sections of online news stories and social media posts. Most news organisations provide warnings to commenters about liability, or rules for commenting, while others require comments to be linked to a Facebook account to discourage anonymity, and increase a sense of responsibility. And some news organisations have decided to shut down the comments section altogether.
[42] Pauline Painter. "New kids on the block or the usual suspects? Is public engagement with committees changing or is participation in committee inquiries still dominated by a handful of organisations and academics?" *Australasian Parliamentary Review*, no. 31(2), Spring/Summer 2016: 7.
[43] Mary Harris and Robyn McLelland. "Workshop No. 3A: Parliamentary privilege and modern information and communication technologies. " *ANZACATT Conference Norfolk Island*, 29 January 2009, pp. 5-6.
[44] Ibid, pp. 1-6.

parliament's duty of care concerning the comments section of social media posts may be worthwhile in another article.

Re-publishing video clips of parliamentary proceedings [hypothetical]

In September 2016, Senator Derryn Hinch took to the Senate floor and under protection of parliamentary privilege publicly identified five alleged paedophiles during his maiden speech.[45] If Senator Hinch then published a video clip of his speech, or the text of his speech as it appears in Hansard, to his social media accounts or on his website, would his remarks still be protected under parliamentary privilege?

This hypothetical situation involves three aspects:

- a Member's speech made in the Chamber, which attracts absolute privilege as a proceeding in parliament;
- a video clip of the speech, which attracts qualified privileged because it is authorised by the House for broadcast; and
- a Member's social media account, which may or may not attract qualified privilege, however moot a point because in this context it is likely to be defeated by malicious intent.

Val Barrett, Manager of Hansard in the Legislative Assembly for the ACT, argues that 'a rebroadcast of proceedings…by the member involved, on a personal website for example, or by any other individual would attract qualified privilege if it was a fair and accurate report.'[46] Of course, a qualified privilege defence can be defeated if malicious intent can be proven. Griffith further notes that the publication would not attract absolute privilege, citing a 1985 Joint Select Committee report, 'a Member choosing to extract his or her own speech for publication, or else for distribution as a photocopy, would not be protected by absolute privilege.'[47]

A similar situation in Queensland resulted in similar advice. In 2009, a group named OpenAustralia requested permission from federal and state parliaments to publish *Hansard* reports online. OpenAustralia is not authorised to publish accounts or reports of parliamentary proceedings. According to Neil Laurie, Clerk of the Queensland Parliament:

> …if permission was granted, it would be on the basis that OpenAustralia is not an authorised publisher under the Act and that Open Australia accepts all risks of any legal liability arising from the further publication of the parliament record – which would not be absolutely protected by parliamentary privilege.[48]

[45] Senator the Hon Derryn Hinch, Senator for Victoria. *Debates and Proceedings*, Hansard. 12 September 2016, p. 591. Available at: http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F281d54bc-cf9c-4ec8-899c-1df197bb4473%2F0121%22

[46] Barrett, *Publishing the Record*, p. 107.

[47] Gareth Griffith. "Parliamentary Privilege: Use, Misuse and Proposals for Reform," *Briefing Paper No 4/97*. (NSW Parliament, 1997), 31.

[48] Email from Neil Laurie to Katherine Szuminska, 7 August 2009, via Barrett, *Publishing the Record,* p. 122.

In 2014, the Clerk's submission to a House Committee on Procedure inquiry stated:

> …if a Member specifically reproduced, either on his or her own website or in print, a specific speech which may have contained defamatory material and particular attention was drawn from that speech, then again the Member would be relying on qualified privilege, but it may be more difficult to establish that there has not been an adoption of the defamatory remarks or that there is no malice.[49]

The evidence above indicates that video clips of speeches delivered on the Chamber floor and then shared to social media are protected by qualified privilege. However, it is important to note that if there is defamatory reference in the parliamentarian's remarks, it is unlikely to hold up to a parliamentary privilege defence.

CONCLUSION

The implications of social media on the current understanding of parliamentary privilege is without precedence. While in many ways, social media may be compared to print publication, it is a vastly different tool. Information published via social media has the qualities of immediacy, vast reach and interactivity. Parliaments and parliamentarians are creating an online presence in order to be more accessible to, more engaged with and more transparent to the public through social media. It is truly a tool of the people. However, there are associated risks.

This article has found that absolute privilege does not extend to social media posts. And there are limited instances in which qualified privilege applies, although this is unclear still. Many parliaments are issuing electronic device guidelines to parliamentarians advising them of the risk. Geographic location does not necessarily ensure that a parliamentarian's remarks attract privilege, such as when they Tweet from the Chamber. Qualified privilege may apply to social posts which reflect the speeches made in the Chamber. However, there remains a risk that the defence of qualified privilege protecting potentially defamatory material on social media, can be defeated if malice can be proven. It is my conclusion that the current application of absolute privilege of freedom of speech is adequate in the social media and modern communications landscape, that it continues to protect the key functions of parliament – that is protecting parliaments so they are able to debate, legislative and hold the Executive to account, provided that parliamentarians are warned of the risks involved with social media.

However, the challenge is that modern communications continue to evolve and change the way people interact and communicate. Parliamentarians and parliaments will need to evolve alongside these developments in order to stay relevant. There may come a tipping point when privilege should be reviewed in order to ensure that parliaments are able to function as they were meant to, as bodies which review and create legislation and hold the Executive to account. Or perhaps there may be scope for a review of the *Defamation Act 2005* to weigh its functionality in the modern communications landscape. As it stands currently, social media is a wonderful tool that brings parliament to the public and allows Parliamentarians to interact directly with their constituencies with immediacy. Social media is not going anywhere, nor should it.

[49] House of Representatives Standing Committee on Procedure, *Use of electronic devices in the Chamber and Federation Chamber* (September 2014) 17.

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