



PRIVILEGES, IMMUNITIES AND POWERS OF PARLIAMENT COMMITTEE

NATIONAL PARLIAMENT OF
SOLOMON ISLANDS

OFFICIAL HANDSARD TRANSCRIPT OF COMMITTEE HEARING

Mr. John Evans

Friday 22 August 2008

Second Hearing
Third Sitting

Hon. Oti: Thank you ladies and gentlemen, before we start our proceedings this morning, can I ask the Honorable MP for South Choisuel, Hon. Rev. Boseto to open our proceeding with a word of prayer.

Hon. Boseto: Let us pray, God of times and the God of blessing, we acknowledged your glorious values. Reveal to us your wisdom. Bestow us with the riches of the deep knowledge that you have, so that we may under the purpose of our meeting today. Continue to be reminded that God be with us. Open the eyes our faith to see your will in our meeting. We ask this in Jesus Name, Amen.

Hon. Oti: Thank you Members of the Committee, our guest presenter today is Mr. John Evans, Clerk, Staff and Secretariat of the Committee, I'd like to welcome you all once again to this second hearing on the privileges, immunities and powers of Parliament, which has been charged to this special committee of Parliament to come up with a report by the end of this year.

As I said this is a continuation of the last meeting in terms of hearing and gathering evidences from key individuals who have some knowledge of what this committee has been charged to deliberate on.

I would also like to thank Members for making yourselves available this morning. I note that only one of our Members is not here as he is on overseas engagement otherwise the full contingent is present this meeting.

I also would like to take this opportunity as Chair to extend my apology to the Committee for my absence on the 18th June hearing when I was in my electorate on other matters. But on that note I'd like to thank the acting Chair at that time, the Hon. MP for North West Choisuel and Deputy Speaker of Parliament, Hon. Clement Kengava for ably presiding over that particular proceeding of the Committee.

A number of important presentations were made at that point in time, a report of which has been availed to all of us, and evidence gathered from Mr. Evans is going to be complementary to the evidence we have already gathered from those other institutions or individuals who have some expertise, knowledge, experience, perhaps of the area and the subject we have been tasked to achieve.

Ladies and gentlemen, I also would like to inform you that initially His Excellency, the Governor General was going to be the second witness to come before this Committee this morning, unfortunately he will not be available to attend this meeting, and I am not yet sure whether we will have him any other time, but that is really up to the Secretariat to arrange, if indeed his input is going to be taken on board amongst other witnesses. And therefore, our only witness this morning is Mr. John Evans and I welcome Mr. Evans.

Mr. Evans was Clerk of the Legislative Council for 18 years. He is the co-author of the New South Wales Legislative Council Practice, 2008. He is recognised throughout the Commonwealth as an expert in parliamentary law and practice and modernising house procedures. I think apart from this, I briefly met with him yesterday whilst passing by and he is working on something to do with the Standing Orders. When he was Clerk of the Legislative Council, he strongly supported a proposal for technical and training assistance from the Parliament of New South Wales to this legislature, and over the past two years Mr. Evans has provided personal support to the National Parliament of Solomon Islands through extensive pro bono advice to the Project Manager on complex procedural and constitutional matters. Hence, Mr. Evans we welcome you this morning. I am sure we will learn and obtain valuable advice from your appearance before this Committee.

Basically, as a way of introduction I'd like to put it but before we proceed with Mr. Evans' presentation I would like to invite Members if there are any comments you would like to make or statements before Mr. Evans speaks.

I'm also reminded to remind you that our proceeding of the Committee is recorded so use the microphone. Make sure you use the microphone and that you are audible enough to be translated onto paper.

Are there any comments from any of our Members? I guess we will make comments later and so I will ask Mr. Evans to proceed now with his evidence before this Committee. Mr. Evans, the floor is yours. Thank you.

Mr. Evans: Thank you, Mr. Chairman and Honourable Members, Madam Clerk and staff of the Parliament. As you've already mentioned, I have a fond attachment to the Solomon Islands during my term of 18 years as Clerk of the Legislative Council. I sent one of my staff, the Deputy Clerk in the 1990s to undertake an evaluation of the staffing and the administrative arrangements of the Parliament. I was also supportive of Warren Cahill's application to accept the UNDP position here in Solomon Islands, and of course you have had him here for a couple of years now. Perhaps I should establish some of my credentials as a Clerk of the House and knowledge of parliamentary privileges. As I mentioned I was Clerk of the Legislative Council for 18 years and retired last year. I am also a recent joint author of a book, the New South Wales Legislative Council Practice, published in June of this year, which I have brought along with me to be given to the Solomon Islands Parliament. I have been involved in many enquiries on parliamentary privilege, two of which resulted in favorable decisions, one by the New South Wales Supreme Court and another by the High Court of Australia. The law of parliamentary privilege or the law of the custom of Parliament is not an easy area for law to understand, and I do not envy your task because it is as I have said a difficult area.

I have also been engaged by the Solomon Islands Parliament to undertake a rewrite of the rules and orders of the Parliament so during that process I have

gained a little bit better understanding of the situation of parliamentary privilege in the National Parliament of Solomon Islands.

As I understand it the laws governing parliamentary privilege here in the National Parliament are: Section 62 of the Constitution Act, which provides that the Parliament may make and amend rules and orders regulating the orderly conduct of its proceedings, the despatch of business and the passing and numbering of bills.

Section 69 of the Constitution Act which states that Parliament may prescribe the privileges, immunities and powers of Parliament and its members.

Section 76 and Schedule 3 (1) which provides for the application in the Solomon Islands of Acts of the Parliament of the United Kingdom, the principles and rules of the common law and equity, customary law, and legal doctrine of judicial precedent, until the Parliament makes its own laws, including customary laws under section 75 of the Constitution.

Of Course, under Schedule 3 (1) to the Constitution, Acts of the Imperial Parliament in force on 1 January 1961 have effect in the Solomon Islands, until the Parliament otherwise provides.

Significantly in terms of parliamentary privilege, Article 9 of the Bill of Rights 1689 of the Imperial Parliament has application in the Solomon Islands, not only as a statute of general application but also as part of the common law.

Most recently, in 2007, the Parliament under the authority of sections 59 (power to make laws) 69 (power to prescribe privileges, immunities and powers of Parliament) and 75 (power to make provision for the application of laws in the legal system) of the Constitution, enacted The Prescription of Parliamentary Privileges, Immunities and Powers Act 2007, which provides in section 2 that until otherwise prescribed by Parliament, the privileges, immunities and powers of Parliament and its members are those of the House of Commons of Great Britain and Northern Ireland existing as at 7 July 1978. (The date of Independence).

As indicated, until the passing of the 2007 Act, the privileges of the National Parliament were those of the United Kingdom Parliament as at 1 January 1961. This was when a Legislative Council was first established in the Solomon Islands.

There are various other provisions in the Constitution, which have application to the Parliament. These include: Section 34 - motions of no confidence in the Prime Minister. Section 42 - entitlement of the Attorney General (when not a Minister) to take part in proceedings as advisor to the government.

Chapter 4, Part 1, Sections 46 – 58, which governs matters such as the establishment of the parliament, qualifications for membership, disqualification from membership, vacation of seats under sentence and determination of questions of membership.

Chapter 6, Part 2, Sections 59 to 74, which governs legislation and proceedings in Parliament such as the power to make laws, introduction of bills, alteration of Constitution and also procedure and oath of allegiance by Members, election of the Speaker and Deputy Speaker, presiding in Parliament, quorum, validity of proceedings in Parliament, privileges, Members entitlements, proceedings to be held in public, voting, prorogation and dissolution, and elections.

Chapter 8, the Leadership Code with its application to the Prime Minister, Ministers and other Members of Parliament and the Speaker.

Chapter 10, Finance – which govern raising and expenditure of monies from the Consolidated Fund.

Section 144, various interpretation provisions concerning the Parliament, and as well there are other Acts which have application to the Parliament, including Section 195(i), (a) & (b) of the Penal Code, which provides absolute privilege to publication of defamatory matter in any official publication or proceeding of Parliament, and publication of defamatory matter in Parliament by the Prime Minister, a Minister or a Member of Parliament. This Section together with Article 9 of the Bill of Rights provides absolute privilege to the proceedings and documents of the Parliament and its Committees. Further, Section 195(1) (f) provides absolute privilege from publication of defamatory matter, which is in fact a fair report of anything said done or published in the Parliament, and Section 196 provides for conditional privilege of defamatory matter, which is published in good faith in certain circumstances.

The Interpretation and General Provisions Act, particularly Section 62 also has application in the tabling and annulment by the Parliament of subsidiary legislation and I also understand there are various other Acts, which provides for tabling and annulment of subsidiary legislation.

Before I go on, Mr. Chairman, I should have said that feel free if any Member wants to interrupt me during the course of my presentation.

So let me start of by posing the question, what is parliamentary privilege? All legislative bodies must enjoy certain legal powers, privileges and immunities that are necessary for the functions which they are intended to execute. Without them a legislature could not function. This is not dissimilar to the courts which must also enjoy certain powers and privileges for their existence such as the common law of contempt to court. Like parliamentary privilege contempt of court is not usually found in any statute.

The term parliamentary privilege is a rule of law. It is not any special kind of privilege as some people seem to think and assume. Because we use the term Parliamentary Privilege, people tend to think that it is some kind of special privilege that the Parliament and its Members enjoy. It is often useful to refer to them rather as the immunities and powers of Parliament rather than

parliamentary privilege. However, we all like to use the term "parliamentary privilege".

The privileges of a legislature are also necessary to ensure autonomy or control from both the Executive and the Judiciary. This is often referred to in the Constitutional sense as separation of powers.

As I have already said Parliament must possess certain powers to enable it fulfill its functions. Members of Parliament and others participate in the proceedings of Parliament, such as witnesses like me before a committee must enjoy certain immunities if the Parliament is to effectively discharge its functions.

These powers, privileges and immunities are often set out in the statute but where no statute exist such as in New Zealand and even in the Parliament where I worked in New South Wales, the law implies that such bodies have inherent powers, privileges and immunities.

If you allow me, Mr. Chairman, to refer to some extracts from Chapter 3 of my book that was recently published that I referred to. I do understand that copies of Chapter 3 of the book have been circulated to Members. I would just like to highlight some matters on pages 47 and 48 of that book.

"The term 'parliamentary privilege' refers to two aspects of the law as it relates to Parliament: the immunities of the Houses of Parliament and the powers of the Houses of Parliament to protect their processes. Both the immunities and powers of Parliament are fundamental to enable it to perform its functions of representing the people, scrutinizing the actions of the executive government and reviewing and passing legislation."

"Importantly, parliamentary privilege belongs to the House itself and is not the privilege of any individual member."

The recent case in "*Prebble v Television New Zealand Ltd*, the Judicial Committee of the Privy Council stated that:

the privilege protected by Article 9 is the privilege of Parliament itself. The actions of any individual Member even if he has an individual privilege of his own cannot determine whether or not a privilege of Parliament is to apply. The decision of an individual Member cannot override the collective privilege of the House to be the sole judge of such matters. ({1995} 1 AC 321 at 335)

Individual Members of Parliament can only claim privilege to the extent that some actions proposed or other laws would impede them in carrying out their responsibilities and duties as a Member of the House or adversely affect the proper functioning of the House or a committee of the House.

While parliamentary privilege gives Members of Parliament immunities, those possessed by other bodies or individuals, it was never intended to set Members above the ordinary law. Members are subject to the criminal law except in

relation to freedom of speech and debates in the context of parliamentary proceedings.

It is for the courts to determine the existence, the validity and extent of the powers and immunities of Parliament. However, it is for Parliament to determine the occasion and the manner of the exercise of those powers."

That statement I have just made comes from the decision of the High Court of Australia in *Egan v Willis* (1998) 195 CLR 424 at 426, a case which I mentioned earlier that I was involved in, and also *R v Richards Ex parte Patrick and Brown* (1995) 92 CLR 157 at 162, a case involving privilege in the Federal Parliament of Australia.

On pages 48 to 50, Chapter 3 of my book, I refer to the history of the development of parliamentary privilege in the United Kingdom, and it would be useful for Members and others when they want some casual reading to refer to those extracts of the book.

Thus parliamentary privilege exist for the greater good of the community and protects the public interest, not only through promoting the functions of an effective parliamentary system and a democratic government but also through Members being freely able to bring matters to the attention of the Parliament subject, of course, to the rules of order and quorum in the House. It also enables citizens to bring to the attention of the Parliament through their members and petitions and committee enquiries.

As David McGee in *Parliamentary Privilege in New Zealand* states: "Parliamentary privileges is thus designed to remove any impediments or restraints to the legislature going about its work and to enable it to deal with challenges to its authority in moderate ways such as attacks that affect its dignity and lower the esteem in which it is held."

While other interests may be infringed by the operation of parliamentary privilege, the privilege is restricted to activities that have connection with the proceedings of Parliament.

The immunities and powers of the House of the Parliament are well documented in various works on parliamentary practice. I might refer to some of those simply for the record because it is often said by many people that the privileges of Parliament are not well known, but there are many books and authorities on parliamentary privilege, the most notable of course, is *Erskine May's treatise on the law of privileges, proceedings and usages of Parliament* 23rd edition. There is the *House of Representative's Practice* in Australia, 5th Edition, 2005, McGee *Parliamentary Privilege in New Zealand*, 3rd Edition 2005, Odgers' *Australian Senate Practice* 11th edition, Marleau and Montpetit, *House of Commons Practice and Procedure* in Canada 2000, Malhotra, *Practice and Procedure of Parliament with particular reference to the Lok Sahah* in India 5th edition 2001,

and as I have already mentioned Lovelock and Evans, *New South Wales Legislative Council Practice 2008*.

There are three books specifically that I am aware of on parliamentary privilege; one is Enid Campbell, *Parliamentary Privileges in Australia* in 1996, Enid Campbell *Parliamentary Privilege* second edition of 2003 and Joseph Maingot QC *Parliamentary Privilege in Canada*, second edition, 1997.

There are also various significant reports of Parliamentary committees, which I am sure the secretariat will make available to Members, such as the 1999 United Kingdom Report of the *Joint Committee on Parliamentary Privilege*. I understand Members have a copy of that report before them.

As I have already discussed the legal root of parliamentary privilege in most Commonwealth countries are the privileges, powers and immunities already established by the House of Commons and the Parliament of the United Kingdom. Interestingly legislative immunity as the term is used in the legislatures of the United States of America, was also founded on the powers, privileges and immunities of the House of Commons. In fact the speech or debate clause as it is referred to in the USA Constitution is similar in terms to Article 9 of the Bill of Rights.

When one talks about passing an Act on parliamentary privilege it should not be thought that such Acts will attempt to cover every situation. Most Acts only cover certain immunities and powers. Other privileges still remain subject to the common law and custom of parliament as it applies in the United Kingdom Parliament, albeit it at a specified date, such as 7 July 1978 in the case of the present law in the Solomon Islands.

For example, the Parliamentary Privileges Act 1987 of the Commonwealth Parliament of Australia, except to the extent of the powers, privileges and immunities provided for in the Act, preserves the remaining powers, privileges and immunities of the United Kingdom Parliament under section 49 of the Constitution Act 1901 as at the date of federation, namely 1 January 1901.

In Western Australia, the Parliamentary Privileges Act 1891 was amended in 2004, to peg the linkage to the privileges of the United Kingdom Parliament to 1 January 1989. Previously they were linked to those of the House of Commons for the time being.

The Parliament of Queensland Act 2001 provides for powers to order the attendance of persons and production of documents, and dealing with matters of contempt, and which includes examples of contempt, while the Constitution of Queensland Act 2001 has linked its privileges to those of the House of Commons at the date of federation, 1 January 1901. The Constitution Act 1934 (South Australia) links privilege to 24 October 1856, and the Constitution Act 1975 (Victoria) links privilege to 21 July 1855.

In New Zealand the Parliamentary Privileges Act 1865 links privilege to 1 July 1865.

New South Wales is the only Australian state in which there is no law on parliamentary privilege and which continues to be based on the common law. There have been six attempts to pass privileges legislation in New South Wales but all have failed to pass either or both Houses of the Parliament.

Many Commonwealth countries have also adopted the practice of defining their privileges by reference to the House of Commons. So even though Parliaments like New Zealand and New South Wales have no privileges legislation, we have been able to survive for more than the past 150 years.

It is acknowledged that no new privilege can be created except by legislation. As long ago as 1704 the House of Commons acknowledged that it had no power to create a new privilege not recognised and known by the law and custom of Parliament. It is also accepted that since parliamentary privilege is part of the law it may not be waived or abrogated in whole or in part except by express words in a statute. General words in a statute or an implication will not be taken to override parliamentary privilege.

Since parliamentary privilege is part of the general law the courts are required to take judicial notice of it. The mere fact that a House refrains from taking action or exercising its powers in any particular case does not mean that it is waiving its privilege as such.

In ascertaining the specific privileges enjoyed by the House it is necessary to ascertain the privileges of the House of Commons as at 7 July 1978 and in the light of any Solomon Islands law made since that date.

Any classification of the privileges of Parliament is rather subjective as it often depends on the circumstances of each case.

I might pose the question, what are some of the immunities or privileges of the Parliament that are generally recognized? The most notable, of course, and important immunity accorded to Members and others participating in parliamentary proceedings is that of freedom of speech and debate. I have already discussed Article 9 of the Bill of Rights as it applies in Solomon Islands by the Prescription of Parliamentary Privileges, Immunities and Powers Act 2007 and supplemented by Section 195 of the Penal Code, covering absolute privilege.

It is under Article 9 of the Bill of Rights that a rule of law exists that the proceedings of Parliament cannot be called into question or impeached in any courts or tribunal. Thus the courts lack jurisdiction to review proceeding in Parliament. Further, a Member who initiates legal action does not open up their conduct in Parliament to scrutiny by the courts.

I refer to an extract on page 58 of Chapter 3 of the book on New South Wales Legislative Council Practice: "Freedom of speech permits Member to speak freely during proceedings in the House or in a committee meeting while enjoying

complete immunity from prosecution for any comments they may make. This allows Members to make statements or allegations that they may otherwise hesitate to make as Lord Cockburn CJ in the case of *Ex parte Wason* put it in these terms:

It is clear that statements made by Members of either Houses of Parliament in their places in the House, though they might be untrue to the knowledge, could not be made the foundation of civil or criminal proceedings, however injurious they might be to the interest of a third party." (1869) LR 4 QB 573 at 576)

There are a number of other immunities of proceedings of Parliament from impeachment or questioning in the courts. I refer to an extract on pages 66 and 67 of the New South Wales Legislative Council Practice. "Members, witnesses and other participants in proceedings in Parliament enjoy the privilege of freedom of speech in parliamentary proceedings. As such they are immune from impeachment or questioning before the courts or in places outside of Parliament, including being sued or prosecuted in relation to their contribution to the proceedings in Parliament.

However, this immunity under Article 9 of the Bill of Rights 1689 also extends to other proceedings in Parliament such as the giving of evidence before the House or a Committee and preparation of documents and communications for Members. It is this aspect of parliamentary privilege, which perhaps gives rise to the most controversial aspect of Article 9, and that is what constitutes a proceeding in Parliament and what activities are covered by parliamentary privilege. No definition of proceedings in Parliament is provided for in the Bill of Rights.

In *Erskine May* 'proceedings in parliament' is broadly described as:
[S]ome formal action, usually a decision taken by the House in its collective capacity. This is naturally extended to the forms of business in which the House takes action and the whole process, the principal part of which is debate by which it reaches a decision. An individual Member takes part in proceedings usually by a speech but also by various recognized forms of formal action such as voting, giving a notice of motions or presenting a petition or report from the committee Officers of the House take part in the proceedings, principally by carrying out its orders, general or particular. Strangers may also take part in the proceedings of the House, for example, by giving evidence before it or one of its committees or by securing presentation of a petition."

The Australian Parliament under the Parliamentary Privileges Act 1987 has attempted to provide a clear and more comprehensive definition of proceedings in Parliament as well as clarify the extent of the use of evidence which derives from such proceedings. Section 16(2) of the Act attempts to define the concept of proceedings in Parliament. In NSW, in the absence of similar legislation and as well as in New Zealand, I would say, it is open to the courts to determine what constitutes 'proceedings in Parliament'.

At page 68 I quote: "Clearly, the term proceedings in Parliament denote the formal transaction of business in either Houses or in committees such as the giving of evidence before the House or a committee or the making of a submission to the committee. However, matters are only connected with or ancillary to the proceedings of Parliament become less clear cut, in particular circumstances of an action are likely to determine where the privilege is attached."

The most difficult area, I guess, in terms of Members, is the provision of information to Members and what privilege if any attaches to documents and communications with Members. Without me reading onto the record I would entreat Members to the discussion on pages 68 and 69 of Chapter 3 on the book on New South Wales Legislative Council Practice under the heading 'Members' Documents and Communications'.

There is a fairly good description of the circumstances in which documents and communications coming to the possession of Members might be protected as a proceeding in Parliament. There is a useful test that we developed in NSW to determine whether a document brought into existence is covered by parliamentary privilege and that is referred to at the top of page 69 of the book. That test arose through a situation that occurred in NSW when the Independent Commission Against Corruption executed a search warrant in Parliament House and seized some documents of a Member. The Member subsequently brought to my attention that some of the documents that the Independent Commission Against Corruption has seized; the Member had used them for the purpose of debate and proceedings in Parliament. Subsequently the Member brought the issue of privilege to the attention of the President and the President allowed the Member to bring the matter to the attention of the House by way of a motion. The matter was referred to the Privileges Committee, which was involved in a lengthy enquiry into the circumstances of the seizure of the documents. The outcome was that the House determined that documents that had been seized by the Member by the Independent Commission Against Corruption had been used by the Member in proceedings in Parliament and demanded that the Independent Commission Against Corruption return some of those documents into my custody because the Member had used them for the purpose of 'proceedings in Parliament'. They were allowed to retain documents, which were not used for the purposes of 'proceedings in Parliament.'

There are other aspects of parliamentary privileges covered by the term 'proceedings in Parliament'. For example, the circulation of petitions for presentation to Parliament. Tabled papers, documents tabled in the House by Members are protected by absolute privilege.

Subpoenas to produce documents and search warrants, I have already discussed one aspect and that is also covered under a heading Subpoenas to produce documents on pages 72, 73 and 74 of the book on NSW Legislative Council Practice.

The publication of documents, proceedings and records of Parliament fall within the scope of 'proceedings of Parliament'. as I have mentioned under Article 9 and absolute privilege, which applies under Section 195 of the Penal Code here.

There are a number of other immunities that are applied to Parliament:

- Freedom from arrest and civil case on any day on which the House sits or on any day on which a committee of which the member is a member. This also applies to officers of the House such as the Speaker, and in the case of Solomon Islands, the Clerk of the House.
- Exemption from jury service, although, I note that this is not applicable in the Solomon Islands as there are no jury trials.
- Exemption from attendance at a court or tribunal as a witness on a day on which the House meets or a committee meets. This applies to Members and officers of the house as well. Often in the Australian context, what happens is that if a member is summoned to attend a court or tribunal on a day in which the House meets, members are given a 'pair' for absence so that they can attend court proceedings but that kind of thing may not be possible in a small legislature such as Solomon Islands. In my own case, I was served a subpoena to attend court to give evidence in a civil case on a day on which the House met. I exercised my right not to attend court because I was an officer of the House.

These kinds of privileges are based on the claim of the House's prior service of its members and officers for effective performance and the discharge of its functions.

There is no immunity for Members from arrest in criminal matters. Exemption from service of legal process is another area. The service of process on a member within the precincts of Parliament when the House is sitting would be regarded as a breach of privilege because Members should not be impeded in the pursuit of their parliamentary duties within the precincts of the parliament.

What are some of the key powers of the Houses of Parliament?

- the Parliament has exclusive control of the proceedings of the House,
- control of reports of proceedings of the House,
- control of access to the sittings of the House,
- the power to maintain the attendance and service of its Members,
- the power to discipline Members because of misconduct, and that might include a reprimand and admonition, apology for words spoken, censure, suspension and in some cases even expulsion.

In New South Wales we have an example where a Member was expelled for conduct unworthy of a Member and more recently just before I retired as Clerk the Independent Commission Against Corruption, found a member had incorrectly claimed his entitlements, and a notice of motion was given for the expulsion of that Member because his conduct was unworthy of a Member. Shortly before the House met the Member resigned.

There is a power to fine but not members. In the United Kingdom, Members can have their salaries suspended as a disciplinary sanction.

- the power to arrest,
- the power to imprison is used rarely these days in the UK, but there is a case in Western Australia in 1990s where a petitioner was imprisoned,
- there is power to control the precincts of the Parliament,
- the power to conduct inquiries and call witnesses,
- the power to obtain evidence,
- the power to delegate its functions, more importantly to committees,
- the power to punish for contempt,
- the power to order the production of documents.

What act or conduct might be considered by Parliament as constituting a breach of privilege or contempt? There is no formal definition of what might constitute contempt. The House will ultimately judge whether the given circumstances constitute contempt, generally following a report from a privileges committee.

On page 94 of the New South Wales Legislative Council Practice, if I may refer to some quotations. "Erskine May has defined contempt as follows: 'Generally speaking any act or omission, which obstructs or impinge other houses of Parliament in the performance of its functions or which obstructs or impedes any member or officer of such house in the discharge of his duty or which has a tendency directly or indirectly to produce such results, maybe treated as a contempt even though there is no precedence of the offence.'"

"A breach of privilege and a contempt to Parliament although often confused are not necessarily one and the same thing. A breach of privilege occurs whenever any of the rights or immunities of the House and its members are disregarded or attacked by an individual or authority. Contempt occurs whenever an offence is committed against the authority of a house or a committee and may not always involve a breach of a specific privilege. The critical feature of contempt is that the relevant conduct must impede or obstruct

the House or a committee or its members or officers in the performance of their functions or have a tendency to produce this result."

Some houses of Parliament have attempted to define conduct that may constitute contempt. As I have said, generally, a House will treat contempt as any act or omission, which instructs or impinge the House in the performance of its functions, obstructs or impinge any member or officer of the House in the discharge of their duties or has the tendency to directly or indirectly have these effects.

Examples of conduct which might constitute contempt include, and this is no exhaustive definition, and you will find some of these listed in the various works on parliamentary practice and procedure:

- misconduct by person in the presence of the house or a committee, for example disorderly conduct by a stranger or a visitor in the precincts of the House or a committee.
- disobedience to the rules and orders of the House, for example, the refusal of a person to attend the House or a committee after having been summoned to give evidence or to produce a document.
- refusal to answer a question.
- abusing the right to petition the Parliament, for example, submitting a petition containing false or a scandalous allegation against any persons, whether or not a Member of the House.
- presenting false documents to the House or a committee.
- giving false evidence by a witness.
- deliberately misleading the House or a committee. This can apply both to Members and other persons.
- intimidation of a member or officer in respect of the parliamentary conduct.
- Bribery..
- serving legal process in the precincts of the Parliament.
- abuse of freedom of speech.
- unauthorized disclosure of material.
- misuse of committee evidence.
- premature publication of committee proceedings.

- molestation of, or threats against witnesses including legal proceedings on account of evidence they have given to the House or a committee.
- reflections on the House Member, speakers or other officers.

Other examples are given on pages 95 and 96 of the New South Wales Legislative Council Practice.

That leads me to what approach should be taken to defining the immunities, powers and privileges of the Parliament.

Personally, as a practitioner in parliamentary law and custom, I am not an advocate of the legislative approach to prescribing the privileges of Parliament. While such approach does give some certainty, it nevertheless leaves interpretation of those matters covered in the statute to interpretation by the courts and a limitation of the scope of the privileges of Parliament. It was a narrow interpretation of the scope of 'proceedings in Parliament' by a court in New South Wales that led to the enactment of the Commonwealth Parliamentary Privileges Act.

We have also seen an erosion of the scope of parliamentary privilege by the courts in the New Zealand case of *Jennings v Buchanan* where the Privy Council allowed the use of debate to support defamation proceedings against a member.

Most criticisms of not having an Act governing privilege stem from academics and the media who claim the law and custom of the Parliament is not known.

There is also a danger that by legislating on a matter of privilege, the Courts can regard that as an attempt to cover the field. Let me give you one example from the Parliamentary Powers and Privileges Act of Papua New Guinea of the danger of legislating for privilege. Section 20 of that Act provides penalties for refusal to answer questions. Under the section it is a defence if the question the witness failed to answer was irrelevant or the matter being inquired into by the Parliament. In that situation, a court could determine the relevancy of a question rather than the Parliament. Further, under section 22 of the Act, a person can object to the production of a document on the ground that it is contrary to public interest. Who is to determine that? The National Executive Council and the Head of State. In both those circumstances, the Parliament is subservient to the Courts and the Executive government. The Parliament, as the grand inquest of the nation with power to inquire into any matter within its legislative competence should be the final arbiter as to whether a person may refuse to answer a question or to produce a document in terms of the public interest of disclosure as against secrecy.

What approaches are available to outline the privileges of Parliament here in the National Parliament of Solomon Islands?

One approach would be to have a document published explaining the privileges of Parliament, which Members and others could become more informed about the privileges of the Parliament.

As I have already said, not being an advocate of the legislative approach, I would prefer that as little as possible be enacted by statute with the balance being covered by the standing orders of the house or resolutions of the house. For example, a standing order or a resolution of the house could regard certain matters as contempt.

The Standing Orders of both the New Zealand Parliament and the Queensland Parliament have a list of possible contempts. The Standing Orders could also outline procedures for dealing with matters of privilege. For example, usual reference to the Speaker in writing, if a prima facie case exists, a resolution of the House to refer the matter to a privileges committee for inquiry and report, and ultimate determination of the issue by the house following a report and recommendation of the privileges committee.

There are some matters, of course, that may need a legislative approach, such as the power of the House and Committee to summon persons to give evidence and to produce documents as well as sanctions and penalties for willful failure to attend committee proceedings and refusal to answer lawful questions. That is one area that probably the law of parliamentary privilege would be useful to codify so that Members, people and others know what the powers of the house are and what are the rights and responsibilities of witnesses and others summoned to attend and give evidence before committees.

The publication and the debates and proceedings of the Parliament presently covered by the Penal Code could perhaps be covered by privileges legislation to cover any doubts about the broadcasting of proceedings and the official publication of the proceedings of the Parliament. The precincts of the Parliament could also be covered by statute to give certainty as to what are the precincts of the Parliament and what are the powers of the House, the Parliament and the Speaker within those precincts.

I think I have said enough and I will be open to questions by members.

Hon. Oti: Thank you Mr. Evans. Colleague committee members, I would now like to invite any comments, any questions you might wish to raise for further clarification or for further expounding by Mr. Evans on the principles and practices that have emanated through parliamentary proceedings in the Parliament of New South Wales and the cases that he referred to.

Perhaps before anyone can comment, I'd like to ask one particular question and this is in reference to the documents, which are brought into parliamentary proceedings either in Committee or in the Chambers which could be used outside by the courts, if it becomes an issue to be investigated by the Courts.

How protected are those documents as documents of Parliament. I would like to cite certain examples here. In audit reports that were tabled before Parliament, it is the privilege of the Parliament to consider those and then taken on by other authorities such as the courts in pursuing some of the exposures that are mentioned in the reports. How immune or what sort of immunity do these documents enjoy in terms of protection under parliamentary privilege, it is a matter for Parliament and so it cannot be used outside of Parliament for other purposes particularly by the courts.

Mr. Evans: A document that is tabled in Parliament is covered by absolute privilege, and to me all the courts are allowed to do is accept that document as evidence of fact of what was said or done. They should not call into question what is within that document. Although I note there has been a tendency of the courts more recently to try, as I have mentioned in a New Zealand case of *Jennings v Buchanan*, they have attempted to use Hansard to support causes of action in defamation. But strictly speaking, those kinds of documents should only be used by the courts as evidence of fact from the usage of the documents and not to be used as part of court proceedings.

Hon. Oti: Thank you Mr. Evans, any other questions or comments from members?

Hon. Tozaka: Thank you John for your presentation. I think you have clearly explained the privileges and immunities, which are very helpful to us Members, especially in regards to our system where we have taken on board the United Kingdom's privileges and immunities and that we also have in our system, in our Constitution as well as in our Standing Orders. But the importance of legislating our privileges and immunities specifying particular ones we want to include in our legislation.

One of the things that I have in mind, which is also shared in our first meeting, is the challenges of the immunities and privileges in court, but at the moment that's not happening, basically because we are protected under our Standing Orders. But in the event that we legislate privileges and immunities then that would become a situation where the courts would come in and the freedom we are enjoying at the moment and the protection so that Members of Parliament can speak openly without fear of being challenged in court might come into question or be jeopardized. What is your comment on that?

Mr. Evans: Here in Solomon Islands you are already protected by absolute privilege under Article 9 of the Bill of Rights and partly under the common law and section 195 of the Penal Code. Members have absolute privilege for what they say and do in Parliament.

The situation as it applies at present is that under the common law here, in New Zealand and in New South Wales, it is for the courts to determine whether or not a privilege exists and that's all. It is for the House to determine the manner of the exercise of its privilege. All the courts can do is say "yes that privilege exists." It is then for the House to decide the manner of its exercise.

As I have already said, I am not a keen advocate for putting a lot into statute because immediately when that is done, you are attempting to cover the field and you open the whole of the statute up to interpretation by the court. I think we need to be very careful about the privileges and powers that you want to enshrine in statute and those that you want to leave as probably covered by the common law of Parliament and by Article 9 of the Bill of Rights.

Hon. Rev Bosefo: Thank you, Mr. Chairman and thank you Mr. Evans for your presentation. For me, I could not follow up on what was presented and so perhaps I should look at your documents and read through.

A question that I have is the question of privileges, immunities and powers and how they have their origin from England in the 17th centuries because of the conflict between the House of Commons and the Crown. Today, we are emphasizing democracy; we are representing the people and therefore if anything that Members of Parliament sees that certain laws should be changed to enact legislations instead of protecting them so that they can say anything they like. So the law should be changed. All the things that parliamentarians say during sittings of Parliament, I don't think will work.

Do you have any comment on that? I know that this is the age of democracy; we are representing our people, it is the government of the people by the people and for the people. I cannot see any use of saying anything we like and be protected by the law. Do you have any comment on that? Thank you.

Mr. Evans: This is an area that I have not covered and it is covered under the term 'a citizen's right of reply'. I know it is covered in Chapter 3 of the New South Wales Legislative Council Practice.

There are many Parliaments in Australia, New South Wales, the Commonwealth Parliament and some of the other state parliaments that have a procedure allowing for persons that have been aggrieved by what has been said about them in proceedings of Parliament to be able to make a reply to those allegations, accepting that Members are free to say whatever they like about any matter, no matter how injurious it might be to an individual under Article 9 the Bill of Rights and the Penal Code.

We have adopted various procedures that allow a citizen to make a submission to the Parliament so they can put on the record their version of a circumstance. That as I have said is often referred to as a 'citizen's right of reply'. In New South Wales the process is; if the statement is made by a Member in the course of debate in the House, the aggrieved person writes to the Presiding Officer. Under our Standing Orders, the Presiding Officer looks at the submission and if he considers the aggrieved person has a case, in other words, let me say they have been defamed, they cannot take legal action against the Member because his speech in Parliament is protected. The Presiding Officer will refer the submission to the Privileges Committee, the Privileges Committee will look at it, they do not

take evidence from anyone, they do not take evidence from an individual or the Member who made the comments because that only adds to the problem, but they will look at it and will negotiate with the individual an agreed statement that can go in the parliamentary record. The committee reports back to the House, the House agrees to the Report of the Committee, the statement from the aggrieved person is incorporated into the parliamentary record so that their side of the story is complete.

It is a bit more difficult in terms of parliamentary committee enquiries. The approach that we take is that if someone, during the course of evidence before the committee, makes allegations against other persons not involved in the enquiry process and the person brings the matter to the attention of the committee, the committee might call that person before the committee to get their version of events on the record, so that they get a right to respond to allegations being made about them. That is how we balance absolute freedom of privilege in Parliament and Committees as against the rights of individuals to be able to defend themselves because they cannot use the process of the courts in those circumstances to defend themselves. I hope that answers your question.

I think from memory and I do not have them here with me, I have included that kind of process in the draft of standing orders that I have prepared for the Parliament.

Hon. Oti: Thank you Mr. Evans. One more question from me also for your clarification. In this age of advocacy of principles of good governance including transparency, particularly as it relates to what to say in Parliament, may be you are protected in Parliament, the use of which could go outside of Parliament and especially the media whereby they blow out of what you say in Parliament might be used against you individually outside of Parliament either through harassment, intimidation and so on. Because the privileges and immunities belong to Parliament and not an individual entitlement as it were.

What you say in Parliament becomes a parliamentary matter. If it is taken on you as an individual Member of Parliament what protection do you have as a Member of Parliament in that regard?

Mr. Evans: As a Member of Parliament, if the media or other people make allegations against you of your conduct in Parliament then you have rights available to you under the law in proceedings for defamation.

The House should not necessarily use its rights in terms of intimidation or contempt of the House in those circumstances where a member has a legal remedy available to him. He should pursue that legal remedy in court rather than through the procedures of Parliament and certainly we would not have allowed that kind of thing to occur.

If a Member has been defamed outside the House that's a matter they have to pursue through a legal remedy, not bring it to the House for the House to resolve it through the processes of immunities and powers of the House.

Hon. Oti: The situation is a third party using what was said in Parliament, the protection you have is only in the precincts of Parliament, outside of Parliament you don't, as an individual may be.

Mr. Evans: That is very true and Members have to be very careful about what they say outside the House about what they said in Parliament. Even using words such as, 'I stand by what I said in Parliament' or words to that effect can amount to a member suffering legal consequences in defamation for making those comments. Members have to be very careful about what they say outside the House of what they said in Parliament.

It is best to say here is a copy of the Hansard, read what I said. Even taking extracts from your speech and publishing those extracts to citizens can have dangerous consequences, particularly where one Member might have said something in their speech and another Member might have said something to counteract that in another part of the debate.

The dissemination of your speech may not be regarded as a fair and accurate report of what was said in Parliament. Where Members make defamatory statements in Parliament they need to be very, very careful about what use you make of the debates and proceedings in Parliament. I always told my Members, say nothing, and give them the Hansard record.

Hon. Oti: There is no protection for you outside of Parliament for what you said on the floor of Parliament.

Mr. Evans: That is right. No protection for you outside the Parliament what you said in the Parliament. You are subject to the normal laws of defamation.

Hon. Waipora: Thank you, Mr. Chairman and thank you Mr. Evans for your presentation today.

This is a difficult subject, as I see it, and we need to go through it many times before we can understand it.

Anyway the question I would like to put here is that, the UK's privileges, immunities and powers might be different, Australia might be different to us here in Solomon Islands. When we debate in Parliament that is okay because Members understand each other, so it doesn't matter when we are throwing mud at each other we don't mind. But our culture speaks quite a lot on us here in Solomon Islands. May be when we go out there people would say, the Member for West Makira was saying this and that about our Member, and so he will have to pay compensation or something like that.

Can you give us examples of UK and Australia summarizing them down that with us in Australia this is okay, with UK this is okay so that we can compare it to ourselves on the kind of privileges and immunities in other countries like that? What would you say about that? Can that be done?

Mr. Evans: It is a very difficult area. The laws and customs of Parliament apply generally across all Commonwealth parliaments where they have no specific parliamentary privileges acts. I appreciate that in some countries you have different customs and conventions, which you may have to take into account in developing any law on parliamentary privilege.

Hon. Oti: That is a critical and important point to take into account here. The cultural, traditional, conventional setting where these legislations are super imposed or exist within and cannot be taken out of the context where the social cultural environment expects and demands those kinds of acknowledgement, ensuring that we debate not only within our rights in Parliament but within the context of our other obligations outside of Parliament.

Mr. Evans: It might be through the process of publishing information and brochures on parliamentary privileges that people will become better informed of the nature of parliamentary privileges.

That is what I am saying. I appreciate that Parliaments like the United Kingdom, Australia, and New Zealand have been developing our practices and procedures for about 100 to 150 years and here in Solomon Islands it is probably within only 40 odd years. So you may need to be cautious in your approach to how you put your laws on parliamentary privilege into statute.

As I have said some aspects you might want to put into statute and others you might want to retain within the Standing Orders. You might have a brochure or leaflet on parliamentary privileges explaining what it is, what it is about, who it protects and what are your rights.

Like I was saying a citizen has the right of reply. We have a document that we circulate on citizens' right of reply. It is available on the parliamentary website so everyone can see that if they have been aggrieved by what has been said in parliament, these are your rights. We have publications that show the protection available to witnesses before parliamentary committees. There a lot of things that can be done to disseminate to people in the community about this complicated notion of parliamentary privilege, immunities and powers of the House.

Hon. Kengava: Thank you Mr. Chairman and thank you Mr. Evans. I want to ask a question but first I just want bring some background points of view of mine on this.

Solomon Islands is developing its parliamentary democracy and more people are now realizing their right or freedom to question government, parliament or

anyone. For that matter in a situation like that Members need not to be intimidated by the media, non government organizations and individuals when they have the responsibility to make any statements in parliament as representatives of their people.

But in that current situation for Solomon Islands both the Members of Parliament and the public are very vague or not very clear on the privileges, immunities and powers of Parliament, if I can say that.

I think only the Standing Orders that is guiding the parliamentary procedures and the decision of the Speaker of Parliament who has the right to make the final decision can decide on the rights, and privileges, so to speak in Parliament and also may be when people are judging what Members are saying in Parliament. If there is a challenge on a Member of Parliament making a statement in Parliament which is not to the liking of the public and if there is a case that somebody would like to challenge a Member of Parliament for that matter outside, probably the courts will come in, it has to make a decision on whether the Member of Parliament is liable for the statement he made or otherwise.

In my view, the situation in this country at the moment is such that there needs to be clear guidelines to exactly tell Members of Parliament or intending Members of Parliament, the public and various stakeholders of what are the privileges, immunities and powers of parliament so that it will avoid a situation where people don't know and so want to take a Member of Parliament to court etc.

I think even cultural obligation, which was raised by my colleague MP for West Makira can also be guided by what I feel as having a separate legislation for that matter; a separate legislation spelling out the privileges, the immunities and powers of Parliament so that the public, the Members of Parliament and even the courts know what those rights or privileges are so that if someone wants to question a Member of Parliament for sure, it will be clear why he or she can do that. What is your view on that? Thank you.

Mr. Evans: As I have already said, it is a difficult area of the law and I would not necessarily want to try and spell everything out regarding parliamentary privilege in a Parliamentary Privilege Act. That would not be practicable. But there are some things that you might want to put in a Parliamentary Privilege Act to clarify some of the matters you have been referring to. That is what the Commonwealth Parliament in Australia did in its Parliamentary Privileges Act 1987 where it is specified in Section 16 what is meant by the scope of 'proceedings in parliament' and the absolute privilege that applies to speeches and debates in Parliament. Members should have before them a copy of that Parliamentary Privilege Act, and that is one of the things that you might want to incorporate in a Privileges Act, as I have already mentioned.

Hon. Tozaka: What about immunity from arrest?

Hon. Oti: Arrest on criminal or on civil matter?

Mr. Evans: I mean civil matters. If the House is sitting or the committee is sitting. It would be most unusual for that to occur these days because there are very few, I cannot give you an example, but there are very few civil matters for which a person can be arrested these days. It would be a rare occurrence but it is a privilege that can be used.

Hon. Tozaka: what do you mean by that? Do you mean arrest in the parliament precinct or parliament sitting?

Mr. Evans: Yes. Even on a day when the House is sitting or a committee is sitting of which you are member under that common law of parliament, the House or the committee has the superior claim to the attendance of the service of its members for the execution of their functions and the member should not be arrested in a civil cause and prevented from attending Parliament or a committee. It is an unusual case and would be extremely rare but it is a privilege or immunity that can be used.

Hon. Tozaka: Mr. Chairman, for example what I am saying is if we have a very important operation or a very important agenda to discuss in parliament and a particular member is under criminal instigation or investigation or search warrant. Can we legislate for that so that the rest cannot be done until parliament is done with its business?

Mr. Evans: You could but it is generally accepted in the law of parliamentary privileges that a member is not free from arrest in criminal matters. That's an accepted fact but if you want to put it in the law, you can put in the law. But I do not think that would be a wise move to create the precincts of Parliament as a sanctuary for avoiding the criminal law.

Hon. Oti: Thank you Mr. Evans and thank you colleagues. I will now dismiss you from the meeting and we will continue with our other aspects of our deliberations.

I hope we will be able to hear from you again since you have been close to this Parliament when the report finally comes or even to the extent when some of the recommendations that we will be making to Parliament will further require input from witnesses that we have interviewed including yourself. I am sure you won't be surprised that you probably will be required to appear again before the committee if we need you. Thank you, Mr. Evans.

Mr. Evans: Thank you Mr. Chairman. If I can assist the committee further in any way I am delighted to do so.

Evidence Concluded