

Owen Walsh (2012) The Slipper conspiracy – sedition or contempt?

This paper was prompted by community reactions to the alleged political conspiracy against the Speaker of House of Representatives, with some in the community raising the prospect of treason or sedition being committed. The paper details the background to and nature of the conspiracy claims, considers the applicability of sedition and treason offences and alternative legal responses, including exercise of parliamentary powers to punish contempt. It concludes that, in the circumstances, recourse to parliamentary contempt power is as equally problematic and dangerous as the suggested recourse to sedition laws.¹

Background and political context

In April 2012, Mr James Ashby, a staff member of the Speaker of the House of Representatives commenced civil proceedings against the Speaker and the Commonwealth of Australia, alleging sexual harassment by the Speaker and claiming damages for breach of his employment contract with the Commonwealth.² The claims made included allegations that the Speaker, the Hon Peter Slipper MP, had fraudulently misused travel vouchers. Slipper subsequently announced his intention to step aside from the Speakership. That is, that he would not take the Speaker's Chair and not enter the chamber of the House, pending the outcome of an investigation into allegations of travel-related fraud. The Deputy Speaker, Labor MP Anna Burke, assumed the duties of Speaker in the Chamber.

The prevailing political climate and the circumstances of the Speaker's appointment, together with the salacious nature of the sexual harassment allegations, fuelled the controversy.

Slipper, a Liberal National Party [LNP] member for the Queensland electorate of Fisher, had been elected Speaker in November 2011 on the nomination and votes of the Labor Commonwealth Government and despite opposition from his coalition colleagues. Slipper resigned from the LNP on taking the Speaker's seat and became an independent.

Elevating Slipper to the position of Speaker appeared to be an astute political move by the Gillard Government to secure its political survival and ensure the delivery of its policy and legislative program. It enabled the minority Labor Government to govern with a majority of 75-73 on the floor of the House of Representatives: that is, 71 Labor members supported by a Green and three Labor aligned independents (Bandt, Windsor, Oakeshott and Slipper who

¹ Author's postscript. This paper was written before the decisions of the Federal Court in *Ashby v Slipper* [2014] FCAFC 15 and *Ashby v Commonwealth of Australia* (No 4) [2012] FCA 1411 were handed down. These decisions cover the background and context in greater detail. Neither decision, in the author's view, undermines this paper's thesis.

² See http://en.wikipedia.org/wiki/Peter_Slipper, http://en.wikipedia.org/wiki/Gillard_Government, <http://australianpolitics.com/tag/peter-slipper>

has a casting vote in the event of a tie)³; 71 Liberal-National Coalition members supported by the two independents aligned with the Opposition (Katter and Cook); leaving one notionally non-aligned independent member (Wilkie). The Government now had 74 clearly committed votes for motions of supply or no confidence. Slipper, being Speaker, lost his deliberative vote, but could exercise his casting vote in the event of 74-74 tie to save the Labor Government.

The allegations of sexual harassment and fraud against Slipper quickly prompted questions over Prime Minister Gillard's judgment, integrity and leadership in pursuing the above political outcome, particularly in light of Labor's ongoing decline in public opinion polls.⁴

The conspiracy claims

The political focus switched back to the federal Opposition on lodgment with the Federal Court on 22 June 2012 of documents setting out the Commonwealth Government's and Slipper's response to Ashby's claims. These sought a stay of proceedings on the grounds that they were an abuse of process and vexatious. That is, as they had been brought for the purposes of 'damaging Slipper, aiding his political opponents and advancing Ashby's own prospects for employment or advancement within the Queensland LNP Government. Slipper's response specifically referred to 'a calculated and orchestrated political and public relations campaign' designed to 'destroy or seriously damage Slipper's reputation and standing, and his political position and career' and 'advance the political interests of the LNP' and/or Mal Brough – a long time political rival and a candidate for LNP pre-selection in Slipper's electorate.⁵ Slipper's response expressly referred to Ashby acting 'in combination' with Brough and other senior LNP members.⁶

These arguments sought to rely on the following: Ashby's failure to raise the alleged sexual harassment with his employer or relevant third parties before commencing legal proceedings; the availability of avenues other than litigation to resolve such claims; and Ashby's alleged behavior immediately prior to his commencing the litigation. These included: discussions and meetings – detailed in emails and phone records - with a journalist and senior LNP members, including Brough; engagement of a public relations firm; the lodgment and withdrawal of allegations of serious sexual impropriety by Slipper, which were then widely reported in the

³ Slipper's election as Speaker predated ALP Member Craig Thomson's suspension from the ALP on 29 April and sitting as an independent.

⁴ See, for example, James Massola 'Despairing Labor MPs question Julia Gillard's leadership' *The Australian* 30 April 2012; Heather Ewart 'Union Raid and Slipper Scandal stir political strife', 7.30 Report, *ABC Broadcast*, 2 May 2012; Heather Ewart, 'Slipper crisis rocks Julia Gillard as Speaker Peter Slipper steps aside' *The Australian*, 23 April 2012.

⁵ The background to the enmity between Slipper and Brough and other LNP figures is summarised in http://en.wikipedia.org/wiki/Peter_Slipper and the media articles referred to therein.

⁶ Federal Court of Australia, NSD S80 of 2012, *Ashby v Commonwealth of Australia, Additional Documents (Points of Claim) Commonwealth of Australia* filed on 22 June 2012. Federal Court of Australia, NSD S80 of 2012, *Ashby v Commonwealth of Australia, Additional Documents (Points of Claim) Mr Peter Slipper* filed on 25 June 2012. Copies at www.federalcourt.gov.au/court_documents/ashby_cth.html.

media; providing extracts from Slipper's work diary to Brough and to a journalist inquiring into Slipper's alleged misuse of travel entitlements.⁷

On 28 June 2012, Slipper advised Ashby through legal representatives that he intended to refer to the Australian Federal Police Ashby's behavior in providing extracts of his work diary to Brough and the journalist in order to 'damage' Slipper. Slipper's correspondence – subsequently published by Ashby's lawyers – cited apparent breaches of section 147.1 of the *Criminal Code Act 1995* (Cth) and section 70 of the *Crimes Act 1914* (Cth) and that that Brough and the journalist had apparently 'conspired' with Ashby and another Slipper staff member to breach the latter.⁸

These legal developments were accompanied by senior Commonwealth Government Ministers attacking Ashby and the Opposition publicly in the media throughout May and June, in effect implying the existence of a political conspiracy undertaken with the knowledge, if not involvement, of Opposition front benchers.⁹

Community reactions

Not unsurprisingly, much public comment, debate and dismay followed, particularly evident online, with the 'conspiracy to "get" the Speaker of the House of Representatives', being characterized 'as a gross breach of democratic processes of the sort typified by Third World countries such as Fiji'.¹⁰ Some debated whether the apparent conspiracy constituted or should be treated as treason or sedition.¹¹ It is such questions that prompted this paper.

Treason and sedition

An examination of the criminal law confirms such a debate is misguided.

None of the treason offences under Commonwealth and State law appear directly relevant to the circumstances of the Slipper matter. These provide that treason may take several forms ranging from causing death or harm resulting in death to the Sovereign; causing harm to or

⁷ Ibid.

⁸ A copy of the correspondence is available at www.scribd.com/doc/998036/tendered-documents-in-james-ashby-case.

⁹ Transcript of press conference – Melbourne. 15 June 2012 The Hon Nicola Roxon MP, Attorney-General for Australia. Copy available via www.attorney-general.gov.au/Transcripts. See also Lana Vaske, 'Christopher Pyne denies any conspiracy with Slipper accuser James Ashby', *The Australian*, 1 May 2012. Michelle Gratten 'Changing Stories on Slipper Saga puts Coalition in the frame', *The Age*, 5 May 2012. Judith Ireland & Jessica Wright 'Government Claims Cover up in Slipper Affairs', *The Age*, 2 May 2012. Phillip Cooney & Laurie Hall, 'Slipper: Labor hits back', *Sydney Morning Herald* 16 June 2012.

¹⁰ See, for example, the discussion on www.bigfoty.com/forum/thread/peter-slipper-as-speaker during May and June. The quote is taken from post number #824 on 16 July 2012.

¹¹ Peter Craven, 'The homophobic horror show of the Slipper Affair', ABC Television, The Drum, at <http://www.abc.net.au/unleashed/4206272.html>. Comments posted on 20 August 2012. Bob Ellis, 'Tony Abbott's Slippery Brough fingerprints', 29 July, 2012 at <http://www.independentaustralia.net/2012/politics/tony-abbotts-slippery-brough-fingerprints/>. See also <http://blogs.crikey.com.au/pollbludger> and <http://www.bigfooty.com/forum/threads/peter-slipper-as-speaker.923055/>.

imprisoning the Governor-General or Sovereign; engaging in conduct intended to materially assist Commonwealth enemies during war or organisations engaged in armed hostilities with the Australian Defence Force.¹²

The law of sedition at first instance appears more relevant. It prohibits words or conduct deemed to incite discontent or rebellion against the authority of the State.¹³

However, at the Commonwealth level, sedition is also defined by reference to an urging of force or violence to effect purposes such as the overthrow of the Constitution or government.¹⁴ Amendments in 2005 shifted the emphasis of the Commonwealth offences away from speech merely critical of the established order to exhortations to use force or violence against established authority, voters or groups within the community.¹⁵ That is, to draw an ‘essential distinction’ between legitimate dissent and speech that constitutes a criminal offence.¹⁶ The requirement of proof beyond reasonable doubt of a violent purpose or intent was seen as protecting ‘rhetorical statements that the person did not intend anyone to act up on as well as expressions in artistic, academic, scientific and media contexts’.¹⁷

At the State level, New South Wales and Victoria rely on the common law offence of seditious libel. The other jurisdictions have statutory offences for sedition directed at the Government, Constitution or Parliament of the jurisdiction concerned and, in the cases of Tasmania and Western Australia, also of the Commonwealth.¹⁸

Tasmania’s legislation, for example, provides that any person who conspires to carry into execution a seditious intention is guilty of a crime. A seditious intention is defined as one including an intention to excite disaffection against the either House of Parliament of the Commonwealth or to raise discontent or dissatisfaction amongst ‘His Majesty’s subjects’. The definition excludes an intention to point out in good faith errors or defects in Government or to ‘excite in good faith attempts to procure by lawful means the alteration of the Government or any matter affecting the same’.¹⁹ In contrast to the Commonwealth legislation, the State legislation does not expressly condition sedition on an intention to cause violence or disorder. On its face, the legislation would appear to render (subject to the good faith exceptions) seditious an intention to raise disaffection or discontent among subjects etc even if the speaker’s intention was not that the hostility generated result in violence, force or illegal conduct.

¹² See, for example, Division 80 of Part 1 of the *Criminal Code* (Cth) and section 56 of the *Criminal Code* (Tas).

¹³ Australian Law Reform Commission, *Fighting Words: A review of sedition laws in Australia* (ALRC Report 104, 2006), para. 2.2.

¹⁴ *Criminal Code* (Cth), sections 80.2 to 80.2B. See also ‘sedition’ in *Halsbury’s Laws of Australia*.

¹⁵ G Griffith, *Sedition, Incitement and Vilification: Issues in the Current Debate*. NSW Parliamentary Library Research Service, Briefing Paper No.1/06, February 2006, para 2.50.

¹⁶ Australian Law Reform Commission, *Fighting Words: A review of sedition laws in Australia* (ALRC Report 104, 2006), para. 176.

¹⁷ *Ibid*; M Head, *Crimes Against the state: - from treason to terrorism*, (Ashgate, 2011), p. 164.

¹⁸ *Halsbury’s Laws of Australia*, op.cit. [para 130-12080].

¹⁹ *Criminal Code* (Tas), sections 66 and 67.

However, the legislation must be interpreted and applied against the backdrop of the common law and overarching constitutional framework. At common law, an intention to cause violence or disorder is required to make out the offence of sedition.²⁰ Moreover, the ability to rely on State offences to prosecute sedition against the Commonwealth remains doubtful and subject to possible constitutional challenge given the narrower, inconsistent Commonwealth provisions outlined above and requirements for the Commonwealth Attorney-General to consent to federal prosecutions.²¹ These considerations mean that the above State legislation would have little or no application to a conspiracy of the sort alleged in the Slipper matter; that is, assuming one could establish it was motivated by an intention to raise community disaffection or discontent against the Commonwealth Government.

Other legal avenues

Recourse to offence provisions or legal remedies other than treason and sedition would appear less problematic. Subject to the outcome of the sexual harassment proceedings, the Commonwealth and Slipper might pursue Ashby under defamation, contract and employment laws. Prosecution of all involved for federal offences other than sedition and treason has already been raised as an option. Specifically, the offence of causing or threaten to cause physical or mental harm to a Commonwealth public official.²² Financial or reputational harm is not covered by this offence. It applies where the person threatens or harms the official because of the official's status (ie, as a Member of Parliament) or because of his or her conduct in an official capacity.²³ Commonwealth criminal law also proscribes conspiring to commit or inciting others to commit such an offence.²⁴

Contempt

The above begs the question whether Parliament itself has or should have the power to prosecute a conspiracy such as the one that the Commonwealth Government implies existed.

²⁰ Halsbury's Laws of Australia, *op.cit.*, para 130-12085. Australian Law Reform Commission, *op.cit.*, Chapter 6 D Feldman, *Civil Liberties and Human rights in England and Wales*, 2nd edition, Oxford University press 2002. Cited in Griffith, *op.cit.* p .

²¹ Commonwealth laws prevail over State law in the extent of inconsistency. Section 80.6 of the Criminal Code (Cth) also states that the Code's treason and sedition provisions are 'not to apply to the exclusion of a law of a State or Territory to the extent that the law is capable of operating concurrently with them. Griffith, *op.cit.*, para 3.56. However, as the two sets of laws proscribe the same activities, impose differing arrangements and federal consent requirements for prosecution under federal law, one could reasonably argue that State offences such as Tasmania's are inconsistent and therefore inoperative as far as sedition against the Commonwealth is concerned. Section 93.1 of the Criminal Code (Cth) requires the Commonwealth Attorney-General's consent to any prosecution for federal treason or sedition offences.

²² *Criminal Code* (Cth), sections 146.1 to 147.2. Section 146.1 defines 'mental harm' as 'psychological harm to the person, but does not include a reference to ordinary emotional reactions (for example, distress, grief, fear or anger).

²³ *Ibid.* It is arguable that the relevant definition of 'Commonwealth public official' excludes the position of Speaker of the House of Representatives. Conversely it expressly includes members of the Commonwealth Parliament.

²⁴ *Criminal Code* (Cth), sections 11.4 and 11.5. The offences of conspiracy and incitement would apply equally to offences relating to the unauthorised disclosure of information by Ashby (ie, extracts of Slipper's work diary) to the extent that the disclosure constituted a criminal offence. This turns in part on whether Ashby is a 'Commonwealth officer' for the relevant federal criminal law.

The *Parliamentary Privileges Act 1987* (Cth) authorises the Commonwealth Parliament to impose a penalty of a fine or six months imprisonment where either House finds that a person has committed an offence within the meaning of section 4 of that Act. An 'offence' requires conduct which 'amounts, or is intended or is likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member'.²⁵ It is not contempt to defame or criticise a House, its committees or members. A determination and punishment of contempt by Parliament remain subject to judicial interpretation and review.²⁶ The effect is that Parliament cannot punish any act as contempt.

As Evans also notes, the above reflects the broader rationale for Parliament's contempt power itself, which is that the two Houses should be able to protect themselves from acts which directly or indirectly impede them in the performance of their functions.²⁷

The existence or prospect of civil or criminal court proceedings (such as those concerning the Slipper matter) would not of itself prevent Parliament from commencing contempt proceedings into the same matters.²⁸

The issue then becomes whether the conduct alleged in the Slipper matter, if proven, could be legally constitute an improper interference with the free exercise of Parliament or with the free performance by Slipper of his duties as a member. Earlier findings of contempt in cases of harassing phone calls to a Senator and in publication of defamatory article by political rivals asserting that an MHR was not fit to be a member provide possible precedents. However, these predate the enactment of the *Parliamentary Privileges Act 1987*, which changed the applicable law.²⁹

The real issue is the extent to which parliamentarians are capable and willing to assess and determine such matters appropriately. In exercising the contempt power, Parliament acts as victim given the conduct required (see above), investigator, prosecutor, judge, jury and executioner. This and political realities can dictate that Members act as interested parties and largely in their own cause when and if possible.³⁰ Similar concerns about 'partisan decisions for political benefit' being made by Members exercising parliamentary powers led to the abolition in 1987 of Parliament's powers to expel members.³¹ The nature of the competing

²⁵ *Parliamentary Privileges Act 1987* (Cth), section 7.

²⁶ *Parliamentary Privileges Act 1987* (Cth), sections 6 and 9.

²⁷ H Evans (ed.), *Odgers' Australian Senate Practice - Twelfth Edition*, Parliament of Australia, pp 63 and 65.

²⁸ *Ibid.* As a matter of practice, contempt proceedings would be deferred pending the outcome of criminal proceedings or court proceedings.

²⁹ H Evans, *Fitzpatrick and Browne: Imprisonment by a House of Parliament*, Papers on Parliament No.52 December 2009, available via www.aph.gov.au. See also *R. v Richards ex parte Fitzpatrick and Browne* 1955 92 CLR 157 and Senate Committee of Privileges, *Parliamentary privilege - Precedents, procedure and practice in the Australian Senate 1966 -2005. 125th Report*, (December 2005), Parliament of the Commonwealth of Australia 2005, para 1.35.

³⁰ H. H Marshall, 'Freedom in Australia by Enid Campbell; Harry Whitmore: Parliamentary Privilege in Australia by Enid Campbell – Review', *The International and Comparative Law Quarterly*, Vol. 16, No.3 July 1967, p. 852. Evans, *supra*, pp 68-69.

³¹ *Parliamentary Privileges Act 1987* (Cth), section 8. Anne Toowney, 'The Expulsion or Suspension of Federal MPs', 14 May 2012, [Constitutional Critique](http://blog.usyd.edu/cru/2012) via <http://blog.usyd.edu/cru/2012>.

claims and agendas in the Slipper matter – and the political problem that these present for the Government and/or Opposition - suggest a similar, if not greater, potential for abuse in any application of contempt powers in that matter.

Evans suggests that such concerns may be overstated, noting procedural safeguards prescribed under the *Parliamentary Privileges Act 1987*, the opportunities for judicial oversight and review, and that -

The question of what acts obstruct the Houses in the performance of their functions may well be seen as essentially a political question requiring a political judgment and political responsibility. As elected bodies, subject to electoral sanction, the Houses may be seen as well fitted to exercise a judgment on the question of improper obstruction of the political processes embodied in the legislature.³²

One can equally argue that these are the very reasons why Parliament ought not exercise such a power, particularly in the case of what are essentially ‘political’ crimes. That is, those involving conduct or allegations such as that canvassed above. Evans down plays the prospect of modern Parliaments repeating the actions of earlier Members in imprisoning or expelling colleagues and others for seditious behaviour.³³ However, there is no reason to believe that a contemporary government exercising a parliamentary majority would not be willing to orchestrate any contempt proceedings for political purposes and gain. Recent studies of Australia’s record in enforcing its sedition and treason laws - which were and are subject to far more checks and balances than parliamentary prosecution of contempt - confirm instigation of political prosecutions by leading figures in the government of the day for political gain.³⁴ The fact of the Slipper conspiracy allegations, whether true or not, is itself proof that little has changed.

³² Evans, *supra*, p.69,

³³ *Ibid.*

³⁴ Head, *op cit.* pp. 166-179. S. Sorial, *Sedition and the Advocacy of Violence: - Free Speech and Counter Terrorism*, London & New York, Routledge (2011), pp. 21-23. L.W. Maher, ‘Modernising the Crime of Sedition’ *Labour History*, No. 90 (May 2006) pp 201 -209. See also comments on Parliament’s denial of natural justice and procedural fairness in the Fitzpatrick case in A. F. Mason, ‘A New Perspective on Separation of Powers’, *Canberra Bulletin of Public Affairs*, No. 82 December 1996, pp.1-9. Australian Law Reform Commission, *supra*, para. 2.38.