

## Naming sex offenders is an abuse of parliamentary privilege

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Senator Derryn Hinch wants to create a sex offender register. Rather than introducing and shepherding a bill sensibly and patiently through the Senate, Hinch revealed in the Australian Senate the names of several convicted sex offenders whose names were otherwise suppressed by the courts. He did so under the cloak of parliamentary privilege.

One of the many parliamentary privileges is the right of a Member of Parliament to speak freely in Parliament without fear of retribution. The privilege dates back to the British Bill of Rights in 1688 and is designed to ensure that members cannot be sued or prosecuted for anything they say in parliamentary proceedings. The scope of this privilege is complex and obscure and there are not many lawyers who can advise on it, yet it is a powerful weapon and a vehicle of oppression if abused.

Senator Hinch abused it on 12 September 2016. First, in the Senate, he declared that the privilege “will be a court of last resort.” Ordinarily, that would mean a forum of last resort when all proper avenues fail. But it was a misleading assurance for he used privilege to name some offenders in his maiden speech, not his valedictory speech. He has yet to sponsor the bill, or ‘Daniel’s law’ as it has been dubbed, in the Senate and has prematurely named offenders as a first resort.

Second, Hinch did not name all sex offenders. He selectively named six through no discernible criteria (though not all were subject to court suppression and some of whose identity were previously published). Hinch’s primary intention was to give effect to people’s right to know where they live, yet did not disclose their location.

Third, in some cases Hinch circumvented court suppression orders and thereby put the doctrine of separation of powers on a collision course. The role of parliament is to make laws and the role of the judiciary is to administer them. The constitutional understanding is that neither of these branches should interfere with the work of the other. While I agree that the courts are far too willing to issue suppression orders, the corrective mechanism is more aggressive legislative amendment, and not senators appointing themselves de facto appellate judges. In New Zealand, the identification in parliament of a former National Party official as the accused in an assault case, despite a court suppression order, was claimed to be an abuse of parliamentary privilege.

Forth, if the purpose of parliamentary privilege is to enable parliamentarians to effectively carry out their legislative functions by inquiring, debating and legislating, Hinch's naming of a few sex offenders did not fulfil any of these functions. A law is required to establish a public register of convicted sex offenders, but naming a few offenders is hardly a condition precedent to a bill being introduced, debated or passed.

There is only one form of redress afforded to those aggrieved by parliamentary privilege: a right of reply. In order to exercise this right, the aggrieved person must first satisfy the president of the Senate that the person has been identified and adversely affected. If the request is not trivial or frivolous, the president must refer the request to the Privileges Committee for consideration. It would be difficult to argue that these offenders' requests would be trivial or frivolous. The Committee only has two options: to reject or allow the aggrieved person's reply to be published by the Senate or incorporated in Hansard. Either way, the damage by then has already been inflicted. A recording of the response will not have equal prominence or publicity relative to the original attack.

Parliaments in other countries have grappled with the dilemma between the right to parliamentary privilege and the holder's abuse of it. In 1994, a senior New Zealand parliamentarian promoted a legislative change to parliamentary privilege which would have required MPs to give notice to the Speaker prior to making assertions under parliamentary privilege. Only if the Speaker is satisfied that there is foundation for the statement, can the statement be made by the MP. There were strong objections to this at the time insofar this would amount to censorship and would be impracticable in instances of spontaneous statements or in complex matters.

But in the modern Australian political environment, as an alternative to removing the privilege of free speech, curbing measures such as these merit incisive re-examination.

Fragile parliaments, minority governments and a growth of third parties and independent parliamentarians as well as the unguaranteed success of bills passing all means that smaller parties or independent MPs may resort to promoting scandals or disclosing matters which have otherwise been suppressed to attract attention, garner much needed support, to further a popular cause or pander to public opinion. The pressures and incentives for this to happen are increasing.

Without a meaningful controllerate in the houses of Parliament and with Hinch's "proud" threat of doing it again and together with past abuses, parliamentary privilege is in need of review. Hinch's use of parliamentary privilege was grossly violative of or, at best, amounts to erratic incursions into the rule of law. These types of uses must be arrested or the rule of law will repeatedly become casualty. The matter can be exacerbated by the media repeating the statements under the defences of 'qualified privilege' or 'fair report'.

Overriding suppression orders is particularly concerning. Pursuing vigilante justice under parliamentary privilege should never be an element of the criminal justice system.

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