House of Representatives

COMMITTEE OF PRIVILEGES

REPORT RELATING TO THE COMMITMENT TO PRISON OF MR T. UREN, M.P.

together with

MINUTES OF PROCEEDINGS OF THE COMMITTEE

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

1971—Parliamentary Paper No. 40

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MEMBERSHIP OF COMMITTEE

Mr E. N. Drury, M.P.—Chairman
Mr N. A. Brown, M.P.[2]
Mr D. M. Cameron, M.P.
Mr F. Crean, M.P.
Mr A. D. Fraser, M.P.
Mr A. W. Jarman, M.P.[1]
Mr H. J. McIvor, M.P.
Mr J. E. McLeay, M.P.
Mr W. G. Turnbull, C.B.E., M.P.
Mr E. G. Whitlam, Q.C., M.P.

[1]Discharged from Committee, 22 April 1971.
[2]Appointed to Committee, 22 April 1971.

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15093/71—2

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No. 94 dated Tuesday, 20 April 1971

2 THE HONOURABLE MEMBER FOR REID (MR UREN)—ADVICE OF COMMITMENT TO, AND RELEASE FROM, PRISON: Mr Speaker informed the House that he had received the following letter from the Clerk of the Central Court of Petty Sessions, Sydney:

Central Court of Petty Sessions,
Sydney
16th April, 1971

The Honourable Sir William Aston, K.C.M.G., M.P.,
Speaker of the House of Representatives,
Parliament House,
Canberra, A.C.T.

Dear Mr Speaker,

I have to inform you that:—

(*a*) in criminal proceedings brought by Mr Thomas Uren (whom I believe to be a member of the House of Representatives) under Section 493 of the Crimes Act, 1900, as amended against Constable of Police No. 3136 (later identified as Ivano Girardi) for assault it was, on 5th January, 1971, adjudged by order of this Court that Mr Uren pay the defendant's costs in the sum of eighty dollars, three months being allowed for payment, and pursuant to section 82(2) of the Justices Act 1902, as amended, it was further adjudged that in default of payment within that time Mr Uren be imprisoned and so kept for forty days;

(*b*) payment was not made within that time and a warrant to commit Mr Uren to prison was, pursuant to section 87 of the Justices Act 1902, as amended, issued on 8th April 1971;

(*c*) pursuant to that warrant, Mr Uren was, on 10th April, 1971, duly taken and committed to prison;

(*d*) Mr Uren was, pursuant to section 94 of the Justices Act 1902, as amended, released from prison on 12th April, 1971 after the balance of the sum ordered to be paid by him by way of costs was duly paid.

The warrant of commitment was executed, and the imprisonment of Mr Uren occurred, during the Easter holidays. Official advice from the Chief Superintendent, Department of Corrective Services, Long Bay of the execution of the warrant and of Mr Uren's subsequent

discharge from prison was received by me this day. A copy of the statement from the Chief Superintendent containing that advice is attached hereto.

Yours faithfully,
(Sgd) K. CLARKE
Clerk of Petty Sessions

Mr Speaker stated that the statement attached to the letter was a formal return which he did not propose to read.

3 PRIVILEGE—COMMITMENT TO PRISON OF THE HONOURABLE MEMBER FOR REID (MR UREN)—REFERENCE TO COMMITTEE OF PRIVILEGES: Mr Bryant raised a matter of privilege with respect to the commitment to prison of the honourable Member for Reid (Mr Uren) on 10 April 1971 which had been reported to the House by Mr Speaker, and moved—That the matter of the commitment to prison of the honourable Member for Reid (Mr Uren) be referred to the Committee of Privileges.

Debate ensued.

Question—put and passed.

EXTRACT FROM THE VOTES AND PROCEEDINGS

No. 95 dated Wednesday, 21 April 1971

5 COMMITTEE OF PRIVILEGES: Mr Swartz (Leader of the House) moved, by leave—That the Committee of Privileges, when considering the matter referred to it on 20 April 1971, have power to send for persons, papers and records.

Question—put and passed.

EXTRACT FROM THE VOTES AND PROCEEDINGS

No. 96 dated Thursday, 22 April 1971

19 COMMITTEE OF PRIVILEGES: Mr Swartz (Leader of the House), moved, pursuant to notice—That Mr Jarman be discharged from attendance on the Committee of Privileges and that, in his place, Mr Brown be appointed a member of the committee.

Question—put and passed.

REPORT

1. The Committee of Privileges to which was referred the matter of the complaint made in the House of Representatives on 20 April 1971 of the commitment to prison on 10 April 1971 of the honourable Member for Reid (Mr T. Uren) has agreed to the following Report.

The Circumstances

2. On 19 October 1970, Mr T. Uren, M.P. laid an information against Constable of Police No. 3136 (later identified as Ivano Girardi) alleging that the defendant did unlawfully assault him. The case was heard in the Central Court of Petty Sessions, Sydney and on 5 January 1971 the information was dismissed. Mr Uren was ordered to pay the defendant's costs in the sum of eighty dollars, three months being allowed for payment and in default of payment within that time, Mr Uren was ordered to be imprisoned for forty days with hard labour.

3. Payment was not made within that time and a warrant to commit Mr Uren to prison was issued on 8 April 1971. Mr Uren was, on 10 April 1971, duly taken and committed to prison. On 12 April 1971, Mr Uren was released from prison after the balance of the sum ordered to be paid by him by way of costs was paid by another person.

The Complaint

4. The House of Representatives had met on Wednesday, 7 April 1971, and its next meeting was held on Tuesday, 20 April 1971. The commitment to prison on 10 April 1971 of Mr Uren occurred therefore during the Easter adjournment of the House of Representatives, but during the Parliamentary session which commenced on 3 March 1970.

5. On 20 April 1971 Mr G. M. Bryant, M.P. raised the commitment to prison of Mr T. Uren as a matter of privilege and the House agreed to refer it to the Committee of Privileges. Relevant extracts from the Parliamentary Debates are included as Appendix I to this Report.

Powers, Privileges and Immunities of the House of Representatives, and its Members

6. Section 49 of the *Commonwealth of Australia Constitution Act* provides that—

> 'The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.'.

7. The powers, privileges, and immunities of the House of Representatives not having been declared by the Parliament, they remain those of the House of Commons as at 1 January 1901.

8. The privilege of freedom from arrest clearly is a privilege that was possessed by members of the House of Commons at the establishment of the Commonwealth of Australia. It is indeed the oldest of the immunities of members but is confined to civil arrest—there is no immunity from arrest for crime. The immunity is enjoyed during the Session of Parliament and for forty days before it begins and for forty days after it ends. It continues during adjournments of the House, however protracted.

9. Relevant extracts from Erskine May's *Parliamentary Practice* (17th Edition) and other authoritative sources defining the area of freedom from arrest enjoyed by members of the House of Commons are set out in detail in Appendices II, III and IV accompanying this Report. However, the following extracts taken from Erskine May's *Parliamentary Practice* (17th Edition) pages 67 and 78 respectively are reproduced in order that the reason for the existence of such immunity might be better appreciated:

'PRIVILEGE OF FREEDOM FROM ARREST OR MOLESTATION

* * * * * * * * *

The principal reason for the privilege has also been well expressed in a passage by Hatsell:—

"As it is an essential part of the constitution of every court of judicature, and absolutely necessary for the due execution of its powers, that persons resorting to such courts, whether as judges or as parties, should be entitled to certain privileges to secure them from molestation during their attendance; it is more peculiarly essential to the Court of Parliament, the first and highest court in this kingdom, that the Members, who compose it, should not be prevented by trifling interruptions from their attendance on this important duty, but should for a certain time, be excused from obeying any other call, not so immediately necessary for the great services of the nation: it has been therefore, upon these principles, always claimed and allowed, that the Members of both Houses should be, during their attendance in Parliament, exempted from several duties, and not considered as liable to some legal processes, to which other citizens, not intrusted with this most valuable franchise, are by law obliged to pay obedience" (I *Hatsell*, pp. 1-2).'.

'This development is in conformity with the principle laid down by the Commons in a conference with the Lords in 1641: "Privilege of Parliament is granted in regard of the service of the Commonwealth and is not to be used to the danger of the Commonwealth".'.

The Principal Question for Determination by the Committee

10. It was put to the Committee that in considering whether the commitment to prison of Mr T. Uren, M.P. was a breach of Parliamentary Privilege, the particular question for determination by the Committee was whether the commitment was one in a case which was of a civil character, or whether it was a commitment in a case which was either of a criminal character or which was more

of a criminal than of a civil character. Clearly, if the commitment was one in a case which was of a civil character, a breach of Parliamentary Privilege had occurred. On the other hand, if the commitment arose out of a case which was either of a criminal character or which was more of a criminal than of a civil character, the member enjoyed no immunity from commitment to prison and no breach of Parliamentary Privilege had occurred. At no stage did Mr Uren seek privilege and the reference to the Committee was raised in the House by another Member.

11. Research failed to reveal any precise precedent in Britain, Australia or elsewhere.

12. In the first instance, the Committee took advice on the subject from the Clerk of the House of Representatives, Mr A. G. Turner, C.B.E., whose paper for the assistance of the Committee is reproduced in full as Appendix II to this Report.

13. Mr C. W. Harders, O.B.E., Secretary, Attorney-General's Department, Canberra, in an opinion sought by the Committee, stated, in part 'The conclusion that I would myself reach is that, having regard to the legislation and on the weight of the authorities, the better view is that the present case partakes more of a criminal than of a civil character. It is true that the imprisonment of Mr Uren did not result from the hearing of any charge that he had committed a criminal offence. Nevertheless, the following features point, in my view, to the conclusion that the case of his arrest and imprisonment partakes more of a criminal than a civil character—in other words, it is more criminal than civil in nature.' Mr Harders' opinion is reproduced in full as Appendix III to this Report.

14. In an opinion sought by the Committee, Professor Geoffrey Sawer, Professor of Law, Research School of Social Sciences, Australian National University, said in part—

> 'It cannot possibly be contended that bringing an information was a criminal act on his (*Mr Uren's*) part, even on the most extended concept of criminal conduct. Nor can it be contended that an order for payment of costs is in any sense punitive. It is an ordinary consequence, in our system, of being the unsuccessful party in litigation, . . . It is an indemnity to the successful party. . . . Hence . . . Mr Uren was imprisoned in a civil and not a criminal cause, and this was prima facie a breach of privilege since the imprisonment occurred during a parliamentary session'.

Professor Sawer's opinion is reproduced in full as Appendix IV to the Report.

15. The opinion of Professor Sawer is further stated in the following extract from the evidence taken by the Committee:

> Chairman—Was the court sitting in criminal jurisdiction during the whole of those proceedings, including the point at which the magistrate adjudged the costs against Mr Uren and the subsequent adjudgment with imprisonment in default?

Professor Sawer—Yes. This is precisely why the difficulty before this Committee arises. In a general sense, the court was exercising criminal jurisdiction at all stages of this matter. The difficulty, as I see it, is that in the course of exercising criminal jurisdiction it is quite possible for a court to make an order which, in its nature, is not criminal. That is to say, as between the court and the person against whom the order is made, the order in question creates a purely civil obligation, not a matter which in itself is criminal.

Findings

16. The findings of the Committee are as follows:

(1) That the Committee is of the opinion that the commitment to prison of the honourable Member for Reid (Mr T. Uren) constituted a breach of Parliamentary Privilege.

(2) That the Committee, having regard to the complexities and circumstances of the case, recommends to the House of Representatives that the House would best consult its own dignity by taking no action in regard to the breach of Parliamentary Privilege which has occurred.

Acknowledgments

17. The Committee records its appreciation of the assistance provided by the witnesses who appeared before it.

The services of the Clerk to the Committee (Mr L. M. Barlin) and the *Hansard* staff are also greatly appreciated.

6 May 1971.

E. NIGEL DRURY
Chairman

MINUTES OF PROCEEDINGS

PARLIAMENT HOUSE, CANBERRA

TUESDAY, 20 APRIL 1971

(27*th Parliament First Meeting*)

Present:

Mr Crean	Mr McIvor
Mr Drury	Mr McLeay
Mr A. D. Fraser	Mr Turnbull
Mr Jarman	Mr Whitlam

The entry in the Votes and Proceedings of the House of Representatives No. 1 of 25 November 1969 recording the appointment of Members of the Committee was read by the Clerk to the Committee.

The Clerk to the Committee informed the Committee that the House of Representatives had, earlier this day, agreed to the following resolution:

> That the matter of the commitment to prison of the honourable Member for Reid (Mr Uren) be referred to the Committee of Privileges.

On the motion of Mr Turnbull, Mr Drury was elected Chairman of the Committee.

The Committee deliberated.

Resolved: That the Clerk of the House of Representatives (Mr A. G. Turner, C.B.E.) be asked to appear before the Committee at its next meeting.

Resolved: That approval of the House of Representatives be sought for the Committee of Privileges, when considering the matter referred to it on 20 April 1971, to have power to send for persons, papers and records.

Resolved: That the Clerk to the Committee be authorised to seek from the Department of Justice, Sydney, certified copies of certain documents relating to the matter referred to the Committee on 20 April 1971.

Resolved: That the Clerk to the Committee should request the appearance before the Committee at its next meeting of the appropriate law officers of the Attorney-General's Department.

Resolved: That all statements to the Press in relation to the Committee's inquiry shall be made by the Chairman after being authorised by the Committee.

The Committee adjourned until Thursday, 22 April 1971 at 8.30 p.m.

THURSDAY, 22 APRIL 1971

(27*th Parliament Second Meeting*)

Present:

Mr Drury (Chairman)

Mr Brown	Mr McIvor
Mr D. M. Cameron	Mr McLeay
Mr Crean	Mr Turnbull
Mr A. D. Fraser	Mr Whitlam

The Chairman informed the Committee that the House of Representatives had, on 21 April 1971, resolved—That the Committee of Privileges, when considering the matter referred to it on 20 April 1971, have power to send for persons, papers and records.

The Chairman informed the Committee that the House of Representatives had this day agreed to the discharge of Mr Jarman from the Committee of Privileges and the appointment of Mr Brown in his place.

The Minutes of Proceedings of the meeting held on 20 April were read and confirmed.

The Chairman informed the Committee that Mr A. G. Turner, C.B.E., Clerk of the House of Representatives, Mr C. W. Harders, O.B.E., Secretary, Attorney-General's Department and Mr P. Brazil, Senior Assistant Secretary, Attorney-General's Department were available to appear before the Committee this day.

The Chairman presented certified copies of certain documents received from the Under Secretary of Justice, Department of the Attorney-General and of Justice, Sydney, concerning the matter referred to the Committee of Privileges on 20 April 1971.

The Committee deliberated.

Mr Alan George Turner, C.B.E., Clerk of the House of Representatives appeared before the Committee and presented the following paper:

> Matter referred to Committee of Privileges 20 April 1971 for inquiry and report—Notes prepared by the Clerk of the House.

The witness withdrew.

Mr Clarence Waldemar Harders, O.B.E., Secretary, Attorney-General's Department, and Mr Patrick Brazil, Senior Assistant Secretary, Advisings Branch, Attorney-General's Department, appeared before the Committee.

The witnesses withdrew.

The Committee deliberated.

Resolved: That Mr C. W. Harders, O.B.E., be asked to appear again before the Committee at its next meeting.

The Committee adjourned until Wednesday, 28 April 1971 at 8.30 p.m.

WEDNESDAY, 28 APRIL 1971

(*27th Parliament Third Meeting*)

Present:

Mr Drury (Chairman)

Mr Brown	Mr McIvor
Mr D. M. Cameron	Mr McLeay
Mr Crean	Mr Turnbull
Mr A. D. Fraser	Mr Whitlam

The Minutes of Proceedings of the meeting held on 22 April 1971 were read and confirmed.

The Clerk having informed the Committee of certain documents handed to him by Mr Uren—

Mr Crean moved—That the documents be now circulated to members of the Committee.

Debate ensued.

Question—put.

The Committee divided.

Ayes, 2	*Noes*, 5
Mr Crean	Mr Brown
Mr McIvor	Mr D. M. Cameron
	Mr A. D. Fraser
	Mr McLeay
	Mr Turnbull

And so it was negatived.

Mr Clarence Waldemar Harders, O.B.E., Secretary, Attorney-General's Department was recalled.

Mr Harders presented the following paper:

Memorandum dated 28 April 1971 prepared by Secretary, Attorney-General's Department, for information of House of Representatives Committee of Privileges together with Annexures A to D, inclusive.

Resolved: That consideration of the paper presented by Mr Harders should be deferred until all members have had the opportunity to study it.

Resolved: That the Committee meet next at 8.30 p.m. on Thursday, 29 April 1971 and that Mr Harders be requested to re-appear at that time.

The witness withdrew.

The Committee deliberated.

Resolved: That Professor Geoffrey Sawer, Professor of Law, Australian National University, be requested to appear before the Committee at 8.30 p.m. on Tuesday, 4 May 1971.

The Committee adjourned until Thursday, 29 April 1971 at 8.30 p.m.

THURSDAY, 29 APRIL 1971

(27th Parliament Fourth Meeting)

Present:

Mr Drury (Chairman)

Mr Brown	Mr McLeay
Mr D. M. Cameron	Mr Turnbull
Mr Crean	Mr Whitlam
Mr A. D. Fraser	

The Minutes of Proceedings of the meeting held on 28 April 1971 were read and confirmed.

The Chairman informed the Committee that Professor Geoffrey Sawer, Professor of Law, Australian National University had accepted the Committee's invitation and would appear before the Committee at 8.30 p.m. on 4 May 1971.

Mr Clarence Waldemar Harders, O.B.E., Secretary, Attorney-General's Department was recalled and further examined.

The witness withdrew.

The Committee deliberated.

The Committee adjourned until Tuesday, 4 May 1971 at 8.30 p.m.

TUESDAY, 4 MAY 1971

(27th Parliament Fifth Meeting)

Present:

Mr Drury (Chairman)

Mr Brown	Mr McIvor
Mr D. M. Cameron	Mr McLeay
Mr Crean	Mr Turnbull
Mr A. D. Fraser	Mr Whitlam

The Minutes of Proceedings of the meeting held on 29 April 1971 were read and confirmed.

Professor Geoffrey Sawer, Professor of Law, Research School of Social Sciences, Australian National University, was called.

Professor Sawer presented the following paper:

Privilege from Arrest—Memorandum dated 30 April 1971 submitted by Professor G. Sawer to House of Representatives Committee of Privileges.

The witness was examined.

The witness withdrew.

The Committee deliberated.

The Committee adjourned until Wednesday, 5 May 1971 at 8.30 p.m.

Wednesday, 5 May 1971

(27th Parliament Sixth Meeting)

Present:

Mr Drury (Chairman)

Mr Brown	Mr McIvor
Mr D. M. Cameron	Mr McLeay
Mr Crean	Mr Turnbull
Mr A. D. Fraser	Mr Whitlam

The Minutes of Proceedings of the meeting held on 4 May 1971 were read and confirmed.

The Chairman having informed the Committee that Messrs Turner and Harders and Professor Sawer had no objection to their respective papers being annexed to the Report of the Committee:

Mr McLeay moved—That the papers presented to the Committee by Mr A. G. Turner, C.B.E., Mr C. W. Harders, O.B.E., and Professor G. Sawer be annexed to the Report of the Committee when presented to the House of Representatives.

Debate ensued.

Question—put.

The Committee divided.

Ayes, 5	*Noes,* 3
Mr Brown	Mr A. D. Fraser
Mr Cameron	Mr McIvor
Mr Crean	Mr Whitlam
Mr McLeay	
Mr Turnbull	

And so it was resolved in the affirmative.

The Committee deliberated.

Mr A. D. Fraser moved—That it is the opinion of this Committee that the commitment to prison of the honourable Member for Reid (Mr T. Uren) constituted a breach of Parliamentary Privilege.

Debate ensued.

The Committee divided.

Ayes, 5	*Noes,* 2
Mr D. M. Cameron	Mr Brown
Mr Crean	Mr McLeay
Mr A. D. Fraser	
Mr McIvor	
Mr Whitlam	

And so it was resolved in the affirmative.

Resolved: That the Minutes of Proceedings record the wish of Mr Turnbull that his abstention from voting on this motion be recorded as the conflict of advice by the two legal witnesses was such that he was persuaded that the House should not intervene.

Mr A. D. Fraser moved—That the Committee, having regard to the complexities and circumstances of the case, recommends to the House of Representatives that the House would best consult its own dignity by taking no action in regard to the breach of Parliamentary Privilege which has occurred.

Debate ensued.

Question—put and passed.

Resolved: That the Minutes of Proceedings record the wishes of Messrs Brown, McLeay and Turnbull that their abstention from voting on this motion be recorded.

Mr Brown moved—That in its Report to the House, the Committee should invite attention to the lack of provision in the Standing Orders of the House for the names of Members who wish to abstain from voting on a motion before a Committee to be so recorded in the Minutes of Proceedings.

Debate ensued.

Motion withdrawn, by leave.

Ordered—That the Chairman prepare a Draft Report for submission to the Committee at its next meeting.

The Committee adjourned until Thursday, 6 May 1971 at 4 p.m.

THURSDAY, 6 MAY 1971

(27th Parliament Seventh Meeting)

Present:

Mr Drury (Chairman)

Mr Brown	Mr McIvor
Mr D. M. Cameron	Mr McLeay
Mr Crean	Mr Turnbull
Mr A. D. Fraser	Mr Whitlam

The Minutes of Proceedings of the meeting held on 5 May 1971 were read, amended and confirmed.

The Chairman submitted his Draft Report.

The Committee proceeded to the consideration of the Draft Report.

Paragraph 1 agreed to.

Paragraph 2 agreed to.

Paragraph 3:

Mr A. D. Fraser moved that the words 'duly paid' be omitted and the words 'paid by another person' be inserted in place thereof.

Debate ensued.

Question—That the amendment be agreed to—put.

The Committee divided.

Ayes, 6	*Noes*, 2
Mr D. M. Cameron	Mr Brown
Mr Crean	Mr McLeay
Mr A. D. Fraser	
Mr McIvor	
Mr Turnbull	
Mr Whitlam	

And so it was resolved in the affirmative.

Question—That the paragraph, as amended, be agreed to—put.

The Committee divided.

Ayes, 6	*Noes,* 2
Mr D. M. Cameron	Mr Brown
Mr Crean	Mr McLeay
Mr A. D. Fraser	
Mr McIvor	
Mr Turnbull	
Mr Whitlam	

And so it was resolved in the affirmative.

Paragraph 4 agreed to.

Paragraph 5 agreed to.

Paragraph 6 agreed to.

Paragraph 7 agreed to.

Paragraph 8:

Mr A. D. Fraser moved—That the words 'there is no immunity for crime' be omitted and the words 'there is no immunity from arrest for crime' be inserted in place thereof.

Debate ensued.

Question—That the amendment be agreed to—put.

The Committee divided.

Ayes, 6	*Noes,* 2
Mr D. M. Cameron	Mr Brown
Mr Crean	Mr McLeay
Mr A. D. Fraser	
Mr McIvor	
Mr Turnbull	
Mr Whitlam	

And so it was resolved in the affirmative.

Question—That the paragraph, as amended, be agreed to—put.

The Committee divided.

Ayes, 6	*Noes,* 2
Mr D. M. Cameron	Mr Brown
Mr Crean	Mr McLeay
Mr A. D. Fraser	
Mr McIvor	
Mr Turnbull	
Mr Whitlam	

And so it was resolved in the affirmative.

Paragraph 9 amended and agreed to.

Paragraph 10 amended and agreed to.

Paragraph 11 amended and agreed to.

Paragraph 12 agreed to.

Paragraph 13 agreed to.

Paragraph 14 agreed to.

Paragraph 15:

Question—That the paragraph be agreed to—put.

The Committee divided.

Ayes, 4	*Noes*, 4
Mr D. M. Cameron	Mr Brown
Mr Crean	Mr A. D. Fraser
Mr McIvor	Mr McLeay
Mr Whitlam	Mr Turnbull

The numbers for the 'Ayes' and 'Noes' being equal, the Chairman gave his casting vote with the 'Ayes'.

And so it was resolved in the affirmative.

Paragraph 16:

Sub-paragraph (1) amended.

Question—That paragraph 16, as amended, be agreed to—put.

The Committee divided.

Ayes, 5	*Noes*, 2
Mr D. M. Cameron	Mr Brown
Mr Crean	Mr McLeay
Mr A. D. Fraser	
Mr McIvor	
Mr Whitlam	

And so it was resolved in the affirmative.

New paragraph 17 inserted.

Appendices agreed to.

Resolved: That the Draft Report, as amended, be the Report of the Committee to the House.

Mr A. D. Fraser, supported by other Members, expressed appreciation of the manner in which the Chairman had presided over the meetings of the Committee.

The Committee adjourned *sine die*.

APPENDIX I

Extract from *Hansard* of the House of Representatives, dated Tuesday, 20 April 1971

Tuesday, 20 April 1971

Mr SPEAKER (Hon. Sir William Aston) took the chair at 2.30 p.m., and read prayers.

THE PARLIAMENT

Mr SPEAKER—I have to inform the House that I have received the following letter from the Clerk of the Central Court of Petty Sessions in Sydney:

I have to inform you that:—

(a) in criminal proceedings brought by Mr Thomas Uren (whom I believe to be a member of the House of Representatives) under Section 493 of the Crimes Act, 1900, as amended against Constable of Police No. 3136 (later identified as Ivano Girardi) for assault it was, on 5th January, 1971, adjudged by order of this Court that Mr Uren pay the defendant's costs in the sum of eighty dollars, three months being allowed for payment, and pursuant to section 82 (2) of the Justices Act 1902, as amended, it was further adjudged that in default of payment within that time Mr Uren be imprisoned and so kept for forty days;

(b) payment was not made within that time and a warrant to commit Mr Uren to prison was, pursuant to section 87 of the Justices Act 1902, as amended, issued on 8th April, 1971;

(c) pursuant to that warrant, Mr Uren was, on 10th April, 1971, duly taken and committed to prison;

(d) Mr Uren was, pursuant to section 94 of the Justices Act 1902, as amended, released from prison on 12th April, 1971 after the balance of the sum ordered to be paid by him by way of costs was duly paid.

The warrant of commitment was executed, and the imprisonment of Mr Uren occurred, during the Easter holidays. Official advice from the Chief Superintendent, Department of Corrective Services, Long Bay of the execution of the warrant and of Mr Uren's subsequent discharge from prison was received by me this day. A copy of the statement from the Chief Superintendent containing that advice is attached hereto.

The statement attached to the letter is a formal return which I do not propose to read.

Mr BRYANT (Wills) (2.34)—I wish to raise a matter of privilege relating to the commitment to prison of the honourable member for Reid (Mr Uren). The Constitution of the Commonwealth, Section 49, states:

The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.

This House not having made any special provision for a situation such as this, it is clear that the privileges of the members of the House of Commons apply to each member of this Parliament. Therefore the commitment of the honourable member for Reid to prison in these circumstances was a breach of that privilege and I believe that the Privileges Committee ought to examine it.

The situation is that the honourable member for Reid was committed to prison, under a warrant, the day before Easter. As you, Mr Speaker, have announced, on 5th January as a result of a court action in which he was unsuccessful, costs were awarded against the honourable member for Reid. This, of course, is the important issue. He was ordered to pay costs of $80. He was not fined; he was ordered to pay costs. So it was ordinarily a civil debt that the honourable member for Reid incurred. I presume that he will take some exception to what I am doing here, as in no way has he set himself out on a course of self-martyrdom. But privilege is the property of all of us. He went down and reported to the police that he was available to meet the costs, I suppose one could say, that is, he placed himself at their disposal as he was not prepared to pay the costs, the result being that he was to spend 40 days in prison. He did this to comply with the court order. He did not go there because he enjoys prisons or anything of that sort, as I understand it. If he did not do so, I would expect that he would be in contempt of court.

I believe that this Parliament must take action to protect its membership in accordance with the procedures that have been laid down over the centuries by the House of Commons. The difficulty that we face, of course, is that we have failed to act on privilege over the

years. Ever since I entered this Parliament we have had it on the agenda somewhere. We were going to do something about privilege. We were going to do something about all these things and bring them into order. Oddly enough, we have done so in regard to other legislative assemblies for which we are responsible. For instance, we have clarified this matter in the Parliamentary Powers and Privileges Ordinance of the Territory of Papua and New Guinea, as we have done in the case of the Northern Territory. That Ordinance states:

> A person shall not, upon a day in respect of which this section applies, arrest a member upon any civil process.
>
> This section applies in respect of—
>
> (a) a day fixed by resolution of the House or otherwise to be a day on which the House will sit;
>
> (b) the three days immediately preceding such a day; and
>
> (c) the three days immediately following such a day.

The House of Commons has been operating for centuries. It is much more liberal one might say, in regard to the time in which a member may not be under arrest. I suggest that honourable members take a look at 'May's Parliamentary Practice'. On this matter it states:

> The privilege of freedom from arrest or molestation of members of Parliament, which is of great antiquity, was of proved indispensability, first to the service of the Crown, and now to the functioning of each House. . . .

Then it is all set out at page 67 of the edition I have here. It is clear enough that the objective was to prevent anyone from being able to stop members attending on the Parliament because that was much more important than anything else which that member might have to do. May states quoting Hatsell Precedents and Proceedings in the House of Commons:

> . . . their attendance is more peculiarly essential to the Court of Parliament, the first and highest court in this kingdom, that the Members, who compose it, should not be prevented by trifling interruptions from their attendance on this important duty, but should, for a certain time, be excused from obeying any other call, not so immediately necessary for the great services of the nation: It has been therefore, upon these principles, always claimed and allowed, that the Members of both Houses should be, during their attendance in Parliament, exempted from several duties, and not considered as liable to some legal processes, to which other citizens, not intrusted with this most valuable franchise, are by law obliged to pay obedience.

As far as the duration of privilege is concerned, it is set out as being 40 days before and after the meeting of sessions.

Mr Whittorn—Have it incorporated.

Mr BRYANT—I would think that even the least knowing citizen in this place would consider that the privilege of the Parliament, particularly in a case such as this, was important enough to deserve his attention. May states:

> With regard to Members of the House of Commons, 'the time of privilege' has been repeatedly mentioned in statutes, but never explained. It is stated by Blackstone and others, and has been the general opinion (founded, probably, upon the ancient law and custom, by which writs of summons for a Parliament were always issued at least forty days before its appointed meeting), that the privilege of freedom from arrest remains with a member of the House of Commons 'for forty days after every prorogation, and forty days before the next appointed meeting'; and this extent of privilege has been allowed by the courts of law, on the ground of usage and universal opinion.

It is obvious, then, that the honourable member for Reid was covered by the privilege of this Parliament. We may say that the time element allowed in those statutes is out of date now, but the fact is that whoever issued and carried out these operations was in breach of the privilege of this Parliament. The magistrate should have known this when he set out the procedure. The law officers who accepted the honourable member into custody or advised that he be accepted into custody should have known. The prison officials should have known. The important thing of course is that we must not allow anything to prevent honourable members from attending this place. To do so could be a threat to the parliamentary system. It would not be unique for some obstacles to be placed in the way of honourable members in order to prevent them carrying out their duties. This could lead to the disruption of government and even the defeat of a government. Recently in Victoria 5 people were sent to prison whilst others who committed the same sin, if that is what it was, were allowed to go free—were not even charged in any way. That is a kind of government by selective malice. The danger of which I speak is apparent in a Parliament which is often just about equally divided. The arrest and incarceration of three or four members for a fortnight or so could make a fundamental difference to the government of the

country. I believe that the Committee of Privileges should examine this matter thoroughly and I therefore move:

That the matter of the commitment to prison of the honourable member for Reid be referred to the Committee of Privileges.

Mr SWARTZ (Darling Downs—Minister for National Development)—The Government has no objection to this motion and will support it.

Question resolved in the affirmative.

APPENDIX II

MEMORANDUM SUBMITTED BY THE CLERK OF THE HOUSE OF REPRESENTATIVES, MR A. G. TURNER, C.B.E.

IMPRISONMENT OF MR T. UREN, M.P.

MATTER REFERRED TO COMMITTEE OF PRIVILEGES 20 APRIL 1971, FOR INQUIRY AND REPORT

NOTES PREPARED BY THE CLERK OF THE HOUSE

IMPRISONMENT OF MR T. UREN, M.P.

Privilege Matter raised by Mr Bryant, M.P., 20 April 1971

Notes Prepared by the Clerk of the House for the Committee of Privileges

The first section of these notes deals with the proceedings in the House, and to the inquiry to be carried out by the Committee of Privileges. It also sets out relevant references from May's 'Parliamentary Practice' and to 'Parliamentary Privilege in Australia'.

The later section relates to the privilege law, the nature and extent of privilege, and the establishment functions, and powers of the Committee of Privileges.

PROCEEDINGS IN THE HOUSE OF REPRESENTATIVES

Mr Speaker informed the House that he had received the following letter from the Clerk of the Central Court of Petty Sessions, Sydney:

Central Court of Petty Sessions,
Sydney
16th April 1971

The Honourable Sir William Aston, K.C.M.G., M.P.,
Speaker of the House of Representatives,
Parliament House,
Canberra, A.C.T.

Dear Mr Speaker,

I have to inform you that:

(a) in criminal proceedings brought by Mr Thomas Uren (whom I believe to be a member of the House of Representatives) under Section 493 of the Crimes Act, 1900, as amended against Constable of Police No. 3136 (later identified as Ivano Girardi) for assault it was, on 5th January, 1971, adjudged by order of this Court that Mr Uren pay the defendant's costs in the sum of eighty dollars, three months being allowed for payment, and pursuant to section 82 (2) of the Justices Act 1902, as amended, it was further adjudged that in default of payment within that time Mr Uren be imprisoned and so kept for forty days;

(b) payment was not made within that time and a warrant to commit Mr Uren to prison was, pursuant to section 87 of the Justices Act 1902, as amended, issued on 8th April 1971;

(c) pursuant to that warant, Mr Uren was, on 10th April 1971, duly taken and committed to prison;

(d) Mr Uren was, pursuant to section 94 of the Justices Act 1902, as amended, released from prison on 12th April 1971 after the balance of the sum ordered to be paid by him by way of costs was duly paid.

The warrant of commitment was executed, and the imprisonment of Mr Uren occurred, during the Easter holidays. Official advice from the Chief Superintendent,

Department of Corrective Services, Long Bay of the execution of the warrant and of Mr Uren's subsequent discharge from prison was received by me this day. A copy of the statement from the Chief Superintendent containing that advice is attached hereto.

Yours faithfully,

(Sgd) K. CLARKE
Clerk of Petty Sessions

Mr Speaker stated that the statement attached to the letter was a formal return which he did not propose to read.

Mr Bryant raised a matter of privilege with respect to the commitment to prison of the honourable Member for Reid (Mr Uren) on 10 April which had been reported to the House by Mr Speaker, and moved—That the matter of the commitment to prison of the honourable Member for Reid (Mr Uren) be referred to the Committee of Privileges.

Debate ensued.

Question—put and passed.

PARTICULAR REFERENCES IN RELATION TO MATTER BEFORE THE COMMITTEE

May 17 *Edition:* *Page*

'It will be convenient to begin with the sphere in which enjoyment of freedom from arrest is unquestioned, namely, in civil suits, setting out the extent to which this privilege has been limited or defined by statutes and resolutions of either House; then similarly to define the sphere in which freedom from arrest does not exist, namely, in criminal process; . . .' 69

'The privilege of freedom from arrest is limited to civil causes, and has not been allowed to interfere with the administration of criminal justice or emergency legislation.' 78

'In early times the distinction between "civil" and "criminal" was not clearly expressed. It was only to cases of "treason, felony and breach (or surety) of the peace" that privilege was explicitly held not to apply. Originally the classification may have been regarded as sufficiently comprehensive. But in the case of misdemeanours, in the growing list of statutory offences, and, particularly, in the case of preventive detention under emergency legislation in times of crisis, there was a debatable region about which neither House had until recently expressed a definite view. The development of the privilege has shown a tendency to confine it more narrowly to cases of a civil character and to exclude not only every kind of criminal case, but also cases which, while not strictly criminal, partake more of a criminal than of a civil character. This development is in conformity with the principle laid down by the Commons in a conference with the Lords in 1641: "Privilege of Parliament is granted in regard of the service of the Commonwealth and is not to be used to the danger of the Commonwealth".' 78

Since 1763, 'it has been considered as established generally, that privilege is not claimable for any indictable offence'. (Webster's dictionary gives as one of the meanings of 'indict'—to charge with a crime, in due form of law, by the finding or presentment of a grand jury; to find an *indictment against; as to indict a person for arson. It is the peculiar province* of a grand jury to indict as it is of a House of Representatives to impeach.) 79

'Finally, because the parliamentary privilege is always associated with the service of the House, it is limited to a period comprised by the duration of the session, together with a convenient and reasonable time before and after the meeting of Parliament. This convenient and reasonable time has generally been taken to be forty days before and after a session of Parliament.' 69

'With regard to Members of the House of Commons, "the time of privilege" has been repeatedly mentioned in statutes, but never explained. It is stated by Blackstone and others, and has been the general opinion (founded, probably, upon the ancient law and custom, by which writs of summons for a Parliament were always issued at least forty days before its appointed meeting), that the privilege of freedom from arrest remains with a member of the House of Commons "for forty days after every prorogation, and forty days before the next appointed meeting"; and this extent of privilege has been allowed by the courts of law, on the ground of usage and universal opinion.' 74

'In all cases in which Members of either House are arrested on criminal charges, the House must be informed of the cause for which they are detained from their service in Parliament.' 80

'The committal of a Member for high treason or any criminal offence is brought before the House by a letter addressed to the Speaker by the committing judge or magistrate.' (May goes on to describe the stages of communication.) 81

'A contempt of a court of justice is an offence partaking of a criminal character; and it was for some time doubtful how far privilege would extend to the protection of a Member committed for a contempt.' 82

'It must not, however, be understood that either House has waived its right to interfere when Members are committed for contempt. Each case is open to consideration when it arises; and although protection has not been extended to flagrant contempts, privilege might still be allowed against commitment under any civil process, or if the circumstances of the case appeared otherwise to justify it. 83

'*It is only in cases of quasi-criminal contempts that* Members of either House may be committed without an invasion of privilege. Such a commitment, as part of a civil process for the recovery of a debt, will not be resorted to by a court, nor would it be allowed in Parliament. This view has been adopted both by statute and by decisions of the court.'

'Parliamentary Privilege in Australia'—Dr Enid Campbell

'Lord Brougham in *Wellesley* v. *Duke of Beaufort* in 1831 . . . 61
ruled that privilege did not protect a Member against attachment for criminal contempt of court and in so doing made it clear that the old list of treason, felonies and breaches of the peace could no longer be regarded as exhaustive of the types of criminal offence excluded from the protection of parliamentary privilege. . . . His Lordship said:

> "that against all civil process privilege protects; but that against contempt for not obeying civil process, if that contempt is in its nature or by its incidents criminal, privilege protects not: that he who has privilege of Parliament in all civil matters, matters which whatever be the form are in substance of a civil nature, may plead it with success, but that he can in no criminal matter be heard to urge such privilege; that Members of Parliament are privileged against commitment, *qua* process, to compel them to do an act—against commitment for breach of an order of a personal description, if the breach be not accompanied by criminal incidents, and provided the commitment be not in the nature of punishment, but rather in the nature of process to compel a performance; that in all such matters Members of Parliament are protected: but that they are no more protected than the rest of the king's subjects from commitment in execution of a sentence, where the sentence is that of a Court of competent jurisdiction, and has been duly and regularly prounounced".'

In 1963, in the United Kingdom, in *Stourton* v. *Stourton,* Mr Justice 62-63
Scarman said 'that the test to be applied to determine whether privilege availed or not was whether the arrest was merely to compel performance of a civil obligation or to punish for breach of the law. In the present case, the wife's summons for leave to issue a writ of attachment in essence was a proceeding to compel performance by her husband of a court order, not to punish him. Mr Justice Scarman added that, although the respondent had successfully claimed privilege in the present case, it did not follow that

> "the privilege would avail if an injunction against molestation or . . . against removal of a child out of the jurisdiction were disobeyed. Each case will depend on its facts, the distinction between process to compel performance of a civil obligation and process to punish conduct which has about it some degree of criminality, some defiance of the general law".'

'From all of these cases, it is clear that the availability of privilege is 63
not necessarily concluded by the character of the legal proceedings, i.e. whether they are criminal or civil. It has been held on several occasions that proceedings are criminal if they may (not must) result in imprisonment. It does not follow, however, that the act or omission in respect of which proceedings are taken is criminal or that a member of parliament who is the defendant in the proceedings cannot claim immunity from imprisonment. In *Seaman* v. *Burley,* for example, it was clear that although a judgment to enforce payment of a poor rate by distress warrant was a criminal cause or matter in that the proceedings might end in imprisonment, the non-payment of the rent was not itself a criminal offence. Moreover, if the proceedings had been taken against a member of parliament and had in fact resulted in an order that the defendant be imprisoned, in all probability he might successfully have claimed privilege. It is submitted that the proper test for determining whether or not a

member of parliament is entitled to claim immunity from imprisonment in any particular case is whether the liability to imprisonment is imposed for the purpose of coercing the defendant into doing or abstaining from doing some act, or whether it is for the purpose of punishment. If the purpose is punitive, then it would seem a plea of privilege should not be available, for in such a case the misconduct for which the defendant is sought to be imprisoned is essentially criminal.'

MATTERS FOR DETERMINATION BY THE COMMITTEE

The principal question is, of course, whether the commitment to prison of Mr Uren was a breach of privilege.

The references in the preceding part of these notes make it clear that a Member has the privilege of freedom from arrest in civil causes, and that the classes of cases to which privilege was held not to apply, which were in early times stated to be 'treason, felony and breach (or surety) of the peace' have been widened to include 'every kind of criminal case and in addition cases which, while not strictly criminal, are more of a criminal than of a civil character'.

The particular question for determination by the Committee is whether the commitment to prison of Mr Uren, in accordance with the provisions of the New South Wales Justices Act, was a commitment in a case which was of a civil character, or whether it was a commitment in a case which was either of a criminal character or which was more of a criminal than of a civil character.

So far as can be ascertained in the time available, there is no precedent in either Britain or Australia of this matter, that is, the commitment to prison of a Member for failure to pay costs in accordance with the order of a court.

This is a question in respect of which the Committee might feel disposed, at the commencement of its inquiry, to seek competent legal opinion, and I suggest that this could well be sought from the Commonwealth Attorney-General's Department.

Whether an opinion should be sought from New South Wales legal officers or other persons is a matter which could be left for determination by the Committee as the inquiry progresses.

It would be consistent with previous practice for the House to give the Committee power to send for persons, papers and records, and if this is done, witnesses may, at the discretion of the Committee, be called and relevant papers may be obtained.

CONSTITUTIONAL PROVISION: GENERAL CHARACTER OF PRIVILEGE

Constitution—

Section 49 of the Constitution states that—

'The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.'

The Parliament has not so declared the privileges, etc., except in relation to a few minor powers, viz., Parliamentary Papers Act (protection of Printer), Broadcasting of Parliamentary Proceedings Act (protection of Australian Broadcasting Commission) and Public Accounts Committee Act and Public Works Committee Act (provisions respecting witnesses before these committees).

To ascertain the law, it is necessary therefore for recourse to be had to the practice and precedents of the House of Commons. These are dealt with at length in May's *Parliamentary Practice.*

What constitutes 'Privilege'

'Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Thus privilege, though part of the law of the land, is to a certain extent an exemption from the ordinary law.

The particular privileges of the Commons have been defined as:—"The sum of the fundamental rights of the House and of its individual Members as against the prerogatives of the Crown, the authority of the ordinary courts of law and the special rights of the House of Lords".'

Breach of Privilege and Contempt

'When any of these rights and immunities, both of the Members', individually, and of the assembly in its collective capacity, which are known by the general name of privileges, are disregarded or attacked by any individual or authority, the offence is called a breach of privilege, and is punishable under the law of Parliament. Each House also claims the right to punish actions, which, while not breaches of any specific privilege, are offences against its authority or dignity, such as disobedience to its legitimate commands or libels upon itself, its officers or its Members. Such actions, though often called "breaches of privilege" are more properly distinguished as "contempts". The powers and procedure of each House in dealing with cases of contempt are treated in Chapters VII and VIII.' (May 17th, p. 43)

New Privileges may not be created

'Although . . . either House may expound the law of Parliament, and vindicate its own privileges, it is agreed that no new privilege can be created. In 1704, the Lords comumnicated a resolution to the Commons at a conference, "That neither House of Parliament have power, by any vote or declaration, to create to themselves new privileges, not warranted by the known laws and customs of Parliament"; which was assented to by the Commons.' (May 17th, p. 47)

'The nature and extent of any particular privilege claimed by Parliament has to be considered in relation to the circumstances of the time, the underlying test in all cases being, whether the right claimed as a privilege is one which is absolutely necessary for the due execution of the powers of Parliament. Not only has Parliament no legal right to extend its privileges beyond those which satisfy this test, but Your Committee feel that any attempt so to do would be contrary

to the interest both of Parliament and the public.' (Report of Committee of Privileges—House of Commons 118, 1946-47, para. 10)

'Your Committee are very mindful of the fact that Parliament has no right to extend its privileges beyond those to which recognition has already been accorded and they believe that it would be contrary to the interest both of Parliament and of the public so to do. On the other hand the absence of an exact precedent does not in itself show that a particular matter does not come within some recognised principle of Parliamentary privilege.' (Report of Committee of Privileges—House of Commons 138, 1946-47, para. 14)

THE COMMITTEE OF PRIVILEGES: FUNCTIONS, PROCEEDINGS, ETC.

Standing Order

House of Representatives Standing Order No. 26 is as follows:

> 'A Committee of Privileges to consist of nine Members, shall be appointed at the commencement of each Parliament to inquire into and report upon complaints of breach of privilege which may be referred to it by the House.'

Witnesses—Summoning of and administration of oath

House of Representatives Standing Orders Nos. 354 to 368 deal with the calling of witnesses, etc.

May, 17th ed., pp. 649-50 deal with the general powers of a Select Committee regarding the attendance of witnesses.

In 1941, the Chairman of the Commonwealth Parliament War Expenditure Committee asked the Solicitor-General for advice on certain questions. In dealing with the following question:

> 'Has a Select Committee or Joint Committee power to summon persons to give evidence and has to administer oaths to witnesses',

the Solicitor-General (Opinion 53 of 1941) said that if a Select Committee is empowered to send for persons, papers and records, it may, in his opinion, summon witnesses to give evidence.

By virtue of Section 49 of the Constitution, the power contained in the Parliamentary Witnesses' Oaths Act, 1871, of Great Britain for any Committee of the House of Commons to administer an oath to a witness is conferred on each House of the Commonwealth Parliament and on the Committees of each such House. This power, however, does not extend to a Joint Committee.

The Solicitor-General briefly answered the question by stating:

> 'A Select Committee or Joint Committee authorised to send for persons, papers and records has power to summon witnesses. A Select Committee also has power to administer oaths to witnesses. It is doubtful whether a Joint Committee has that power.'

Scope of Inquiry

'A select committee, like a Committee of the whole House, possessses no authority except that which it derives by delegation from the House by which it is appointed. When a select committee is appointed to consider or inquire into a matter, the scope of its deliberations or inquiries is defined by the order by which the committee is appointed (termed the order of reference), and the

deliberations or inquiries of the committee must be confined within the limits of the order of reference. . . . interpretation of the order of reference of a select committee is a matter for the committee. . . . If it is thought desirable that a committee should extend its inquiries beyond the limits laid down in the order of reference, the House may give the committee authority for that purpose by means of an instruction.' (May 17th, p. 641)

'Besides the report properly so called relating to the subject-matter referred to the committee, it is frequently necessary for a committee to make what is termed a special report in reference to some matter incidentally arising relating to the powers, functions or proceedings of the committee. . . .

A report from a committee desiring the instructions of the House as to the authority of the committee or a proper course for it to pursue; or a report that a witness has failed to obey a summons to attend or has refused to answer questions addressed to him by the committee, are examples of such special reports.' (May 17th, p. 664)

A House of Representatives case of a special report relates to the Committee of Privileges inquiring into articles in the Bankstown 'Observer' (1955). An article dated 28th April 1955 had been referred to the Committee. Subsequently, the Committee presented a special report to the House seeking authority to include in its investigations articles appearing in the Bankstown 'Observer' of the 5th, 12th and 19th May. The House agreed to a motion that the Committee's request be acceded to. (V. & P. 1954-55, pp. 225, 239)

' . . . The scope of any inquiry (*of the Committee of Privileges*) comprises all matters relevant to the complaint.' (May 17th, p. 670)

The foregoing reference in May results from a resolution of the House of Commons in 1947-48—

> 'That when a matter of complaint of breach of privilege is referred to a Committee, such Committee has and always has had power to inquire not only into the matter of the particular complaint but also into facts surrounding and reasonably connected with the matter of the particular complaint and into the principles of the law and custom of privilege that are concerned.' (House of Commons Journals 1947-48, p. 23.)

Counsel: Lack of judicial form—

'Persons accused of breaches of the privileges or of other contempts of either House are not, as a rule, allowed to be defended by counsel; but in a few cases incriminated persons have been allowed to be heard by counsel, the hearing being sometimes limited to "such points as do not controvert the privileges of the House". Where a person has been allowed to make his defence by counsel, counsel have sometimes been heard in support of the charge; and where a complaint of an alleged breach of privilege was referred to the Committee of Privileges, counsel were allowed, by leave of the House, to examine witnesses before the Committee on behalf of both the Member who had made the complaint and the parties named therein.' (The last cases recorded in May were in the 18th century.) (May 17th, pp. 139-40.)

Details of the Commons Practice in relation to counsel appearing before Select Committees are given in May 17th, pp. 654-5.

During the course of the sittings of the House of Representatives Committee of Privileges in the Bankstown 'Observer' case, Mr R. E. Fitzpatrick, who had been called by the Committee, requested that he be represented by counsel. By resolution, the Committee decided to hear counsel on the following two points:

(*a*) as to his right to appear generally for Mr Fitzpatrick, and

(*b*) as to the power of this Committee to administer an oath to the witness.

The Committee heard counsel on these points but did not agree to counsel's application to appear. (Report of Committee tabled 8 June 1955, pp. 9-10.)

'Little attempt is made in the Committee of Privileges to observe judicial forms. Persons accused of contempt of the House are not as a rule allowed to be defended by Counsel, though in a few cases the House has given leave for an exception to be made. The Committee of Privileges usually hears only the parties concerned and the Clerk of the House, and the House decides the appropriate penalty on the tenor of the debate on the Committee's report.' (Extract from Paper prepared by the Clerk of the House of Commons for the Association of Secretaries-General of Parliaments—March 1965.)

Protest or Dissent may not be added to the Report—

Standing Order 343 reads as follows:

'The chairman shall read to the committee, at a meeting convened for the purpose, the whole of his draft report, which may at once be considered, but, if desired by any Member it shall be printed and circulated amongst the committee and a subsequent day fixed for its consideration. In considering the report, the chairman shall read it paragraph by paragraph, proposing the question to the committee at the end of each paragraph—"That it do stand part of the report". A Member objecting to any portion of the report shall move his amendment at the time the paragraph he wishes to amend is under consideration, but no protest or dissent may be added to the report.'

APPENDIX III

MEMORANDUM SUBMITTED BY THE SECRETARY, ATTORNEY-GENERAL'S DEPARTMENT, MR C. W. HARDERS, O.B.E.

ATTORNEY-GENERAL'S DEPARTMENT
CANBERRA, A.C.T.
28 April 1971

The Chairman,
Committee of Privileges,
House of Representatives,
Parliament House,
Canberra, A.C.T. 2600

Dear Mr Chairman,

I refer to the letter dated 21 April 1971 and to the further letter dated 23 April 1971 from the Clerk to the Committee of Privileges concerning the Committee's consideration of the matter of the commitment to prison of the Honourable Member for Reid, Mr T. Uren. It was stated in the Clerk's letter of 21 April that the Committee desired advice on the following question:

> 'Was the imprisonment of Mr Uren the result of civil process, or was it result of a criminal case or of a case which, whilst not strictly criminal, partakes more of a criminal than of a civil character.'

2. The circumstances in which the Honourable Member for Reid was committed to prison were described in a letter addressed to the Speaker of the House of Representatives by the Clerk of the Central Court of Petty Sessions in Sydney. The letter is reproduced at page 1659 of *Hansard* for 20 April 1971. It may nevertheless be convenient to re-state the circumstances very shortly.

3. On 21 September 1970, Mr Uren laid an information against Constable of Police No. 3136 alleging that on 18 September 1970 the Constable had unlawfully assaulted the informant (Mr Uren) contrary to section 493 of the Crimes Act of New South Wales.

4. Section 493 of the Crimes Act of New South Wales is as follows:

> '493. Whosoever unlawfully assaults any person shall, on conviction before two Justices, be liable to imprisonment for a term not exceeding three months, or to pay a fine, exclusive of costs, if ordered, of one hundred dollars or, where the offender at the time of the assault was undergoing imprisonment, to imprisonment for a term not exceeding six months, or to pay a fine exclusive of costs, if ordered, of two hundred dollars.'

5. On 5 January 1971 the Court of Petty Sessions dismissed the information. Acting under section 81 of the Justices Act of New South Wales, the Court ordered that Mr Uren pay the defendant's costs in the sum of $80. Three months were allowed for payment to be made. Pursuant to section 82 (2) of the Justices Act, the Court further ordered that in default of payment Mr Uren be imprisoned for forty days with hard labour.

6. Payment of the sum of $80 was not made within the period of three months that had been allowed.

7. On 8 April 1971 a warrant to commit Mr Uren to prison was issued pursuant to section 87 of the Justices Act. Mr Uren was committed to prison on 10 April 1971. He was released from prison on 12 April 1971, pursuant to section 94 of the Justices Act, after the balance of the sum ordered to be paid by him by way of costs had been duly paid.

The Privileges of the House of Representatives—General Observations

8. The starting point in any examination of the privileges of the House of Representatives is, naturally, section 49 of the Constitution. Section 49 is as follows:

> '49. The powers, privileges, and immunities of the Senate and of the House of Representatives, and of the members and the committees of each House, shall be such as are declared by the Parliament, and until declared shall be those of the Commons House of Parliament of the United Kingdom, and of its members and committees, at the establishment of the Commonwealth.'

9. The powers, privileges and immunities of the House of Representatives not having been declared by the Parliament, they remain those of the House of Commons as at 1 January 1901 (see the discussion by the High Court of Australia in *The Queen* v. *Richards; Ex Parte Fitzpatrick and Browne* (1955) 92 C.L.R. 157).

10. Secondly, it is to be observed that it is for the House itself to determine in each case whether a breach of privilege has occurred. The position was stated as follows by the High Court in the *Fitzpatrick and Browne case* (92 C.L.R., at p. 162):

> 'It is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise.'

The Privilege of Freedom from Arrest

11. The privilege of freedom from arrest clearly is a privilege that was possessed by members of the House of Commons at the establishment of the Commonwealth of Australia. It is indeed the oldest of the immunities of Members (see paragraph 95 of the Report of the House of Commons Select Committee on Parliamentary Privilege, 30 November 1967—H. of C. Paper 34, 1966-1967).

12. The nature of the privilege is discussed in Chapter V of *Erskine May's Parliamentary Practice* (17th edition, 1964). For convenience, copies of the passages that appear to be most relevant to the Committee's present inquiry are attached as Annex 'A' to this letter. Also attached (Annex 'B') are extracts from the House of Commons Select Committee Report of 1967, referred to in paragraph 11 above, and an extract (Annex 'C') from the evidence given to that Committee by Sir Barnett Cocks, Clerk of the House of Commons. May I refer your Committee also to the Report of the House of Commons Committee of Privileges in the case of Captain Ramsay in which it was found that a breach of privilege had not been involved in the arrest of Captain Ramsay by executive order under Defence (General) Regulations (see also the memorandum of the Clerk of the House of Commons attached to the Report).

13. As appears from the question asked by the Committee, a distinction has been made between civil and criminal matters, the former, but not the latter, giving rise to a breach of privilege. At first, the alternatives of civil actions or the criminal offences of treason, felony and surety of the peace 'were tacitly supposed to exhaust all possible grounds of arrest' (*May,* page 68). But, so the passage in *May* continues, 'there was later found to be a debatable intermediate region, including cases of commitment for contempt, the growing list of modern statutory offences, and preventive detention by order of an executive authority'.

14. The test to be applied in determining whether there has, in a particular case of arrest, been a breach of privilege has been variously stated. The following are illustrations:

May, p. 68—where the distinction is described as being between 'an offence of a quasi-criminal character' and an offence that is 'purely civil'.

May, p. 78—the privilege is limited to 'civil cases' and has not been allowed to interfere with 'the administration of criminal justice'.

May, p. 78—discussing the tendency to confine the privilege more narrowly to 'cases of a civil character' and to exclude not only every kind of criminal case, but also 'cases which, while not strictly criminal, partake more of a criminal than of a civil character'.

H. of C. Select Committee, 1967—the application of the immunity 'today is limited to committal for contempt in civil process and the like'. Such justification as exists for its continuance is contained in the principle that the House should have the first claim on the service of its Members, 'even to the detriment of the civil rights of a third party'.

Professor Campbell (Parliamentary Privilege in Australia (1964), p. 63)—'the proper test . . . is whether the liability to imprisonment is imposed for the purpose of coercing the defendant into doing or abstaining from doing some act, or whether it is for the purpose of punishment. If the purpose is punitive, then it would seem a plea of privilege should not be available, for in such a case the misconduct for which the defendant is sought to be imprisoned is essentially criminal.'

15. In *Stourton* v. *Stourton* [1963] 1 All E.R. 606, the Registrar of the Court, in proceedings under the Married Women's Property Act 1882 (U.K.), ordered that a husband should despatch certain items of property to his wife by a specified date and file a certain document, but the husband failed to comply with the order. The wife then issued a summons for leave to issue a writ of attachment for the arrest of the husband. The husband was a peer of the realm and claimed Parliamentary privilege from arrest. Mr Justice Scarman said that the answer to the question whether a member of Parliament is protected from arrest for disobedience to a court order depends upon the particular circumstances of each case. It is necessary, he said, to determine 'whether the arrest is to punish for a breach of the law or merely to compel performance of a civil obligation'. He thought the arrest in the case before him was of the latter kind 'albeit it has the technical character of criminal process'.

16. In *Seaman* v. *Burley* [1896] 2 Q.B. 344, which was not a case of Parliamentary privilege but is referred to in that connection by some commentators and has been mentioned in your Committee, the English Court of Appeal held that a judgment in proceedings before justices to enforce payment of a poor-rate by warrant of distress against the defendant's property was a judgment in a 'criminal cause or matter' within the meaning of legislation concerning appeals; the particular legislation in question provided that if the warrant of distress did not yield sufficient goods, the defendant could be committed to gaol for up to six months, unless the amount was paid in full. The Court of Appeal regarded it as a criminal proceeding to enforce performance of a 'public duty' to pay the poor-rate. In relation to *Seaman* v. *Burley* Professor Campbell remarks that 'if the proceeding had been taken against a member of parliament and had in fact resulted in an order that the defendant be imprisoned, in all probability he might successfully have claimed privilege'. However, Professor Campbell gives no reasons why she considers that arrest pursuant to an unsuccessful levy of distress would not have been punitive rather than coercive.

17. Mention might also be made of *Edgcome* v. *Edgcome* [1902] 2 K.B. 403, where the English Court of Appeal held that an order committing a person to gaol pursuant to an unsuccessful levy of distress for rates was an order of a 'punitive character' notwithstanding that the person would be released upon payment. The decision concerned bankruptcy legislation empowering courts to release debtors whose imprisonment was not a form of 'punishment'.

18. Finally with regard to this part of the analysis, I refer your Committee to the view of the House of Commons Select Committee of 1967 that the diminished importance of the privilege of freedom from arrest had substantially reduced the justification for its retention in modern times. The Select Committee recommended that the privilege should be abandoned (see Annex 'B').

The New South Wales Legislation

19. I have noted that the proceedings brought by Mr Uren were proceedings alleging an offence against section 493 of the Crimes Act of New South Wales (i.e., proceedings alleging assault). The proceedings were described by the Clerk of the Court of Petty Sessions in his letter to the Speaker as criminal proceedings. I consider that this was a correct description of the proceedings.

20. I have also noted that the Court of Petty Sessions, in ordering that Mr Uren pay costs in the sum of $80, was exercising powers conferred by section 81 of the Justices Act of New South Wales. Sub-section (1) of section 81 first provides authority for costs to be ordered against a defendant against whom a conviction has been made. The same sub-section then provides authority, in the case of an order of dismissal, for costs to be ordered against the prosecutor or complainant.

21. The order for the imprisonment of Mr Uren, in default of payment of the costs that had been awarded, was made pursuant to section 82 (2) of the Justices Act. Two observations should be made at this point with regard to that provision. First, where the order for costs has been made against an individual person, distress may

not be levied. Second, as in the case of section 81 (1), the position with regard to a convicted defendant and the position with regard to an unsuccessful informant or complainant are dealt with in the one provision and in the same manner.

22. Though it is not expressly stated in the Justices Act, it seems clear that the serving of imprisonment, as adjudged, discharges the liability to pay costs that are awarded (see in this connection s. 90 (2) and also s. 94 of the Justices Act, as amended, under which the person who is imprisoned is to be discharged on payment in full).

23. Section 82 of the Justices Act applies (inter alia) in respect of orders made under section 32 of the Police Offences Act 1901-1965. Section 32 provides, in effect, that a justice may, in certain cases, order a person to deliver goods detained without just cause. The order may also provide that, in default of delivery, the person should forfeit the full value of the goods, and that in default of payment he should be imprisoned in accordance with section 82 of the Justices Act. The detainor is, however, not convicted of any offence, and if no order for imprisonment is made the order for payment is enforceable as a civil judgment. In *Ex parte Duffy; Re Automobile Advance Co.* [1958] S.R. (N.S.W.) 343, the Full Supreme Court of N.S.W. held that, having regard to the fact that imprisonment in accordance with section 82 of the Justices Act could be ordered, the proceedings under section 32 of the Police Offences Act were 'criminal in their nature'. Owen J. (with whose judgment Street C.J. and Roper C.J. in Eq. expressed agreement) said (see at p. 350):

> 'Section 32 (3A) of the Police Offences Act, 1901-1951, empowers a magistrate in certain circumstances to impose a term of imprisonment, and s. 82 (2) of the Justices Act, 1902-1957, provides that the imprisonment shall be either with hard labour or light labour, as the magistrate thinks fit. Such an imprisonment is not therefore a mere imprisonment as a judgment debtor.'

24. Section 82 (2) of the Justices Act of New South Wales received the attention of the High Court in *De Vos* v. *Daly* (1946) 73 C.L.R. 509. A Magistrate sitting as a Court of Petty Sessions of New South Wales had convicted the defendant Daly for an offence against section 49 of the Commonwealth Conciliation and Arbitration Act (involving breach of an award) and had ordered the defendant to pay a fine and certain costs. The Magistrate, however, had refused to apply section 82 (2) of the Justices Act of New South Wales on the ground that the Conciliation and Arbitration Act provided an exclusive means of recovering the fine and costs, namely, by filing a certificate in a court of civil jurisdiction and enforcing the order for fine and costs in that court. The High Court (by a 4-1 majority) held that the Magistrate should have applied section 82 (2) of the Justices Act, as applied by the Commonwealth Judiciary Act.

25. The following observations of Latham C.J. in *De Vos* v. *Daly* are noted:

> 'This provision makes it possible to obtain a certificate from the Industrial Registrar and, upon filing the certificate in a court of civil jurisdiction, to enforce the order imposing a penalty as a final judgment of that court. This provision relates, however, only to courts having civil jurisdiction and provides a means of obtaining execution in a civil jurisdiction. It does not deal with such a criminal remedy as imprisonment and cannot be regarded as in any way inconsistent with the application of s. 82 of the Justices Act.'

See also per Rich J. at p. 517 and per Starke J. at p. 518 ('that provision—i.e., section 82 (2)—is imperative but it is not the imposition of a substantive or new penalty but a mode of execution—the enforcement of payment of a penalty adjudged to be paid. The order for imprisonment is only in default of payment of the penalty and unless the amount be paid.')

The Committee's Question

26. In commenting on the Committee's question (paragraph 2 above) it must first be said that the researches made by the Attorney-General's Department have not disclosed any case of the arrest of a Member of Parliament, either in the United Kingdom or in Australia, that is exactly like the case that the Committee has been asked to consider. I am not able therefore to draw the Committee's attention to any precedent that is directly in point.

27. The conclusion that I would myself reach is that, having regard to the legislation and on the weight of the authorities, the better view is that the present case partakes more of a criminal than of a civil character. It is true that the imprisonment of Mr Uren did not result from the hearing of any charge that he had committed a criminal offence. Nevertheless, the following features point, in my view, to the conclusion that the case of his arrest and imprisonment partakes more of a criminal than a civil character—in other words, it is more criminal than civil in nature.

28. In the first place, the Court of Petty Sessions was exercising criminal jurisdiction when it dealt with the proceedings that had been brought by Mr Uren. In my view, the Court continued to exercise criminal jurisdiction when it ordered Mr Uren to pay costs and when it ordered his imprisonment in default of payment. I find it difficult to see that any distinction can be drawn between, on the one hand, an order under section 82 (2) of the Justices Act for imprisonment in default of payment of a fine and costs by a person who has been convicted of an offence and, on the other hand, an order under the very same provision for imprisonment of a person who has unsuccessfully brought proceedings alleging an offence and has been ordered to pay costs. Section 82 (2) itself makes no distinction. The order first-mentioned—namely, an order against a person who has been fined—is clearly more of a criminal than of a civil character and I think that it follows that an order of imprisonment in default of payment of costs that have been awarded against an unsuccessful prosecutor is of the same, or a similar, character. If the proper test is to determine whether the imprisonment is at all punitive or simply coercive then I consider that the imprisonment does have a punitive purpose.

29. As noted above, the question whether there has or has not been a breach of privilege in the present case is a question that can finally be determined only by the House of Representatives itself.

Yours faithfully,

(Sgd) C. W. HARDERS
Secretary

ANNEX A

Extracts from Erskine May's Parliamentary Practice, 17th edition (1964)— Chapter V : Privilege of Freedom from Arrest or Molestation

Scope of the privilege (pages 67 and 68)—

It will be convenient to indicate briefly the scope of the privilege of freedom from arrest and the extent and principal limits of its application which are dealt with in this chapter.

The privilege has been defined both positively and negatively; the positive aspect of the privilege is expressed in the claim of the Commons to freedom from arrest in all civil actions or suits during the time of Parliament and during the period when a Member was journeying to or returning from Parliament. In their petition of 1404 the Commons claimed that, according to the custom of the realm, they were privileged from arrest for debt, trespass or contract of any kind (3 Rot. Parl., 541). 'Here may be seen both the limitation of their privilege, since they did not claim that it extended to criminal charges, and its dependence on the King's assistance for realization' (Pickthorn, Henry VII, p. 110)

The privilege has been defined negatively in the claim of the Commons in 1429, which specifically excepted treason, felony and surety of the peace (4 Rot. Parl., 357). For the purposes of constitutional theory, the alternatives of civil actions or criminal offences of the kind specified were at first tacitly supposed to exhaust all possible grounds of arrest. But there was later found to be a debatable intermediate region, including cases of commitment for contempt, the growing list of modern statutory offences, and preventive detention by order of an executive authority. In order to draw the line between what was privileged and what was not privileged it became necessary for the House or select committees of the House to decide in each particular case of arrest whether it was for an offence of a quasi-criminal character, or whether the offence was purely civil. In the nineteenth century, for example, as is described below in detail, the House referred to committees on privilege almost every case in which a Member had been arrested for criminal contempt of court, in order to discover whether or not privilege might be claimed. The application of the privilege to cases of Members arrested and subsequently released by the action of either House is also described below (p. 70 et seq.).

Freedom from arrest has lost almost all its value since, as a result of the Judgments Act, 1838, s. 1, and subsequent legislation, imprisonment in civil process has been practically abolished (a).

Privilege of freedom from arrest not claimed in respect of criminal offences or statutory detention (page 78)—

The privilege of freedom from arrest is limited to civil causes, and has not been allowed to interfere with the administration of criminal justice or emergency legislation (see p. 81).

In early times the distinction between 'civil' and 'criminal' was not clearly expressed. It was only to cases of 'treason, felony and breach (or surety) of the peace' that privilege was explicitly held not to apply (see p. 68). Originally the classification may have been regarded as sufficiently comprehensive. But in the case of misdemeanours, in the growing list of statutory offences, and, particularly, in the case of preventive detention under emergency legislation in times of crisis, there was a debatable region about which neither House had until recently expressed a definite view. The development of the privilege has shown a tendency to confine it more narrowly to cases of a civil character and to exclude not only every kind of criminal case, but also cases which, while not strictly criminal, partake more of a criminal than of a civil character.

Limitation on power of courts to commit members for contempt (pages 83 and 84)—

It must not, however, be understood that either House has waived its right to interfere when Members are committed for contempt. Each case is open to consideration when it arises; and although protection has not been extended to flagrant contempts, privilege might still be allowed against commitment under any civil process, or if the circumstances of the case appeared otherwise to justify it.

It is only in cases of quasi-criminal contempts that Members of either House may be committed without an invasion of privilege. Such a commitment, as part of a civil process for the recovery of a debt, will not be resorted to by a court, nor would it be allowed in Parliament. This view has been adopted both by statute and by decisions of the court.

ANNEX B

Extract from Report of the House of Commons Select Committee on Parliamentary Privilege (H. of C. Paper 34, 1966/1967)

95. The origin of the immunity from arrest in civil suits has been described in paragraph 30. It is the oldest of the immunities of Members. It is confined to civil arrest; there is no immunity from arrest for crime. It is enjoyed during the Session of Parliament and for forty days before it begins and for forty days after it ends. It continues during adjournments of the House, however protracted.

96. This immunity lost most of its importance in 1870 when imprisonment for debt was abolished. Its application today is limited to committal for contempt in civil process and the like. Such justification as exists for its continuance is contained in the principle that the House should have the first claim on the service of its Members, even to the detriment of the civil rights of a third party.

97. Your Committee would not think it right that the claims of individuals should be open to obstruction by the indiscriminate use of this immunity. In their view, moreover, its diminished importance has substantially reduced the justification for its retention in modern times.

98. Your Committee accordingly recommend that this immunity be abandoned. Since it is at present open to Members as of right to claim this immunity, legislation will be necessary to provide for its discontinuance.

ANNEX C

Extract from Supplementary Memorandum of Sir Barnett Cocks, Clerk of the *House of Commons* (*Select Committee Report—H. of C. Paper 34, 1966/1967*)

4. WHAT FREEDOM FROM ARREST IN THE CASE OF CIVIL CONTEMPT IS ENJOYED BY MEMBERS?

The privilege of freedom from arrest in cases which are not criminal is expressed in the claim of the Commons to freedom from arrest in all civil cases or suits during the time of Parliament and during the period when a Member was journeying to or returning from Parliament. In their petition of 1404 the Commons claimed that, according to the custom of the realm, they were privileged from arrest for debt, trespass or contract of any kind (3 Rot. Parl., 541). It will be noted that even at that early date the Commons tacitly admitted the limitation of their privilege of freedom from arrest since they did not claim that it extended to criminal charges.

The ancient privilege of freedom from arrest lost much of its value so far as legal process was concerned following the Judgments Act 1838 S.I. and subsequent legislation which restricted the occasions for imprisonment in civil process.

The maintenance of the privilege, however, remains important by reason of its application to exemption from attending as a witness, and exemption from jury service; both these privileges are, like the privilege of freedom from arrest, based upon the prior claim of the House to the services of its Members.

The privilege has been applied to cases of Members who are served with subpoenas during the sittings of the House requiring them to give evidence as witnesses in civil actions of all kinds; and the prior claim of the House is acknowledged by the courts (Lewis v. Mullaly (1953) Times 3rd December). The privilege is of special value where subpoenas have been issued vexatiously.

Although Members may claim exemption from jury service under the Juries Act 1922, this statutory right does not affect the right of the House to treat as a breach of its privilege any refusal to excuse a Member who is summoned as a juror from attending or serving while the House is sitting, and it would appear that the mere summoning of a Member to serve in a jury might constitute a breach of privilege.

On the same ground of the prior rights of Parliament, a similar privilege of freedom from arrest and molestation has been attached to all witnesses summoned to attend and others in personal attendance upon the business of Parliament, in coming, staying and returning. This privilege, while of considerable value at a time when arrest for debt was common, survives only in vestigial form at the present day. The privilege has not been used for 100 years, no occasion for its exercise having arisen.

Although the privilege of freedom from arrest would still protect a Member in contempt of court arising from non-payment of a court order involving a private injury since this is of a civil character, contempt of court may also be of a criminal character if it consists of words or acts obstructing the administration of justice. In this latter class of contempt, the privilege of freedom from arrest

cannot be sustained. For example in Long Wellesley's case in 1831, a Member committed for contempt for having taken his daughter, a ward in Chancery, out of the jurisdiction of the Court, claimed privilege. The Lord Chancellor had informed the Speaker of the commitment. The Committee of Privileges reported that the claim ought not to be admitted. (C.J. (1830-31) 701.) Nor is privilege available in bankruptcy proceedings (Bankruptcy Act, 1914 s. 128).

In cases of doubt, in a field in which few cases illustrate the limits of the present law of privilege of freedom from arrest in civil process with absolute certainty, the question which the House would have to decide on each occasion would be whether a given arrest or service of any process on a Member was purely civil in character or if there was anything in the nature of criminal proceedings involved. It is only in cases of quasi-criminal commitments that Members of either House may be committed for contempt by a court, without any invasion of privilege. Any attempt to proceed against a Member for contempt, as part of a civil process for the recovery of a debt, should not be admitted by a court, nor would it be allowed by Parliament.

ANNEX D

Justices Act 1902 (N.S.W.)—Texts of sections 81, 82 (1) and (2), and 87

81. (1) The Justice or Justices making any conviction or order may in and by such conviction or order adjudge that the defendant shall pay to the clerk of the court, to be by him paid to the prosecutor or complainant, or, in the case of an order of dismissal, that the prosecutor or complainant shall pay to the clerk of the court, to be by him paid to the defendant such costs as to such Justice or Justices seem just and reasonable.

(2) The amount so allowed for costs shall in all cases be specified in the conviction or order.

(3) (a) For the purpose of the exercise of the power conferred by subsection one of this section, any order made under subsection one of section 556A of the Crimes Act, 1900, as amended by subsequent Acts, shall have the like effect as a conviction.

(b) The amount allowed for costs under subsection one of this section as extended by this subsection shall be specified in the order made under subsection one of the said section 556A and that order shall be deemed to be an order whereby a sum of money is adjudged to be paid within the meaning of this Act.

82. (1) In no case, except where the conviction or order is made against a corporate body, shall any fine, or penalty, or any sum of money, or costs, adjudged to be paid by any conviction or order made by any Justice or Justices founded on this or any other Act past or future, be or be adjudged to be levied by distress.

(2) Whenever by any conviction or order it is adjudged that any fine or penalty, or any sum of money, or costs, shall be paid, the Justice or Justices making the conviction or order shall, except where the conviction or order is made against a corporate body, therein and thereby adjudge that, in default of payment, in accordance with the terms of the conviction or order, of the amount thereby adjudged to be paid as ascertained thereby, the person against whom the conviction or order is made shall be imprisoned and so kept for a period calculated in accordance with the provisions of this subsection, unless the said amount and, if to such Justice or Justices it seems fit, the costs and charges of conveying him to prison be sooner paid:

Provided that this subsection shall not affect the provisions relating to periodical payments contained in the Maintenance Act, 1964.

Where the said amount does not exceed two dollars such period shall not exceed twenty-four hours.

Where the said amount exceeds two dollars but does not exceed four dollars such period shall be forty-eight hours.

Where the said amount exceeds four dollars such period shall be one day for each two dollars of such amount or part thereof,

but in no case shall such period exceed twelve months.

Such imprisonment shall be with either hard labour or light labour, as the Justice or Justices in and by the conviction or order adjudge.

87. Where, by any conviction or order, it is adjudged that any fine, or penalty, or any sum of money or costs shall be paid, any Justice may, if the person against whom such conviction or order is made does not pay in accordance with the terms of the conviction or order the amount thereby adjudged to be paid as ascertained thereby, by warrant commit such person to prison, there to be kept according to the terms of the conviction or order, unless he sooner pays such amount together with such further sum for the costs of enforcing such conviction or order, including the costs and charges of conveying such person to prison as to such Justice may seem just and reasonable.

APPENDIX IV

MEMORANDUM SUBMITTED BY PROFESSOR G. SAWER, AUSTRALIAN NATIONAL UNIVERSITY

Privilege from Arrest

I have been asked by a Committee of Privileges appointed by the House of Representatives of the Parliament of the Commonwealth to express a view upon problems brought before the Committee because of the imprisonment of Mr Thomas Uren, M.P., in a prison under the control of the Government of New South Wales. The incarceration occurred pursuant to an order made against him on 5 January 1971, and took place on 10 April 1971. It is beyond question that under s. 49 of the Commonwealth of Australia Constitution (i.e., s. 49 of Clause 9 of the *Commonwealth of Australia Constitution Act 1900*) the Members of the House of Representatives have the privileges enjoyed by Members of the Commons House of the Parliament of the United Kingdom as at 1900. It is also beyond doubt that these privileges include immunity from arrest in any civil cause during, and for forty days before and after, a session of Parliament. It is also beyond doubt that under ss. 49 and 50 of the Constitution the House of Representatives may deal with matters arising under this privilege in the same way as the House of Commons has been accustomed to proceed. The decision of the High Court of Australia in *R* v. *Richards ex parte Fitzpatrick and Browne* (1955) 92 CLR 157, affirmed by the Privy Council ibid at 171, settled any possible doubts as to the scope of ss. 49 and 50 in matters relevant to the present problem. I have expressed a view that notwithstanding the dicta in the case just cited, there may be limitations on the scope of s. 49 arising from the federal nature of the Commonwealth Constitution. These possible limitations, however, have no relevance to the question now under consideration on any conceivable view of ss. 49 and 50, the imprisonment of a Member of the Commonwealth Parliament is clearly a matter within the control, and in appropriate cases the summary control, of the House in which he is a Member. In my view, Mr Uren's case raises two, and only two, questions, both difficult and important. They are as follows. Firstly, did the circumstances of his imprisonment constitute detention in a civil cause? Secondly, if the answer to the first question is affirmative, did the circumstances (or would similar future circumstances) call for intervention at the initiative of the House of Representatives, or was it incumbent on Mr Uren himself to claim privilege, so that his failure to do so rendered the subsequent events of no significance from the point of view of the House?

1. (a) It is well established that the immunity from arrest arises in relation to civil causes and does not arise in relation to criminal causes. It is also recognised that while many cases clearly come within one or the other category, there is a range of cases bridging the two categories as to which the appropriate categorisation, and hence the applicable rule, can be a matter of doubt. These questions are admirably discussed in May's *Parliamentary Practice,* 17th edition, Chapter 5, and in Campbell's *Parliamentary Privilege in Australia,* Chapter 4. I have

consulted the decisions referred to by those authors, have no doubt that the account they give of the development and present state of the law relating to this matter is sound, and know of no further authorities which could help in the present case. It is a question without direct precedent and must be argued from first principles. I find Professor Campbell's discussion, especially at pp. 60-7, in many respects the most helpful on the question now under discussion, because she addresses herself more particularly to the distinction between 'civil' and 'criminal'; her quotations from *Wellesley* v. *Duke of Beaufort* (1831) 2 Russ & M. 639, and her analysis of *Seaman* v. *Burley* [1896] 2 QB 344 are masterly (if one can properly say this of a lady). The main conclusion to be drawn is that distinctions between'civil' and 'criminal' in other parts of the law are not of much help in this context. Here the test is not procedural, as it was in cases like *Seaman* v. *Burley* (*supra*) and *ex parte Duffy* [1958] SR (NSW) 343 concerned with the course of appeals from one court to another. Instead, as eloquently explained by Lord Chancellor Brougham in *Wellesley* v. *Duke of Beaufort* (*supra*) in the passage cited by Campbell (op cit, p. 61) we are here concerned with the *substantial nature* of the *specific order* made against the Member of Parliament.

(b) It is clear from the historical development of the arrest immunity that exposure to arrest in the case of criminal causes was allowed on the public policy ground that not even Members should be regarded as having a licence to commit acts 'to the danger of the Commonwealth' (May ut cit, p. 78). However, this exposure was confined strictly to the case where a Member had *personally* been *guilty* of *crime*—at first only the more serious offences, but as time went on and the categories of criminal offences came to include misdemeanours and summary offences, these too were added to the crimnial causes in respect of which arrest during sessions could be carried out. That the position as to crime was not related to any wider policy of merely giving *assistance* in criminal *procedure* is shown by the circumstance that Members are not subject to subpoena as witnesses, in criminal or civil cases, (see *Report of Commons Select Committee on Privilege* 1967, paragraph 102), and cannot give bail because the bail may not be enforceable against them on account of the civil immunity (May op cit, p. 73), and were exempt from jury service under the privilege even before this exemption was provided in Jury Acts (May op cit, p. 77). The furthest the Commons have gone in extending the liability to arrest beyond the strict sphere of criminal responsibility is the case of preventive detention under wartime security legislation (May, op. cit, p. 81), and such cases are obviously quasi-criminal in character. The same conclusion emerges from the long series of cases concerning Members committed for contempts of court; the House inquires whether the actual conduct in question could reasonably be described as 'criminal' as with the grosser contempts; if the contempt is a technical one or mere 'contempt in procedure', then the immunity from arrest applies (May, op cit, pp. 82-4).

(c) Hence I agree completely with the formulation of the test by Professor Campbell (op cit, p. 63)—'is . . . the liability to imprisonment . . . imposed for the purpose of coercing the defendant into doing or abstaining from doing some act, or for the purpose of punishment'. This test agrees with the view of Lord Brougham, cited above, and of *Scarman* J., now Chairman of the English

Law Commission, in *Stourton* v. *S,* 1963 3 All ER 606 at 610, and I know of no authority to the contrary. For the same reason I agree with Professor Campbell that if the defendant in *Seaman* v. *Burley* (*supra*) had been an MP, he would have been able to claim privilege on the ground that the cause was for *that* purpose civil, even though for the purposes of choice of appellate jurisdiction the cause was 'procedurally criminal'.

(d) Applying this test to Mr Uren's case, it is clear that the cause in respect of which he was imprisoned was civil, not criminal. Confusion of thought can occur because ss. 81, 82 and 87 of the *Justices Act* of N.S.W. deal in a single set of phrases with many kinds of possible liability, some of which would undoubtedly be criminal and so beyond the reach of the privilege. But concentrating attention on the specific provision under which Mr Uren had an order made against him, it was an order for costs, and it was made against him as an unsuccessful informant. It cannot possibly be contended that bringing an information was a criminal act on his part, even on the most extended concept of criminal conduct. Nor can it be contended that an order for payment of costs is in any sense punitive. It is an ordinary consequence, in our system, of being the unsuccessful party in litigation, though for historical reasons this consequence has not been applied in the trial of indictable offences by the higher courts. It is an indemnity to the successful party. Moreover, the provision for imprisonment in default payment is in the clearest terms a method of enforcing the order for payment of costs; getting them paid is the primary objective. As Lord Brougham put it in *Wellesley* v. *Duke of Beaufort* (*supra*) in the passage cited by Professor Campbell at p. 61, it is 'in the nature of process to compel a performance'. I would think this would be so even in relation to an order for costs under these sections against a convicted *defendant,* but in relation to a unsuccessful *informant* it is hardly arguable. Hence the answer to the first question posed is that Mr Uren was imprisoned in a civil and not a criminal cause, and this was prima facie a breach of privilege since the imprisonment occurred during a parliamentary session.

2. The answer to the second question does not emerge quite so clearly from the authorities mentioned, but I think can also be deduced from first principles. The general statements of the basis of the arrest and associated immunities always stress the predominant interest of the Houses *as institutions* in the free and uninterrupted access of their Members because of the overwhelming importance of Parliament in our governmental system. For example, in relation to the immunity from serving as witnesses, May (op. cit., p. 77) refers to 'the paramount right of Parliament to the attendance and service of its Members'. It will be noticed that in case after case through the centuries the House of Commons in fact took the initiative in asserting these privileges, often in a very high-handed fashion. So far as my researches go, there seems never to have been a case in which the Member in question resented the assertion of privilege. However, my conclusion is that because of the principle underlying the privilege, the opinion of the Member in question is not decisive; it is primarily a matter for the House itself to decide whether it wishes to assert the privilege in a particular case. I would expect it to go on the assumption that the privilege ought to be

asserted, for the reason given by May, though there could be circumstances in which it decided not to intervene; obvious possible considerations would be the duration of the detention, its relation to actual parliamentary sittings as distinct from the formal 'session', the inappropriateness of the 'forty day before and after' rule in modern conditions, and the conduct of the Member and his views on the privilege question.

3. I have not considered in this opinion the separate question of the obligations which may fall on courts and administrative officers when called upon to take action in respect of Members of Parliament in circumstances where immunity from arrest and detention may exist. There are dicta suggesting that at least a court should take judicial notice of Membership and of the applicability of the immunity in the particular case, but there seems to be no authorities on the position of prison officers and the like. These questions would become relevant only if the Committee wished to consider the possibility of some action in respect of the courts, magistrates and officials who were concerned in the series of events under consideration. In my view an opinion on those questions should be formed only after considering in detail the laws of New South Wales under which the courts, magistrates and officials concerned were bound to take action, and I do not consider myself sufficiently familiar with the complex combination of common law and statutory provisions relevant to that question. I do, however, refer the Committee to the observations of the Commons Committee of 1966-7, paragraph 99, as a possible guide to future action.

G. SAWER

30 April 1971

15093/71—(R70/8615)