JOINT SELECT COMMITTEE

ON

PARLIAMENTARY PRIVILEGE

AN EXPOSURE REPORT FOR THE CONSIDERATION OF SENATORS AND MEMBERS

JUNE 1984

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MEMBERS OF THE COMMITTEE

(33RD PARLIAMENT)

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Senator the Hon. G.J. Evans, Q.C. (Deputy Chairman)

Hon. A.E. Adermann, M.P.

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Senator D.S. Jessop, M.P.

Hon. Barry Jones, M.P.

Senator M.J. Macklin

Senator Peter E. Rae

Secretary: Mr B Wright

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Mr Barry Jones, M.P.

Senator B.F. Kilgariff

Senator M.J. Macklin

Mr J.R. Porter, M.P.

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THE COMMITTEE'S RECOMMENDATIONS

1. THE PENAL JURISDICTION

Retention of the penal jurisdiction

That the exercise of Parliament's penal jurisdiction be retained in Parliament.(R.17)

No substantive change in the law of contempt

That, subject to what is said elsewhere concerning defamatory contempts, no substantive changes be made to the law of contempt.(R. 13)

Sparing exercise of the penal jurisdiction

That the House should exercise its penal jurisdiction in any event as sparingly as possible and only when it is satisfied to do so is essential in order to provide reasonable protection for the House, its Members its Committees or its officers from improper obstruction or attempt at or threat of obstruction as is causing, or is likely to cause, substantial interference with their respective functions. Consequently, the penal jurisdiction should never be exercised in respect of complaints which appear to be of a trivial character or unworthy of the attention of the House; such complaints should be summarily dismissed without the benefit of investigation by the House or its Committees.(R. 14)

Guidelines for matters which may constitute contempt

That the following guidelines be adopted by the Houses to indicate actions which may be pursued as contempts:

Interference with the Parliament

A person shall not improperly interfere with the free exercise by a House or a Committee of its authority, or with the free performance by a Member of his duties as a Member.

Improper influence of Members

A person shall not, by fraud, intimidation, force or threat of any kind, by the offer or promise of any inducement or benefit of any kind, or by other improper means, influence a Member in his conduct as a Member, or induce him to be absent from a House or a Committee.

Molestation of Members

A person shall not inflict any punishment, penalty or injury upon or deprive of any benefit a Member on account of his conduct as a Member or engage in any course of conduct intended to influence a Member in the discharge of his duties as a Member.

Contractual arrangements, etc.

A Member shall not ask for, receive or obtain, any property or benefit for himself, or another, on any understanding that he will be influenced in the discharge of his duties as a Member, or enter into any contract, understanding or arrangement having the effect, or which may have the effect, of controlling or limiting the Member's independence and freedom of action as a Member, or pursuant to which he is in any way to act as the representative of any outside body in the discharge of his duties as a Member.(R. 27)

Disobedience of orders

A person shall not, without reasonable excuse, disobey a lawful order of either House or of a Committee.

Obstruction of orders

A person shall not interfere with, or obstruct, another person, who is carrying out a lawful order of either House or of a Committee.

Interference with witnesses

A person shall not, by fraud, intimidation, force or threat of any kind, by the offer or promise of any inducement or benefit of any kind, or by other improper means, influence another person in respect of any evidence given or to be given before either House or a Committee, or induce another person to refrain from giving such evidence.

Molestation of witnesses

A person shall not inflict any penalty or injury upon or deprive of any benefit another person on account of any evidence given or to be given before either House or a Committee.

Offences by witnesses

A witness before either House or a Committee shall not:

(a) without reasonable excuse, refuse to make an oath or affirmation or give some similar undertaking to tell the truth when required to do so;

(b) without reasonable excuse, refuse to answer any relevant question put to him when required to do so; or

(c) give any evidence which he knows to be false or misleading in a material particular, or which he does not believe on reasonable grounds to be true or substantially true in every material particular.

A person shall not, without reasonable excuse:

(a) refuse or fail to attend before either House or a Committee when summoned to do so; or

(b) refuse or fail to produce documents or records, or to allow the inspection of documents or records, in accordance with a requirement of either House or of a Committee.

A person shall not wilfully avoid service of the summons of either House or of a Committee.

A person shall not destroy, forge or falsify any document or record required to be produced by either House or by a Committee.(R. 28)

Disturbance of Parliament

A person shall not wilfully disturb a House or a Committee while it is sitting, or wilfully engage in any disorderly conduct in the precincts of a House or a Committee tending to disturb its proceedings or impair the respect due to its authority.(R. 30)

Publication of in camera evidence

A person shall not publish any evidence taken in camera by either House or by a Committee without the approval of that House or Committee.

Premature publication of reports

A person shall not publish any report or draft report of either House or a Committee, without the approval of that House or Committee.

False reports of proceedings

A person shall not wilfully publish any false or misleading report of the proceedings of either House or of a Committee.(R. 29)

Service of writs, etc.

A person shall not serve or execute any criminal or civil process in the precincts of either House on a day on which that House sits except with the consent of that House.(R. 32)

Attempts and conspiracies

Generally, attempts or conspiracies made or entered into in respect of matters set out in the foregoing recommendations may be dealt with as contempts.(R. 33)

Defamatory contempts

The species of contempt of Parliament constituted by reflections on Parliament, its Houses, Members of Parliament or groups of Members and generally known as libels on Parliament or defamatory contempt be abolished.(R. 15)

Alternatively, should the Parliament be unwilling to adopt the foregoing recommendation:

(a) At all stages in the raising, investigation and determination of a complaint of defamatory contempt, the general principles of restraint expounded in recommendation 14 be observed.

(b) At all stages of the assessment of the complaint account be taken of the existence of possible alternative remedies that may be available, in particular proceedings in the Courts for defamation, and of the mode and extent of publication of the material in question; and

(c) That the *defences of*:

(i) truth, with the added requirement that it was in the public interest that the statement should be made in a way in which it was in fact made; or

(ii) an honest and reasonable belief in the truth of the statement made, provided that:

A. the statement had been made after reasonable investigation;

B. the statement had been made in the honest and reasonable belief that it was in the public interest to make it; and

C. the statement had been published in a manner reasonably appropriate to that public interest,

should be available.(R. 16)

2. **TREATMENT OF COMPLAINTS OF BREACH OF PRIVILEGE OR CONTEMPT**

Raising of complaints

That the following rules shall apply where a Member of either of the Houses wishes to raise a matter of privilege or other contempt:

(a) The Member complaining shall, as soon as reasonably practicable after the matter in question comes to his notice, give notice thereof to the Presiding Officer of his House;

(b) The Presiding Officer shall then consider the matter to determine whether or not precedence should be accorded to a motion relating to it;

(c) During the period while the complaint is under consideration by the Presiding Officer it shall be open to the Member to withdraw the complaint;

(d) If the Presiding Officer decides that precedence should not be given to the complaint he shall, as soon as reasonably practicable, inform the Member in writing of his decision, and he may inform the House. It shall still be open to the Member to give notice in respect of the matter, which notice shall not have precedence;

(e) If the Presiding Officer decides to allow precedence to a motion relating to the complaint, he shall advise the Member, inform the House of his decision, and the Member may then give notice of his intention to move on the next sitting day for referral of the matter of the complaint to the appropriate body;

(f) On the next sitting day such notice shall be given precedence over all other notices and orders of the day, provided that, if it is expected that the next sitting day will not take place within one week, a motion may be moved later in the day on which the Presiding Officer's decision is given, when it shall have precedence;

(g) The Presiding Officer's decision should be at his discretion but shall be given as soon as reasonably practicable.(R. 20)

Procedures for conduct of Privileges Committee inquiries

(a) The hearings of the Privileges Committee shall be in public, subject to a discretion in the Committee to conduct hearings in camera when it considers that the circumstances are such as to warrant this course;

(b) The whole of the transcript of evidence shall be published, and shall be presented to its House by the Committee when it makes its Report, subject however to a discretion to exclude evidence which has been heard in camera and to prevent the publication of such evidence by any other means;

(c) Issues before the Committee should be adequately defined so that a person or organisation against whom a complaint has been made is reasonably apprised of the nature of the complaint he has to meet;

(d) A person or organisation against whom a complaint is made should have a reasonable time for the preparation of an answer to that complaint;

(e) A person against whom a complaint is made, and an organisation through its representative, should have the right to be present throughout the whole of the proceedings, save for deliberative proceedings and save where in the opinion of the Committee he or she should be excluded from the hearing of proceedings in camera;

(f) A person or organisation against whom a complaint is made should have the right to adduce evidence relevant to the issues;

(g) A person or organisation against whom a complaint is made should have the right to cross examine witnesses subject to a discretion in the Committee to exclude cross examination on matters it thinks ought fairly to be excluded such as matters of a scandalous, improper, peripheral or prejudicial nature;

(h) At the conclusion of the evidence, the person or organisation against whom a complaint is made should have the right to address the Committee in answer to the charges or in amelioration of his or its conduct;

(i) A person or organisation against whom a complaint has been made shall be entitled to full legal *representation and to examine or to cross examine* witnesses through such representation and to present submissions to the Committee through such representation;

(j) In its Report the Committee shall set forth its opinion on the matter before it, the reasons for that opinion, and may, if it thinks fit, make recommendations as to what if any action ought to be taken by its House;

(k) Subject to the foregoing, the procedures to be followed by the Committee shall in all places be for the Committee to determine;

(l) The Committee shall be authorised in appropriate cases and where in its opinion the interests of justice so require, to recommend to the Presiding Officer payment out of Parliamentary funds for the legal aid of any person or organisation represented before the Committee or reimbursement to such person or organisation for the costs of legal representation incurred by him, and

(m) The Committee shall be entitled to obtain such assistance, legal or otherwise, in the conduct of its proceedings as it may think appropriate.(R. 21)

Seven days' notice for imposition of penalty

That as a general rule, seven days' notice must be given of any motion for the imposition of a fine or the committal of any person for breach of privilege or other contempt.(R. 22)

Penalties

That the powers of the Houses to commit for a period not exceeding the current term of the then session, and to recommit when newly constituted be abolished and that in its place the Houses should have the power to commit a person found to be in breach of the privileges of Parliament, or otherwise to be in contempt of Parliament, for a period not exceeding six months.(R. 18)

That where a corporation is judged to be in breach of the privileges of Parliament, or otherwise in contempt of Parliament, it shall be liable to a fine not exceeding $10,000

That where an individual is judged to be in breach of the privileges of Parliament or otherwise in contempt of Parliament he shall be liable to a fine of $5,000 and that to impose such a fine shall be an alternative to the imposition of a period of committal. In no case should both a period of committal and a fine be imposed.(R. 19)

Expulsion of Members

That the power of the Houses to expel Members be abolished.(R. 25)

Forms of resolutions and warrants for committal

That:

(a) Where a person is committed for breach of privilege or other contempt, the resolution of the House and the warrant for committal shall each state the grounds of the commitment;

(b) Where a person is committed for failure to pay a fine imposed by a resolution of one of the Houses, the further resolution for commitment and the warrant for committal shall state the grounds of the commitment;

(c) In each of the foregoing cases it shall be open to the Full High Court to declare that the grounds stated in the warrant for committal was not capable of constituting a breach of privilege or other contempt of the House;

(d) Such a declaration shall only be made by the Full High Court;

(e) Where the Full High Court makes such a declaration, it shall not be capable of making any ancillary order or orders for the purposes of giving effect to that declaration, compliance with the views expressed by the High Court in any declaration made by it being entirely a matter for the House in question.(R. 23)

Privileges Committee inquiries and the reputations of third persons

That where it appears to the Privileges Committee that the reputation of a person may be substantially in issue, the Committee may advise that person that his reputation may be substantially an issue and may permit him such rights as the Committee considers just in all the circumstances such as the right to attend private hearings (if any), to examine the transcript of any evidence taken in private, to adduce evidence, to cross examine witnesses, to make submissions, and for any or all of these or other purposes to be legally represented.(R. 24)

Consultation between Privileges Committees

That the Standing Orders of each House be amended so as to permit the Privileges Committees of each House to confer with each other.(R. 26)

3. PROCEEDINGS IN PARLIAMENT

Expanded definition of proceedings

(1) That the Parliament adopt an expanded definition of proceedings in Parliament in the following terms - 'That without in any way limiting the generality of the 9th Article of the Bill of Rights or the interpretation that would otherwise be given to it, for the purposes of a defence of absolute privilege in actions or prosecutions for defamation the expression "proceedings in Parliament" shall include:

(a) all things said, done or written by a Member or by an officer of either House of Parliament or by any person ordered or authorised to attend before such House, in or in the presence of such House and in the course of the sitting of such House and for the purposes of the business being or about to be transacted, wherever such sitting may be held and whether or not it be held in the presence of stangers to such House: provided that for the purpose aforesaid the expression "House" shall be deemed to include any Committee, sub-committee or other group or body of Members or Members and officers of either or both of the Houses of Parliament appointed by or with the authority of such House or Houses for the purposes of carrying out any of the functions of or representing such House or Houses;

(b) all things said, done or written between Members and Ministers of the Crown for the purpose of enabling any Member or Minister of the Crown to carry out his functions as such, provided that the publication

thereof be no wider than is reasonably necessary for that purpose;

(c) questions and notices of motion appearing, or intended to appear, on the Notice Paper, and drafts of questions and motions which, in the case of draft questions, are to be put either orally or as questions on notice, and in the case of draft motions, are intended to be moved, and draft speeches intended to be made in either House, provided in each case they are published no more widely than is reasonably necessary;

(d) written replies or supplementary written replies to questions asked by a Member of a Minister of the Crown with or without notice as provided for in the procedures of the House;

(e) communications between Members and the Clerk or other officers of the House related to the proceedings of the House falling within (a), (c) and (d).

(2) For the purposes of this provision "Member" means a Member of either House of Parliament, "Clerk" means the Clerk of the Senate or the Clerk of the House of Representatives as the case requires and "officer" means any person, including the Clerk of the Senate or the Clerk of the House of Representatives, not being a Member, and who is, or is acting as, a person or a Member of a class of persons designated by the President of the Senate or the Speaker of the House of Representatives, as the case requires, for the purposes of the provision. (R. 1)

Questions as to whether any person is, or is acting as, an officer of either of the Houses or of a Committee of either or both Houses, or any sub Committee thereof, for the purposes of the protection given by Article 9 and any of the recommendations contained in Recommendation 1, or whether a document falls within paragraph (b), (c), (d) or (e) of that recommendation should be determined by Parliament.(R. 2)

Misuse of privilege of freedom of speech - reflections on non-Members

That:

(a) The standing orders of each House be amended to enable its Privileges Committee, or an authorised sub-committee, to deal with complaints made by members of the public to the effect that they have been subjected to unfair or groundless Parliamentary attack on their good names and reputations;

(b) Any complaints made should be directed to the relevant Committee;

(c) Complaints to the Committees:

(i) should be succinct;

(ii) should be confined to a factual answer to the essentials of the matter complained of;

(iii) should not contain any matter amounting either directly or indirectly to an attack or a reflection on any Member of Parliament.

(d) The Committees in dealing with complaints:

(i) should have complete discretion as to whether a complaint should, in the first instance, be entertained. For example, they may consider that the matter complained of was not of a serious nature, or that it did not receive wide-spread publicity, or that the complaint is frivolous or vexatious.

(ii) should be empowered to deal with the complaint in whatever manner they think fit, including calling for supporting evidence, and making such amendments as they think fit to any answer proposed to be submitted to Parliament. In particular, they would have complete authority to determine the form in which any answer was to appear in the Parliamentary record. In doing so, they should have regard to the

fundamental desirability of not causing, unnecessarily adding to, or aggravating any damage to the reputation of others, or the invasion of privacy of others.

(e) That it should operate for an initial period to be determined by each House;

(f) That at the end of that period the Committee's functions should be reviewed. (R. 3)

That at the commencement of each session, each House agree to resolutions in the following terms:-

(a) That, in the exercise of the great privilege of freedom of speech, Members who reflect adversely on any person shall take into consideration the following:

(i) The need to exercise the privileges of Parliament in a responsible manner;

(ii) The damage that may be done by unsubstantiated allegations, both to those who are singled out for attack, and to the standing of Parliament in the community;

(iii) The very limited opportunities for redress that are available to non-Members;

(iv) The need, while fearlessly performing their duties to have regard to the rights of others;

(v) The need to satisfy themselves, so far as is possible or practicable, that claims made which may reflect adversely on the reputations of others are soundly based.

(b) That whenever, in the opinion of the Presiding Officer it is desirable so to do, he may draw the attention of the House to the spirit and to the letter of this resolution.(R. 4)

That a person who claims that the contents of a paper authorised to be printed or published under the Parliamentary Papers Act contains an unfair or

goundless attack on his good name and reputation, should have availabe to him the processes set out in Recommendation 3 for the purposes of seeking to have incorporated in Hansard an answer to the essentials of what is said about him.(R. 5)

That the present provisions conferring absolute immunity in respect of the printing of papers, and the authorisation of the publication of documents under the Parliamentary Papers Act, be maintained.

That in any relevant legislation the opportunity should be taken to ensure that Officers of Parliament in making available copies of tabled documents to Members, or to the staff of Members, are protected by absolute immunity against any prosecution or action for defamation.(R. 6)

Reports of proceedings

That the laws of qualified privilege as they apply to reports of proceedings in Parliament be modified to produce uniformity throughout Australia in respect of the following specific matters:

(a) The publication of fair and accurate reports of parliamentary proceedings;

(b) The publication of extracts from or abstracts of papers presented to Parliament, or papers ordered to be printed or authorised to be published.(R. 7)

Reference to Parliamentary documents in Courts

That each House agree to resolutions in the following terms:

That this House, while reaffirming the status of proceedings in Parliament conferred by Article 9 of the Bill of Rights, gives leave for reference to be made in future Court proceedings, or in proceedings before any Royal Commission constituted under Federal or State or Territory laws, to the official record of debate and to published reports and evidence of Committees and to any other documents which, under the practice of the House, it is presently required that a petition for leave should be presented and that the practice of presenting petitions for leave to refer to such documents be discontinued.(R. 8)

That, if for the purpose of giving effect to any of the recommendations contained in this Report a law is enacted by Parliament, provision be made for regulations under that law to specify tribunals to which the tenor of the last recommendation should apply; failing which the Presiding Officers be empowered by resolution of their Houses to consider and to act on requests from other tribunals, provided that they report the circumstances thereof to their respective Houses at the first convenient opportunity and they consult their Houses in cases where they consider consultation is desirable before action is taken.(R. 9)

4. PARLIAMENTARY COMMITTEES

Protection of witnesses

(1) That Parliament enact a Witnesses Protection Act.

(2) That in such act it should provided that anyone who threatens or punishes or injures, or attempts to threaten or punish or injure, or who deprives of any advantage (including promotion in employment) or who discriminates against a witness by reason of his having given evidence before any committee shall be guilty of an offence and shall be liable to damages at the suit of that witness which may be awarded by the Court before which a person may be convicted of such an offence, or awarded in civil proceedings brought by the witness.

(3) Those convicted be punishable by imprisonment for a maximum period of twelve months, or a maximum fine of $5,000 for an individual, and $25,000 for a corporation.(R. 34)

Rights of witnesses

That, in principle, guidelines to the following effect (allowing for all necessary or desirable modifications that circumstances may require or suggest) be adopted:

That, in their dealings with witnesses, all investigatory committees of the Senate/House of Representatives and joint committees of the Parliament shall observe the following procedures:

(1) A witness shall be invited to attend a committee meeting to give evidence. A witness shall be summoned to appear only where the committee has resolved that the circumstances warrant the issue of a summons.

(2) A witness shall be invited to produce documents or records relevant to the committee's inquiry, and an order that documents or records be produced shall be made only where the committee has resolved that the circumstances warrant such an order.

(3) A witness shall be given reasonable notice of a meeting at which he is to appear, and shall be supplied with a copy of the committee's terms of reference and an indication of the matters expected to be dealt with during his appearance. Where appropriate a witness may be supplied with a transcript of relevant evidence already taken in public.

(4) A witness shall be given the opportunity to make a submission in writing before appearing to give oral evidence.

(5) A witness shall be given reasonable access to any documents or records which he has submitted to a committee.

(6) A witness who makes application for any or all of his evidence to be heard in camera shall be invited to give reasons for such application, and may do so in camera. If the application is not granted, the witness shall be given reasons for that decision in public session.

(7) Before giving any evidence in camera a witness shall be informed that the committee may subsequently decide to publish or present to the Senate/House/either House the evidence and that either House has authority to order the production and publication of evidence taken in camera.

(8) A committee shall take care to ensure that all questions put to witnesses are relevant to the committee's inquiry and that the information sought by those questions is necessary for the purpose of that inquiry.

(9) Where a witness objects to answering any question put to him on any ground, including the grounds that it is not relevant, or that it may tend to incriminate him, he shall be invited to state the ground upon which he objects to answering the question. The committee may then consider, in camera, whether it will insist upon an answer to the question, having regard to the relevance of the question to the committee's inquiry and the

importance to the inquiry of the information sought by the question. If the committee determines that it requires an answer to the question, the witness shall be informed of that determination, and of the reasons for it, and shall be required to answer the question in camera, unless the committee resolves that it is essential that it be answered in public: Where a witness declines to answer a question to which a committee has required an answer, the committee may report the facts to the Senate/House/either House.

(10) Where a committee has reason to believe that evidence about to be given may reflect on a person, the committee shall give consideration to hearing that evidence in camera.

(11) Where a witness gives evidence in public which contains reflections on a person or an organisation and the committee is not satisfied that it is relevant to the committee's inquiry the committee may give consideration to ordering that the evidence be expunged from the transcript of evidence, and to resolve to forbid the publication of that evidence.

(12) Where evidence is given which reflects upon a person, that committee may provide a reasonable opportunity for the person reflected upon to have access to that evidence and to respond to that evidence by written submission or appearance before the committee.

(13) A witness may make application to be accompanied by counsel and to consult counsel in the course of the meeting at which he appears. If such an application is not granted, the witness shall be notified of reasons for that decision. A witness accompanied by counsel shall be given reasonable opportunity to consult counsel during a meeting at which he appears.

(14) A departmental officer shall not be asked to give opinions on matters of policy, and shall be given reasonable opportunity to refer questions asked of him to his superior officers or to the appropriate Minister.

(15) Reasonable opportunity shall be afforded to witnesses to request corrections in the transcript of their evidence and to put before a committee additional material supplementary to their evidence.

(16) Where a committee has any reason to believe that any witness has been improperly influenced in respect of evidence before a committee, or has been subjected to or threatened with any penalty or injury in respect of any evidence given, the committee shall take steps to ascertain the facts of the matter. Where the committee is satisfied that those facts disclose that a witness may have been improperly influenced or subjected to or threatened with penalty or injury in respect of his evidence, the committee shall report those facts to the Senate/House/either House.(R. 35)

5. OTHER MATTERS

Modification of immunity from civil arrest

(1) That the immunity from arrest in civil causes be retained, but be limited to sitting days of the House of which the Member concerned is a Member, and days on which a Committee or a sub-committee thereof of which the Member concerned is a Member is due to meet, and five days before and five days after such times.

(2) That where a Member is detained in custody, and regardless of whether or not the matter is of a civil or criminal character, the Court, or the officer having charge of the Member, shall forthwith inform the Presiding Officer of the Member's House of that fact, of the circumstances giving rise to his detention, and of the likely or possible duration thereof.(R. 10)

Modification of immunity from attendance as a witness

(1) That the exemption of Members from attendance as witnesses be retained, but that the period of exemption be confined to sitting days of the House of which the Member concerned is a Member, and days on which a Committee or a sub-committee thereof of which the Member concerned is a Member is due to meet and five days before and five days after such times.

(2) That where requested to attend to give evidence, or served with a subpoena to give evidence, the Member may, after paying due regard to the need of his House for his services, elect not to insist on the application of the immunity and instead to attend in Court.

(3) That in other cases, it shall be open for application to be made to the Presiding Officer of a Member's House for the purposes of obtaining agreement to the release of that Member to attend on subpoena. Any such application shall be supported by a statement of the reasons therefor, and shall be dealt with by the Presiding Officer in accordance with his views as to the competing claims of the House for the attendance of the Member and the due administration of justice in the Courts.(R. 12)

Jury Service

That the exemption of Members and specified officers from jury service be retained in its present form.(R. 11)

Delineation of precincts

That:

(1) the areas of doubt concerning the application of particular laws within the precincts be clarified and resolved;

(2) the precincts of the present Parliament House and of the new Parliament House, be defined authoritatively.(R. 31)

CHAPTER 2 - THE COMMITTEE

Establishment of the Committee

2.1 On the 23rd of March 1982 the House of Representatives resolved:

> "That a joint select Committee be appointed to review, and report whether any changes are desirable in respect of:
>
> (a) the law and practice of parliamentary privilege as they affect the Senate and the House of Representatives, and the Members and the Committees of each House,
>
> (b) the procedures by which cases of alleged breaches of parliamentary privilege may be raised, investigated and determined, and
>
> (c) the penalties that may be imposed for breach of parliamentary privilege....[1]"

The full terms of reference are set out in Appendix 1. On 29th of April 1982, the Senate concurred in the resolution.[2]

2.2 The original Committee had not reported to Parliament before the dissolution of both Houses on 4th February 1983. Early in the new Parliament, each House agreed to the re-establishment of the Committee. The successor Committee was empowered to consider and make use of the records and evidence of the original Committee.[3] The full terms of reference of the successor Committee are set out in Appendix 2.

2.3 The resolutions of appointment of the original and of the successor Committee provided that the Committee should consist of ten members, with equal representation from each House. Details of membership of the Committee appear at the beginning of this report.

2.4 At the first meeting of the original Committee, Mr John Spender was appointed Chairman and Senator Gareth Evans was appointed Deputy Chairman. At the first meeting of the successor Committee, Mr Spender and Senator Evans (Attorney-General in the new Government) were each re-appointed to the positions they held on the original Committee.

Conduct of the Inquiry

2.5 The terms of reference of the Committee are broad and were interpreted as demanding a comprehensive review of the law and practice of parliamentary privilege and the penalties that may be imposed by Parliament for a breach of privilege or other contempt of Parliament.

2.6 Because of the fundamental importance of parliamentary privilege to both Parliament and the community the original Committee decided it should seek the views of the community on any questions within its terms of reference. Advertisements were placed in national newspapers, submissions received, and oral evidence taken from a number of witnesses.[4] At an early stage the Committee contacted Presiding Officers in each of the State Parliaments and, with their co-operation, organised a seminar which was attended by Members of the Committee, Presiding Officers from State Parliaments, and Clerks from Commonwealth and State Parliaments.

2.7 The Committee also thought it should inform itself of the laws and practices of overseas Parliaments as well as those of each of the State Parliaments. Each State Parliament, and a selected number of overseas Parliaments, were contacted and information on their laws and practices obtained. A list of overseas Parliaments from which information was obtained appears in annexure 3. Some Members of the Committee have also had the opportunity to meet with the Joint Select Committee upon Parliamentary Privilege of the Parliament of New South Wales (whose terms of reference are substantially similar to the Committees) and to discuss with that Committee issues of common interest.

2.8 The Committee wishes to express its thanks to those who made submissions to it or who gave evidence before it, to those who attended the seminar of 2nd August 1982 and to the Clerks and Presiding Officers of other Parliaments who have provided the Committee with material on the laws and practice of their legislatures.

2.9 The Committee also wishes to express the particular debt it owes to the Secretary to the Committee, Mr Bernard Wright.

ENDNOTES

1. VP 1980-83/805 - 806.

2. VP 1980-83/875; J 1980-83/884.

3. VP 1983/52-53; J. 1983/63-64.

4. For a list of persons who appeared before the Committee and made submissions see Appendices 3 and 4.

CHAPTER 3 - THE INQUIRY

Background to the Inquiry:

3.1 At the time of Federation no attempt was made to define the privileges of Parliament. Instead, the Commonwealth Parliament adopted the "powers, privileges and immunities" possessed by the House of Commons on 1st January 1901, the date our Constitution became law. This was effected by section 49 of the Constitution which 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."

(In this report the expressions "privileges" or "privileges of Parliament" or expressions to like effect, will be used as an omnibus means of embracing the "powers, privileges and immunities" conferred on the two Houses by section 49 of the Constitution.)

3.2 No declaration within section 49 has been made.[1] Hence, the privileges of the two Houses, their Committees and their Members, are in all respects identical to those of the House of Commons of over 80 years ago. To many, it seems distinctly odd that to discover the nature and extent of its privileges a sovereign legislature should have to look back to a point of time frozen in the history of a legislature of another country. Moreover, in looking back, it is necessary to recall that the privileges of the House of Commons had been judged by that House to be incapable of change in substance, save by statute, since the year 1704. There have been vast changes in the political, social and economic fabric of our society since 1901, and in the means of communication of spoken and written words. The changes that have taken place since the turn of the 18th Century are even more vast, and the obvious question arises of the relevance of privileges grounded on such ancient precedents.

3.3 It was understandable, easy and convenient to adopt in 1901 the privileges of the House of Commons and to leave to future generations the task of judging their continuing relevance, whether changes were desirable and, if they were, what they should be. The Committee now has the task of making that judgment.

Parliamentary Privilege: nature and origin:

3.4 It might be thought that as the rules of Parliamentary privilege developed over the centuries, they would become clearly established, leaving no doubt on essential questions. This is not so. In vital respects the content of some of the rules, and the circumstances in which they may apply remain unclear - as later appears.

3.5 Parliamentary privilege is the sum of the special rights attaching to Parliament and to its Members. It attaches to them for one prime and fundamental purpose: the proper and fearless discharge of Parliament's functions.[2] Conceptually speaking, it may be said that

> "...the real basis of privilege is to safeguard in the interests of the nation as a corporate entity the efficient and independent working of Parliament as an institution...".[3]

3.6 While it is obvious that parliamentary privilege can operate for the personal benefit of the Member of Parliament - as with the defence of absolute privilege in defamation cases - the privilege remains the privilege of Parliament itself.

> "The distinctive mark of a privilege is its ancillary character ... (privileges)... are enjoyed by individual Members, because the House cannot perform its functions without unimpeded use of the services of its Members ..."[4]

3.7 Parliamentary privilege is the outcome of the struggle by the House of Commons to establish its independence and to assert its authority over the regulation of its own affairs. This struggle began at the end of the 14th Century, by which time the Commons had come to be recognised as a separate House of Parliament. While, in the main, the basic issues were resolved in favour of the Commons by the time of the Bill of Rights of 1689, areas of controversy remain to this day. We do not think it necessary to examine in detail the development of the law and practice of Parliamentary privilege. But, when examining how things now stand, and evaluating the need for reform, there are aspects of Parliamentary privilege and characteristics of its development which need to be kept in mind.

3.8 In the first place, it is beyond our Parliament's power to create new privileges except by statute, pursuant to the powers conferred by section 49 of the Constitution.[5]

3.9 Secondly, Parliament's privileges are a mirror of the times when they were gained. Here lies the explanation of two of the features of those privileges: some apparently idiosyncratic characteristics, and, in the views of critics, their failure in certain areas to match the needs of the times.

3.10 An example of the former is the immunity from arrest in civil proceedings. This immunity is the oldest of the clearly defined privileges of the House of Commons and was first vindicated in 1543 when the Commons secured the release from arrest of a Member and the commitment of those who had authorised his arrest. This privilege extends, somewhat biblically, to 40 days before a session begins and 40 days after it ends and continues through all adjournments. When first established it was of very great importance - especially in cases of imprisonment for civil debt - and "in early days it was the most frequent cause of the exercise of the House's penal jurisdiction".[6] The immunity existed so the House could have the first claim on the services of its Members. Arrest in civil proceedings has mainly been abolished, and many would say that its continuing existence is an artifact of times long gone and that it now should be decently interred. But it still remains part of the law of Australia.

3.11 An example of the failure of Parliamentary privilege to match the needs of the day is to be found in the protection given to debates and proceedings in Parliament. The law (Article 9 of the Bill of Rights of 1689) provides that debates and proceedings in Parliament shall not be impeached or questioned outside of Parliament. The word "debates" causes little difficulty, but the expression "proceedings in Parliament" is another matter.[7] The difficulties of interpretation presented by this summary statement of a concept so fundamental to Parliament's authority and raison d'etre are examined elsewhere. The vagueness of this expression has also been criticised in the 1967 Commons Report and some of its shortcomings noted.[8]

3.12 Thirdly, the development of Parliamentary privilege in the House of Commons was characterised by clashes between the Commons and the courts over the nature and extent of Parliamentary privilege. This has resulted in a jurisdictional no-man's land in which both the courts and Parliament claim sovereignty. While the possibility of a clash between the courts and Parliament seems remote, it nevertheless remains theoretically possible.

3.13 Lastly - and this is of great importance - the powers, privileges and immunities of Parliament, including the power to punish for contempt of Parliament, developed in the context of the vindication of the rights of Parliament against outside authority.

Perhaps for this reason, and perhaps also because of the wholly different political, social and economic circumstances of those days, not a great deal of thought appears to have been given to the rights of others. In particular, the rights of those who criticise Parliament and Members of Parliament - a fundamental of any democratic society - and the rights of those who are called by Parliament to explain why they should not be held in contempt of it, have not always had as much regard paid to them as we think they deserve.

3.14 The balancing of the essential and legitimate rights of Parliament against other equally essential and legitimate rights is of great difficulty and importance. In certain areas these conflicting interests may not be resolvable, in which case the decision has to be made one way or the other. But to engage in this exercise is essential to the task Parliament has given us.

Summary of privileges of Parliament and its Members:

3.15 What are the privileges of Parliament and its Members? For ease of exposition they may here be grouped under two headings. Firstly, privileges of Members of Parliament; secondly, the privileges of the Houses in their corporate capacities. This classification is adopted for convenience only and, with some amendments, is based on the 1967 Commons Report. In principle, there is no true distinction between the two heads of privilege, as fundamentally all claims of privilege rest on the proposition that the privilege is necessary for the proper, efficient and fearless conduct of the business of Parliament. Nor is the categorisation under these two heads as neat or as watertight as it may at first sight appear. But it is an acceptable basis for the purpose of summarising the existing state of affairs.

Rights and immunities of Members:

3.16
(i) Freedom of speech
(ii) Freedom from arrest in civil suits
(iii) Exemption from service as jurors
(iv) Exemption from attendance as witnesses

3.17 The 1967 Commons Report also included, as one of the rights and immunities of Members, "freedom from appointment as a sheriff". This exemption from appointment was, the Committee thought, "somewhat complicated".[9] Happily, since the office is unknown in Australia, these complications may be disregarded. But the existence of such a "freedom" - which developed in an entirely different historical context - as a privilege of the House of Commons throws into relief the incongruities that can emerge from tying the Australian Parliament to the privileges of the House of Commons.[10] The 1967 Commons Report also included "freedom from molestation" amongst the rights and immunities of Members.

It is doubtful whether such a specific right or immunity exists,[11] and we think "molestation" more properly falls under Parliament's power to punish as contempt actions which impede or may impede its work. We have therefore excluded molestation from this summary.

Rights of the Houses in their corporate capacities:

3.18 (i) The right to have the attendance and service of its Members.

(ii) The right to regulate its own internal affairs and procedures free from interference by the courts.

(iii) Subject to constitutional limitations, the right to provide for its proper constitution, including the power to expel Members guilty of disgraceful and infamous conduct.

(iv) The right to institute inquiries and to require the attendance of witnesses and the production of documents.

(v) The right to administer oaths to witnesses.

(vi) The right to punish by committal persons guilty of breaches of its privileges or other contempts.

(vii) The right to direct the Attorney-General to prosecute for contempts of the House which are also criminal offences and for offences connected with Parliamentary elections.

(viii) The right to publish papers containing defamatory matter.

So far as we are aware, the right to direct the Attorney-General to prosecute for contempts which are also criminal offences has never been exercised. Electoral offences are now covered by the elaborate provisions of Part XVII of the Commonwealth Electoral Act. Prosecution for offences under Part XVII are primarily the responsibility of the Electoral Commisioner, acting on advice from the Crown law authorities. While it would seem that the Houses still retain the rights to direct the Attorney-General to prosecute in these areas, these rights now appear to be of academic interest only.

3.19 Witnesses examined before the Houses, or any Committee, are entitled to the protection of the relevant House in respect of anything that may be said by them in their evidence. This protection was expressed by Senator Greenwood, and Mr Ellicott QC, in their report "Powers over and protection afforded to witnesses before Parliamentary Committees" in these terms:

> "Clearly [a witness's] evidence could not, without the consent of the House before whose Committee it was given, be used against him in subsequent civil or criminal proceedings to prove the commission of a crime or a civil wrong. There seems no reason to doubt that on the same basis it could not be used to prove an admission by him to challenge his credit or to rebut denials in cross-examination."[12]

In our view this protection also extends to witnesses appearing before Joint Committees. Witnesses summoned to attend before either House, or any Committee, are also entitled to freedom from civil arrest for the purposes of their attendance. Officers in immediate attendance to either House are similarly privileged.

3.20 The 1967 Commons Report also included among the corporate rights of the House the right to impeach. By English law impeachment is the prosecution by the House of Commons before the House of Lords of any person for treason or other high crimes or misdemeanours, or of a peer for any crime.[13] The concept of a right to impeach is alien to Australian law and to our historical circumstances. We have neither a House of Lords to sit in judgment on citizens, nor, incidentally, any peers to prosecute. More fundamentally, the process of impeachment is inconsistent with the exercise under our Constitution by the courts, and the courts alone, of judicial powers.

Contempt of Parliament:

3.21 Because of its great practical importance, we think it desirable to say something here about the power of either House to punish for breaches of its privileges or other contempts.

3.22 The expressions "breach of privilege" and "contempt of Parliament" are frequently used interchangeably and as if they were two different ways of expressing the same concept. They are not. A breach of privilege is a breach of a specific privilege of Parliament. Broadly speaking, it may be said that these privileges are part of the law of the land, and will be enforced by the Courts either positively by taking action to protect the privileges of Parliament, or negatively, by refusing to assist a person affected by the exercise of Parliament's privileges. Thus, if during a trial it appears to the court that a debate in Parliament has been called into question contrary to the protection given by Article 9 of the Bill of Rights, it is the duty of the court to prevent that being done, just as it is the court's duty to give effect to any other of the laws of the land.

3.23 It has been aptly said "All breaches of privilege amount to contempt; contempt does not necessarily amount to a breach of privilege".[14] Whether the matter complained of is in breach of an undoubted privilege, or an offence against Parliament which does not come within that description, the powers of Parliament to investigate and punish are the same. But we think the distinction between breach of privilege and contempt of Parliament is of fundamental importance and needs be kept firmly in mind. The basal distinction is that Parliament and Parliament alone determines what constitutes contempt of Parliament. The reach of Parliament's power in contempt matters was succinctly put by the Chairman of the 1967 Commons Committee to the Clerk of the House of Commons:

> "I ought to ask you this. There is this practical difference, that if a matter is judged to be a breach of privilege it must fall within one of the already existing cases of breach of privilege. In the case of contempt, however, the House has got a complete discretion to decide without legislation what is or is not contempt of the House? Answer: Yes." (emphasis added)[15]

3.24 The nature of the offence of contempt of Parliament, and Parliament's powers to punish for contempt, may be stated in these terms:

> "The power of both Houses of Parliament to punish for contempt is a general power similar to that possessed by the superior courts of law and is not restricted to the punishment of breaches of their acknowledged privileges. Any act or omission which obstructs or impedes either House in the performance of its functions, or which obstructs or impedes any Member or officer of the House in the discharge of his duties, or which has a tendency to produce such a result, may be treated as a contempt even if there is no precedent for the offence. Certain offences which were formerly described as contempts are now commonly designated as breaches of privilege, although that term more properly applies to infringements of the rights or immunities of one of the Houses of Parliament."[16]

ENDNOTES

1. However, legislation relevant to the privileges of Parliament in certain specific respect has been enacted. This legislation includes the Parliamentary Papers Act, the Parliamentary Proceedings Broadcasting Act, the Public Accounts Committee Act, the Public Works Committee Act, and the Jury Exemption Act. A list of relevant enactments and a brief description of their purpose or effect appears in annexure 6.

2. Senator Sir Magnus Cormack, 'Press, Parliament and Privilege', Eighth Summer School of Professional Journalism, ANU Centre for Continuing Education 1972, p.7

3. Question 44 by Mr Hogg (now Lord Hailsham); House of Commons Select Committee on Parliamentary Privilege, Report, HC 34(1967)37. (Hereafter 1967 Commons Report)

4. May, E., Parliamentary Practice, 20th edition, Butterworths, London, 1983, pp 70-71, (hereafter May)

5. Opinion of Attorney-General's Department, dated 29 July 1983. See also; Opinion of Hon. T.E.F. Hughes, Appendix III, 'Use of or reference to the records of proceedings of the House in the Courts', Report of Committee of Privileges, (House of Representatives) PP 154 (1980) 101

6. 1967 Commons Report, para 30

7. See para 5.4 and following paragraphs of this Report

8. 1967 Commons Report, para 74 and following paragraphs; and Memorandum of Mr L.A. Abraham, HC 34(1967)92

9. 1967 Commons Report, para 105

10. See also; Quick, J., & Garran, R.R., The Annotated Constituted of the Australian Commonwealth, Angus & Robertson, Sydney, 1901, pp 501-502, (hereafter Quick & Garran) which, somewhat more elaborately, lists the following as the principal powers, privileges and immunities of each House and its Members, drawn from the law and custion of the House of Commons at 1901:

    . the power to order the attendance at the Bar of the House of persons whose conduct has been brought before the House on a matter of privilege;

- the power to order the arrest and imprisonment of persons guilty of contempt or breach of privilege;
- the power to order the arrest for breach of privilege by warrant of the Speaker;
- the power to issue such a warrant for arrest, and imprisonment for contempt or breach of privilege, without showing any particular grounds or causes thereof;
- the power to regulate its proceedings by standing rules and orders having the force of law;
- the power to suspend disorderly Members;
- the power to expel Members guilty of disgraceful and infamous conduct;
- the right of free speech in Parliament, without liability to action or impeachment for anything spoken therein; established by Article 9 of the Bill of Rights 1688;
- immunity of Members from legal proceedings for anything said by them in the course of parliamentary debates;
- immunity of Members from arrest and imprisonment for civil causes whilst attending Parliament, and for 40 days after every prorogation, and for 40 days before the next appointed meeting;
- immunity to Members from the obligation to serve on juries;
- immunity of witnesses, summoned to attend either House of Parliament, from arrest for civil causes;
- immunity of parliamentary witnesses from being questioned or impeached for evidence given before either Houses or their Committees, and
- immunity of officers or either House, in immediate attendance and service of the House, from arrest for civil causes.

11. 1967 Commons Report, paras 109-111

12. Greenwood, I.J., & Ellicott, R., "Parliamentary Committees: Powers over and protection afforded to witnesses", PP 168 (1972)29

13. Jowitt, W.A., The Dictionary of English Law, 2nd ed., Sweet & Maxwell, London, 1959, p939.

14. Memorandum by the General Council of the Bar, HC 34(1967)171

15. 1967 Commons Report; Minutes of Evidence para 127

16. Halsbury's Laws of England, 4th ed., Vol 34, Butterworth's, London, 1973, para 1500

CHAPTER 4

THE AUSTRALIAN EXPERIENCE

Attempts at reform

4.1 Early in our history, misgivings were felt about some of the ancient privileges of Parliament, the means by which they were enforced, and their application to Australian conditions.

4.2 In 1908 each House appointed a Select Committee:

> "... to enquire and report as to the best procedures for the trial and punishment of persons charged with the interference with or breach of the powers, privileges, or immunities of either House of the Parliament, or of the Members or Committees of each House".[1]

The Joint Committee was trenchantly critical of procedures of punishment inherited from the Commons:

> "The ancient procedure for punishment of contempts of Parliament is generally admitted to be cumbersome, ineffective, and not consonant with modern ideas and requirements in the administration of justice. It is hardly consistent with the dignity and functions of a legislative body which has been assailed by newspapers or individuals to engage within the Chamber in conflict with the alleged offenders, and to perform the duties of prosecutor, judge, and gaoler."[2]

It recommended that:

> "All persons printing, publishing or uttering any false, malicious or defamatory statements calculated to bring the Senate or House of Representatives or Members or the Committees thereof into hatred, contempt, or ridicule, or attempting to improperly interfere with or unduly influence, or obstructing, or insulting or assaulting, or bribing or attempting to bribe Members of Parliament in the discharge of their duties, shall be deemed guilty of breach of privilege and contempt of Parliament, and shall be liable to be prosecuted for such contempts upon complaint instituted by the Commonwealth

> Attorney-General before a Justice of the High Court pursuant to a resolution authorising such prosecution to be passed by the House affected."[3]

The Committee also recommended that on proof of a complaint, the Justice hearing the complaint should be empowered to impose a fine not exceeding five hundred pounds, or imprisonment for a term not exceeding 12 months, and to order the offender to pay the costs of the prosecution.

4.3 The Committee made two other significant recommendations. Firstly, that proof of truth should be a defence to a complaint of libel or slander against Parliament. Secondly, "... that a law be passed defining the mode of proving by legal evidence what are the powers, privileges and immunities of the House of Commons."[4]

4.4 These recommendations were far reaching - perhaps too far reaching. Nothing was done to implement them until they were disinterred from the archives in 1938. In that year a Bill was drafted to give effect to the recommendations of the Joint Committee of 1908. It was never introduced.

4.5 The next essay in reform followed the case of Browne and Fitzpatrick, a case of great importance to the law and practice of Parliamentary privilege.

4.6 Browne and Fitzpatrick were found by the Privileges Committee of the House of Representatives, in a Report of the 8th June 1955, to be guilty of a serious breach of privilege by publishing articles intended to influence and intimidate a Member in his conduct in the House and in deliberately attempting to impute corrupt conduct as a Member against a Member for the express purpose of silencing him. A scant two days later motions were put and carried to the effect that each, being guilty of a serious breach of privilege, should be imprisoned for a period of three months, or until earlier prorogation or dissolution of the House, unless the House should in the meantime order his discharge.[5] In accordance with Commons precedent, the warrants issued by the Speaker for the commitment of Fitzpatrick and Browne were expressed in general terms. Each warrant stated that the person concerned had been guilty of a serious breach of privilege, quoted the decision of the House, and set out the terms of committal.

4.7 Both men applied to the High Court for writs of habeas corpus. Their applications were dismissed. In its judgement,[6] the Court said:

> "...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 Court also said:

> "If the warrant specifies the ground of the commitment the court may, it would seem, determine whether it is sufficient in law as a ground to amount to a breach of privilege, but if the warrant is upon its face consistent with a breach of an acknowledged privilege it is conclusive and it is no objection that the breach of privilege is stated in general terms".

Since the House had adopted the Commons' practice of stating the ground of commitment in general terms, effectively the Court was precluded from reviewing Parliament's decision.

4.8 Two things may be said on the High Court's decision, and of the action taken by the House of Representatives - the only occasion when either House has imposed a sentence of imprisonment on a person found guilty of a breach of privilege or other contempt. Firstly, while dealt with by the House of Representatives, and by the Court, as a case of breach of privilege, the offences of Browne and Fitzpatrick could have been - and perhaps should have been - dealt with simply as contempts of Parliament not involving any breach of an undoubted privilege. Secondly, what the High Court said in its judgement as to the unreviewability of decisions made by the House, or the Senate, in privilege cases where the warrant specifies the breach in general terms applies equally to cases treated simply as cases of contempt.[7]

4.9 The Browne and Fitzpatrick episode provoked widespread controversy. In the same month that Browne and Fitzpatrick were committed, Prime Minister Menzies undertook to conduct a review of Parliamentary privilege. The fate of that review is unknown.

4.10 The most recent attempt to reform the law of Parliamentary privilege came from Senator Button, then Leader of the Opposition in the Senate. In November 1981 he introduced a Bill in the Senate which, to use his words, sought "to reform the law of Parliamentary privilege as it relates to the power of the two Houses of Federal Parliament to punish for contempt of Parliament". This Bill lapsed on the dissolution of the 32nd Parliament.

Breaches of privileges and other contempts: History of the two Houses

4.11 A few words should be said on the history of privilege cases within the Houses.

4.12 Up to the time of the establishment by the last Parliament of this Committee at least 83 matters had been raised in the House as matters of privilege. We do not imply that these matters were all properly described as issues of privilege or contempt. The majority of complaints related to matters properly classified as contempt, rather than as breaches of specific privileges. Of the matters raised, 12 could be characterised as complaints relating to intimidation or alleged attempts improperly to influence Members, 17 involved reflections or misrepresentations concerning the House, Parliament or Members thereof generally (including reflections or misrepresentations made, or allegedly made, by Members); 15 concerned reflections or misrepresentations about identified Members and five related to Committee matters. The balance ranged over issues such as censorship of correspondence, the administration of Parliament, service of process in the precincts, and alleged unlawful imprisonment.

4.13 The House of Representatives' Committee of Privileges was not established until 7th March 1944. Before the formation of that Committee there were several instances in the House of motions expressing particular views following the raising of complaints. Some were debated and agreed to, some negatived and some withdrawn or not resolved. Since the formation of the House's Committee of Privileges, 22 complaints have been referred to it for investigation and report. Of these seven involved reflections on or misrepresentations concerning the House or Members generally, four concerned reflections against identified Members, one - the Browne and Fitzpatrick case - involved intimidation, three concerned Committee inquiries, and the others included such matters as the use of House records in Court, a letter fraudulently written in a Member's name, immunity from civil arrest, publication of an advertisement featuring a photograph of the House in session, and alleged censorship of Members' correspondence. In the case of one reference no report was made before a dissolution - the matter therefore lapsed.

4.14 The Senate's record has been altogether less turbulent. It did not establish a Senate Committee of Privileges until the 1st January 1966 and before that date, only one matter was investigated by the Senate. Since the establishment of the Committee, only six cases have been referred to it. These cases concerned: premature disclosure of Committee material, claims for Crown privilege, the security of Parliament, the use of unparliamentary language in debate, the arrest and imprisonment of a Senator, and, most recently, repeated abusive telephone calls to a Senator.

4.15 The stimulus for the establishment of this Committee came from the publication in the Sydney Daily Mirror of the 2nd September 1981 of an article by Mr Laurie Oakes. In it, Mr Oakes made a number of uncomplimentary references to Members of Parliament - references which could easily have been read as relating to Senators, but the Senate declined to bother itself with these matters. A complaint was made in the House, the Speaker found that prima facie there had been a contempt, some Members of the House not agreeing on this point forced a division, and after the division - not on party lines - the matter was referred to the Privileges Committee. That Committee, when it came to report, was unanimously of the view that a comprehensive inquiry which had been proposed in a resolution of the House of Representatives of the 13th April 1978 should be commenced without delay. (The Committee's findings on the reference were that the article in question constituted a contempt, that it was irresponsible and reflected no credit on the author, the editor and the publisher, but it considered that the matter was not worthy of occupying the further time of the House).[8]

Criticisms

4.16 Opinions are divided on the merits of the law and practice of Parliamentary privilege as they now stand. The competing arguments may be broadly summarised along the following lines. Supporters of the status quo contend that no, or little, change is needed, that in essential respects the law and the practice of Parliamentary privilege is apposite to the needs of Parliament, that the enforcement of the privileges of Parliament should remain with Parliament and that in particular the penal jurisdiction - the power to investigate and punish - must be retained by Parliament as the ultimate guarantee of its independence. Critics point to the arcane nature of some of the privileges, to the uncertainty of the law in at least two major areas of importance - offences which may attract Parliament's penal jurisdiction and the grey areas at the extremities of the freedom granted by Article 9 of the Bill of Rights - and to the claimed injustice of allowing Parliament to sit in judgement on offences committed against it or its Members. Some also question the desirability of retaining in Parliament the power to punish for reflections on Parliament or its Members - "defamatory contempts" as they may be called.

4.17 Some indication of the contending views, and how irreconcilable they are, may be gained from the following excerpts from evidence given to the Committee:

> "By and large the records of our elected Parliament in the exercise of its powers, privileges and immunities over eighty two years deserve more than public denigration.

> Its record is worthy of acclaim, as well as criticism; that acclaim, however, should not give rise to self satisfaction or complacency. Considerable room remains for improvement; there is much to be done." (Evidence from Professor G.S. Reid)[9]

> "...we are saying...that from the experience of being within the Parliament and with some concept of the Parliament looking after its own affairs, we think that the present situation, with some significant variations of procedures and so on, can adequately deal with the situation". (Evidence of Mr A.R. Cumming Thom, Clerk of the Senate).[10]

With these views may be contrasted:

> "The law is unnecessarily uncertain and gives neither Members of Parliament nor the public adequate guidance on what their rights and duties are. Uncertainty exists not only because the law is inaccessible, but because parliamentary precedents are ambiguous and because the contempt power in some jurisdictions enables new offences to be created". (Statement of Professor Enid Campbell quoted with approval in his submission by Mr J.A. Pettifer, a former Clerk of the House of Representatives).[11]

> "(My) submission argues that the mechanisms for protecting the integrity of Parliament are no longer appropriate. Indeed, it may be argued that the confusion surrounding application of parliamentary privilege, both in the public mind and among some media professionals, and the anachronistic methods of dealing with breaches may do more to damage the reputation of the Parliament than uphold it". (Mr Ranald MacDonald, then Managing Director of David Syme and Co.).[12]

The Committee's task

4.18 However useful it may be to look to the history and past application of the law and practice of Parliamentary privilege, and however valuable the contribution of witnesses and others, in the end the issues before the Committee resolve themselves down to these. Firstly, what are the laws and practices of Parliamentary privilege? Secondly, are they appropriate today for the independent, efficient, and fearless

working of Parliament as the body responsible for governing the affairs of the nation? Thirdly, if in any respect they are not, what changes are desirable? More broadly stated, the issues may be put in this fashion: what is the proper scope of Parliamentary privilege?

4.19 At the outset, there is a threshold question which is easily overlooked and should be addressed. Does Parliament need to have special powers, privileges and immunities?

4.20 The answer to this question lies in Parliament's very special role in the Australian community. Within its constitutional limits, Parliament is the supreme law maker for the Australian nation. No-one is beyond its reach; no-one remains untouched by its actions. Parliament is the sole repository of powers crucial to Australia's security and its survival, such as the defence and external affairs powers. Parliament sets the framework of the economic life of this country, levies taxes, dispenses welfare, provides support and payments for the States, determines who may become citizens and who may enter and remain upon the Australian soil. It retains the power - though greatly diminished in vitality by the Party system - to check a capricious or discredited executive. Through its Committees, Parliament monitors, oversights and examines executive actions and the workings of Government departments and instrumentalities, and addresses and informs itself on social, economic, political and security issues of national importance. In these functions lies the reason for giving to it special powers, privileges and immunities: so that it may discharge the unique and special tasks reposed in it by the Constitution and the Australian people.

ENDNOTES

1. 'Procedure in cases of privilege', Progress Report of Joint Select Committee on Privilege, H of R 4(1907-8)4

2. ibid, p.4

3. ibid, p.5

4. ibid

5. Report from the House of Representatives Committee of Privileges relating to articles published in the Bankstown Observer, H of R 2(1954-55); VP 1954-55/269-271.

6. The judgement was that of the full court; Dixon, C.J., McTiernan, Williams, Webb, Fullagar, Kitto and Taylor, J.J., R. v. Richards; ex parte Fitzpatrick & Browne (1955) 92 CLR 157.

7. See Sheriff of Middlesex (1840) 11 Ad. and E, 273

8. 'Article in the Sydney Daily Mirror of Wednesday 2 September 1981' Report of Committee of Privileges, (House of Representatives) PP 202(1981)5; VP 1978-80/147-148.

9. Transcript of Evidence, p571

10. Transcript of Evidence, p94

11. Transcript of Evidence, p213

12. Transcript of Evidence, p792

CHAPTER 5

RIGHTS AND IMMUNITIES

Freedom of Speech

5.1 Parliament's freedom of speech derives from Article 9 of the Bill of Rights of 1689. Laconically phrased, it reads:

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

We believe it to be beyond contest that this freedom is a "privilege of necessity".[1] Without this foundational right, Members would fear to express themselves with the bluntness and directness Parliamentary life so frequently demands, and Parliament would become a shell devoid of content or meaning. If what was said or done by Members in debates and proceedings in Parliament could be called into question outside of Parliament, we would be taking a giant step backwards to the days of the Fourteenth Century and executive ascendency. An analogy may be made to the immunity that judges of superior courts enjoy from any form of civil action arising out of anything they may say or do in court in the course of a trial. This immunity is grounded on the principle of public policy that they should be able to perform their duties free from fear that what they do or say may later involve them in litigation. While the immunity given to them may not extend to criminal prosecutions - a point on which we do not think it necessary to form a concluded opinion - there is an obvious basis in public policy for giving Members of Parliament immunity from criminal proceedings for what they say or do in debates or proceedings in Parliament, namely, the fear that a disgruntled, capricious or corrupt executive might bring *criminal proceedings against a dangerous political foe for* what he said in Parliament; for example, in respect of an alleged disclosure of information contrary to a statutory prohibition to keep the information secret.

5.2 We emphasise that the prohibition against calling into question freedom of speech and debates or proceedings in Parliament is not intended to inhibit the most trenchant criticism of the political process. It is a cardinal feature of our democratic system that such criticism should be made. We believe there are two bedrock elements to a democratic Parliamentary system. Firstly, absolute protection must be given to a Member for his participation in debates and proceedings in Parliament - protection in the sense that what he says or does in those debates and proceedings can never be the subject of any

challenge by the courts, or by the executive, or by any other authority. Secondly, the most complete freedom to criticise the actions of Governments, Parliament itself, political parties represented within Parliament, and Members.

5.3 Whilst we believe that the principle embodied in Article 9 should be maintained with undiminished vigour, a very real problem arises as to the meaning of that provision.

5.4 Little practical difficulty is caused by the word "debate". Not only is a Member absolutely privileged against defamation proceedings brought in respect of anything said or done in a debate or in proceedings in Parliament, in respect of those matters he is also protected against any other form of action, civil or criminal. To take an extreme example; if, in wartime a Member deliberately revealed in debate secret information and did so to aid the enemy, he could not be the subject of criminal proceedings for what he said in that debate, even though he would have been liable to prosecution for uttering the same words outside of Parliament. This does not mean that his House would be without remedy. As the law now stands, it could expel him, or treat his action as contempt and punish him accordingly. We add a cautionary note. The protection conferred by Article 9 extends only to what is done or said in the of course of debates or proceedings. It

> "does not follow that everything that is said or done within the Chamber during the transaction of business forms part of proceedings in Parliament. Particular words or acts may be entirely unrelated to any business which is in course of transaction, or is in a more general sense before the House as having been ordered to come before it in due course".[2]

Thus, a slanderous aside made by one Member to another in the course of a casual conversation unconnected with any matter before his House would not attract the protection of Article 9.

5.5 The real difficulty lies in the use in Article 9 of the expression "proceedings in Parliament". The meaning of that expression may have been plain enough to 17th century lawyers and Parliamentarians, but it certainly is not plain today. Moreover, the conduct of the business of Parliament has changed so greatly over the last 300 years as to render uncertain the extent of the protection given to facets of the work of today's Parliament.

5.6 Neither courts of Australia or England, nor Parliament, nor the House of Commons, have attempted to define exhaustively what is meant by "proceedings in Parliament".

The expression, as a technical Parliamentary term, primarily denotes the formal transaction of business in one of the Houses, or of a Committee of one or both of the Houses, such as voting, or the giving of notices of motion. More widely, it clearly covers the asking of and reply to oral Parliamentary questions, written questions and notices printed on the Notice Paper, and everything done or said by a Member as a Member of a Committee of one or both of the Houses - at least when the business of the Committee is transacted within the precincts of Parliament.

5.7 While such matters are clearly protected, there are areas of great doubt and difficulty. We instance the following:

5.8 It is open to doubt whether the protection extends to drafts of oral questions or questions on notice or to drafts of motions, which a Member may wish to show to another to seek his advice as to form, content or propriety. The same comment applies to a draft of a speech intended to be made in Parliament, on which advice may also be sought, and which may, for reasons quite beyond the control of the individual Member, never be made.[3]

Letters from Members to Ministers

5.9 Of equal, or greater, importance is the consideration that the defence of absolute privilege may not apply to communications from Members to Ministers made for the purposes of discharging a Member's Parliamentary or constituency obligations. In the second half of the 17th century such communications, if not wholly unknown, were probably of such infrequency and unimportance that it never occurred to anyone that they should be absolutely protected as part of the essential business of Parliament. These days, because of the changes in the scope, mass, and detail of Parliament's work, in place of oral questions in the House or questions on notice, it is common for a Member to write to a Minister requesting information of him, or otherwise to raise with him some matter of legitimate concern connected with the discharge of that Member's Parliamentary or constituency duties. While questions in the House or questions on the Notice Paper are absolutely privileged, it may well be held that the same question asked by a Member of a Minister in a letter to the Minister is not privileged. If this is correct, if sued, the Member would not be able to plead absolute privilege but merely qualified privilege. The problem presented to Members by the absence of absolute privilege for such communications is vividly illustrated by the Strauss Case.[4]

5.10 In February 1957, the Right Honourable G.R. Strauss, a Member of the House of Commons, wrote to a Minister of the Crown. Mr Strauss was critical of certain actions of the London Electricity Board and asked the Minister to look into them.

The Minister brought Mr Strauss's views to the attention of the Board. It was offended, took legal advice, and through its solicitors wrote to Mr Strauss advising him that if he was not prepared to withdraw and to apologise, he would be sued for libel.

5.11 Mr Strauss had a choice. He could capitulate or stand firm. He stood firm and complained to the House of Commons. The Privileges Committee of that House examined the matter and concluded that, in writing his letter to the Minister, Mr Strauss was engaged in a "proceeding in Parliament", and that the threat made against him constituted a breach of privilege. The Committee's Report was brought before the House. The Leader of the House moved a motion agreeing that a breach of privilege had occurred, debate ensued and an amendment was moved to the effect that Mr Strauss's letter was not a proceeding in Parliament and therefore the letters threatening legal action against him did not constitute a breach of privilege. The House divided on a free vote and the amendment was agreed to - thus negativing the conclusion of the Committee. The margin was very narrow: 218 against, 213 in favour.

5.12 The Strauss Case raises a number of points of importance to Parliamentary life.

5.13 Firstly, and putting to one side the narrow margin on the vote, the decision of the House of Commons by no means forecloses the position of the Australian Parliament should a similar set of facts arise. Moreover, it seems to us that the House failed to address itself to two questions of basic importance, namely: did the threats made against Mr Strauss have a tendency to improperly interfere with the discharge of his duties as a Member of Parliament, and if so, did those threats amount to a contempt of the House? We have no doubt that it would have been open to the House to answer 'yes' to both these questions.

5.14 Next, as we have pointed out, had Mr Strauss put his criticisms in the form of a motion or an oral or written question in the House, he would have had available to him the defence of absolute privilege. Because he chose the course that is now so frequently adopted by Members of Parliament, he exposed himself to a libel action to which he had only a defence of qualified privilege. Had Mr Strauss raised his criticisms in the House, they would have attracted far greater publicity, with greatly increased risk of damage to the reputation of the Directors of the London Electricity Board, than would his letter to the Minister. This, it will at once be realised, is an observation of general application to Australian parliamentary life. Letters to Ministers written by Members for parliamentary or constituency purposes, unless leaked to and published in the media, will necessarily have a far more restricted audience than questions or motions in Parliament.

5.15 Thirdly, when his House is not sitting, the only way a Member can make criticisms or seek information on controversial subjects is by communication with relevant Ministers, Departments, or Government instrumentalities. We believe it would be against the public interest if Members, because of the fear of possible defamation proceedings, were to be dissuaded when their House was not sitting from raising urgent and important matters. We realise that such cases may be few and infrequent, but they should not happen at all.

5.16 The Strauss Case has an Australian twin which forcefully underlines the problems Members of Parliament may face if they raise complaints with Ministers in letters, instead of adopting the far more public and more damaging practice of putting a question in Parliament or, even worse from the point of view of the person the subject of criticism, raise the matter in debate.[5]

5.17 In 1977, a constituent of Mr O'Connell, a Member of the Legislative Assembly of the NSW Parliament, complained to him about alleged rudeness of an officer of the Housing Commission. The officer in question worked in an office in Mr O'Connell's electorate. Apparently Mr O'Connell had heard from other sources allegations concerning this officer's conduct. In October 1977, Mr O'Connell, in answer to his constituent's complaint, wrote a letter marked 'Personal' to the Minister for Housing. In that letter, he expressed the view that the officer was totally unsuitable for his job. It seems that Mr O'Connell's letter was passed down the line for comment, and the officer learnt what Mr O'Connell had said. His solicitors threatened Mr O'Connell with action for defamation. Mr O'Connell took legal advice costing him some thousands of dollars. Eventually, the officer moved from Mr O'Connell's electorate and no further action was taken by him against Mr O'Connell.

5.18 Had the matter come to the courts, Mr O'Connell would have had open to him a defence of qualified privilege. Broadly speaking, his defence would have been to the effect that the letter was written by him in discharge of a duty, that it was written to someone who had an interest in receiving it, and that in the absence of malice what he said was privileged. While this defence may have been a very compelling one, the fact remains that a defence of qualified privilege is just that, it is qualified, not absolute. Proof of malice destroys the defence and while it may be said that malicious statements should not be made, the fact remains that our legal system is not perfect. Mistakes can be made; all Members of Parliament know this to be so.

5.19 What if the complaint had been made by a wealthy organisation determined to take Mr O'Connell to the courts?

It is not fanciful to suggest such a case could arise, and in delicate and contentious matters where a Member believes he will or may be exposed to the risk of defamation proceedings if he puts his constituent's case in the terms he thinks he should put it, he may decide the wisest course is to protect himself rather than to fearlessly and at risk to himself advance his constituent's position.

5.20 In looking to the status of communications by Members to Ministers we think it relevant to refer to a non-Parliamentary area of absolute privilege: high executive communications. The boundaries of the absolute privilege given to executive communications are not clear but we agree that while it "does not attach to official communications by all public servants or persons implementing statutory duties", and is "confined to 'high officers of State' ... it undoubtedly covers communications between Ministers and the Crown, or amongst Ministers themselves".[6] It seems distinctly odd that a Member's communication to a Minister made in the discharge of his duties as a Member of Parliament may not attract absolute privilege while the same communication repeated by a Minister to another Minister - and also we think, at the very least, by a Minister to the head of his Department - does attract absolute privilege[7]. Of itself, this consideration would not be sufficient for us to recommend that communications made by Members to Ministers in the discharge of Members' Parliamentary or constituency duties should be absolutely privileged. Nevertheless, the existence of this absolute protection to high executive communications is of some persuasive force. It is, we believe, very easy to understand the rationale for the protection presently given to high executive communications, namely that those concerned should feel perfectly free in the discharge of their duties to express themselves in whatever terms they believe to be appropriate.

5.21 While the conclusion of the Committee is that it should be made clear beyond argument that absolute privilege attaches to correspondence of the Strauss kind, there are quite legitimate views to the contrary. It is, for instance, argued that it is unnecessary and dangerous to extend absolute privilege to correspondence with Ministers. Such correspondence, it is pointed out, is covered by qualified privilege, and this protection should be sufficient. There is a view that to give absolute privilege to such correspondence would allow a Member to be malicious in his dealings with Ministers without fear of legal redress and a view that absolute privilege should be restricted to proceedings in the Houses and their Committees and matters closely connected therewith.

5.22 Communications between Members and Ministers are not the only areas of difficulty presented in seeking to apply the protection afforded to "proceedings in Parliament" to the workings of today's Parliament.

5.23 We take it to be the law that proceedings of a Committee appointed by either or both Houses is absolutely privileged. (We point out however, that after a lapse of almost three centuries there is no pronouncement from the Courts on this subject.[8]) But what, to paraphrase the expression used in the Bill of Rights, is included in the expression "proceedings of a Committee"? Undoubtedly, formal proceedings in which evidence is taken or submissions put to the Committee when sitting within the precincts of Parliament would come within that expression. But what of informal meetings between Members of a Committee?

5.24 And what of meetings held outside the precincts of Parliament by a Committee, or a subcommittee of a Committee?[9] Would a hearing of a Committee or subcommittee sitting in Darwin inquiring into Aboriginal land rights or uranium mining be protected? And what of witnesses giving evidence before such a body? Or, to take a more extreme example, what if such a body decides to take evidence abroad?[10] While the work of that body might be of profound importance to Parliament, it is a little difficult to see how proceedings outside Australia could, without the aid of a very benign and elastic interpretation of the expression "proceedings in Parliament" be accurately described as falling within that expression. At best the status of the proceedings of such a body is not beyond doubt, although in the United Kingdom, the Privileges Committee of the House of Commons has expressed the opinion that disruption of the work of a sub-committee sitting at the University of Essex constituted contempt.[11] So far as we know, this kind of situation has yet to pose a practical problem in Australia.[12] But, given the development of the Committee system in the Australian Parliament over recent years, especially in the Senate, and the contentious issues that can come before Committees, it is on the cards that this kind of problem could arise in the future. And here, as elsewhere in our report, it is our duty to try to foresee the kind of problems in the law and practice of Parliamentary privilege that may arise in the future and to express our views on them.

5.25 Enough has been said to indicate that real difficulties, uncertainties and anomalies may arise in the application of the protection conferred on proceedings in Parliament to the workings of a modern Parliament. What should be done? In our view it would be wholly unsatisfactory to allow matters to stand as they are. We think the law should be clarified so that, without doubt, the immunities conferred by Article 9 of the Bill of Rights reflect the needs and the practices of today's Parliament. We emphasise it is not our intention to limit in any way the protections given by Article 9. Rather we propose that those protections or immunities be retained unaltered, but that it should be put beyond doubt that they extend to matters in respect of which protection is uncertain or obscure or doubtful or arguable.

5.26 An incidental advantage, if our views are adopted, is that the possibility of clashes with the Courts as to the extent of protection given by Article 9 is reduced. While perhaps remote, this possibility remains because of the jurisdictional no-mans land that exists at the outer perimeters of some areas of Parliamentary privilege, and over which both the Courts and Parliament claim sovereignty. On many matters, the Courts and Parliament would be in agreement as to the nature and extent of Parliament's privileges. But neither the Courts, nor Parliament concede to the other the right of final arbiter on this question. Theoretically:

> "....there may be at any given moment two doctrines of privilege, the one held by the Courts, the other by either House, the one to be found in the Law Reports, the other in Hansard; and there is no way of resolving the real point at issue should the conflict arise."[13].

The clarification of ambiguities and uncertainties and doubtful or arguable points will make even more remote the possibility of jurisdictional conflict.

5.27 We acknowledge there are differing views as to the need for clarification of the meaning of the expression "proceedings in Parliament". We favour clarification; others would not. In particular, it may be said that because there are no court judgments on specific questions in this area it should not be assumed that areas of doubt arise that require to be clarified by statute. It should be understood that our doubts in this area do not, however, rest simply on the absence of court judgments, as what we have said should make plain. We add that our reservations concerning the position of Parliamentary Committees meeting outside the precincts may be challenged on the grounds that proceedings in Parliament is not a geographical concept. The proposed definition deals only with the meaning of "proceedings in Parliament" in the context of defamation actions, but the immunity contained in the Bill of Rights applies to other actions as well. It has been argued that the definition could create an anomaly in that the expression "proceedings in Parliament" could be taken to have one meaning in defamation actions and a different meaning in other legal proceedings.

Recommendation 1

5.28 We therefore recommend:

(1) That the Parliament adopt an expanded definition of proceedings in Parliament in the following terms - 'That without in any way limiting the generality of the 9th Article of the Bill of Rights or the interpretation that would otherwise be given to it, for the purposes of a defence of absolute privilege in actions or prosecutions for defamation the expression "proceedings in Parliament" shall include:

(a) all things said, done or written by a Member or by an officer of either House of Parliament or by any person ordered or authorised to attend before such House, in or in the presence of such House and in the course of the sitting of such House and for the purposes of the business being or about to be transacted, wherever such sitting may be held and whether or not it be held in the presence of stangers to such House; provided that for the purpose aforesaid the expression "House" shall be deemed to include any Committee, sub-committee or other group or body of Members or Members and officers of either or both of the Houses of Parliament appointed by or with the authority of such House or Houses for the purposes of carrying out any of the functions of or representing such House or Houses;

(b) all things said, done or written between Members and Ministers of the Crown for the purpose of enabling any Member or Minister of the Crown to carry out his functions as such, provided that the publication thereof be no wider than is reasonably necessary for that purpose;

(c) questions and notices of motion appearing, or intended to appear, on the Notice Paper, and drafts of questions and motions which, in the case of draft questions, are to be put either orally or as questions on notice, and in the case of draft motions, are intended to be moved, and draft speeches intended to be made in either House, provided in each case they are published no more widely than is reasonably necessary;

(d) written replies or supplementary written replies to questions asked by a Member of a Minister of the Crown with or without notice as provided for in the procedures of the House;

(e) communications between Members and the Clerk or other officers of the House related to the proceedings of the House falling within (a), (c) and (d).

(2) For the purposes of this provision "Member" means a Member of either House of Parliament, "Clerk" means the Clerk of the Senate or the Clerk of the House of Representatives as the case requires and "officer" means any person, including the Clerk of the Senate or the Clerk of the House of Representatives, not being a Member, and who is, or in acting as, a person or a Member of a class of persons designated by the President of the Senate or the Speaker of the House of Representatives, as the case requires, for the purposes of the provision.

5.29 These recommendations, and other recommendations in this report which may be required to be expressed in a statute or by some other formal means are not intended to be precise drafts. Our view is that all matters of drafting are best left to parliamentary draftsmen. What we intend by our recommendations is to indicate lines along which the draftsmen should work.

5.30 It will be appreciated that the recommendations just made are limited to the defence of absolute privilege in actions or prosecutions for defamation.

It is in this area that practical problems are likely to arise. We do not take the further step of seeking expressly to give immunity in respect of criminal prosecutions where a Member or officer might otherwise be liable to be prosecuted. Whether, in such circumstances, a Member or officer would have immunity from prosecution would depend on the application of Article 9 of the Bill of Rights to the facts in question. Should the question arise for determination by the courts, it may be that at some time in the future it will be held that the protection conferred by Article 9 extends to all of the matters in respect of which we think it wise that specific provision should be made. If this should happen, then our recommendations would to that extent become quite otiose. But, in the meantime, for the reasons we have sought to express, we think that clarification is essential. As to the remaining matters, while some of them would certainly appear to fall within Article 9, we think it useful to remove whatever doubts may exist. One example of doubt is evidenced by the practice presently adopted in dealing with questions on notice: namely, during adjournments, answers are given to the Members who have asked questions, but these answers are not distributed to the media.

5.31 In making these recommendations we have been careful to limit the areas in which we have sought to clarify or extend the law. In respect of communications between Members and Ministers of the Crown - we emphasise that our recommendation on this matter should extend only to communications by and between those persons - we thought that it was necessary to confine our proposal and not to extend it to communications by and between Members and heads of departments or statutory bodies. We do so because it is always open to a Member to go directly to the Minister who has ultimate responsibility for a department or - to the extent of his statutory responsibilities - for a statutory body. Furthermore, we thought that inquiries made of a Minister, himself responsible to Parliament, were appropriate to be protected, but inquiries made of a person not responsible to Parliament fell into a somewhat different category.
We add that in the preparation of the recommendations in this part of our report, we have been greatly assisted by the work of the 1967 Commons Committee, and the 1976-77 recommendations of the Privileges Committee of that House on the recommendations of the Select Committee on Parliamentary Privilege.

5.32 A related question arises out of the substantive recommendations just made: should the courts, or Parliament, determine who is or is not acting as an officer of the House, of a Committee etc., for the purpose of the protection of the recommendations just made? In our view it would be inconsistent with Parliament's exclusive control over its own proceedings to allow the Court to determine these questions, and this conclusion is reflected in part (2) of the definition recommended in 5.28. Another question arising is whether the application of absolute privilege should be determined, as is presently the practice, by the Courts.

These questions should not and we therefore recommend that:

Recommendation 2

> Questions as to whether any person is, or is acting as, an officer of either of the Houses or of a Committee of either or both Houses, or any sub Committee thereof, for the purposes of the protection given by Article 9 and any of the recommendations contained in Recommendation 1, or whether a document falls within paragraph (b), (c), (d) or (e) of that recommendation should be determined by Parliament.

We would expect that this would be done by a certificate issued by the Presiding Officer, acting on his own authority or pursuant to a resolution of his House.

5.33 It may be said that obscurity still remains as to the meaning and application of Article 9. We freely concede this may be the case, but we think that the recommendations we have made will go a long distance to resolving practical difficulties in the application of Article 9. We do not think it wise to attempt to redraft Article 9 in its entirety. That provision has been part of the law of Parliament for 300 years. We think it would be unwise to seek to substitute for it a provision that attempted to spell out in different language - perhaps by attempting greater precision - the protections embodied in Article 9. There is always the danger that in redrafting the draftsman would inadvertently overlook some matter or restrict the protection granted by the general words of Article 9. Furthermore a body of law and learning has developed around Article 9. For all the difficulties it presents, we do not think a fresh start is warranted. We think that the wiser course is to leave any other problems in this area - should they emerge - to be dealt with in the light of their own particular facts.

Misuse of Privilege

5.34 One of the most difficult and contentious of areas, and one that has occasioned a great deal of public criticism and has caused us a great deal of concern, is the misuse of Parliamentary privilege. Here is to be found a clear conflict of public policy: between on the one hand Parliament's rights to, and its need of, the fearless, open and direct expression of opinions by its Members, and on the other the citizen's right to his good reputation. All of us are familiar with the claims that Members of Parliament misuse the privilege of freedom of speech by making groundless attacks on others. The Committee received diverse views both on the question of the extent of any probable misuse and as to the means by which the matter should be redressed.

For instance, the written material from the Rt. Hon. J.D. Anthony, C.H., and Dr the Hon. D.N. Everingham, M.P., Mr S. Perry and Mr P.B. Stapleton indicated that each considered the problem a serious one which ought to be dealt with. Of those who gave oral evidence, most conceded that there were periodic instances of the misuse of privilege. Nevertheless, most acknowledged the fundamental importance of freedom of speech, and even those who agreed something should be done to minimise or deal with misuse of privilege tended to stress that the privilege itself must be maintained. The Committee has found some difficulty in assessing the extent and the significance of the problem. But it must be acknowledged that the very great privilege or immunity for what is said by a Member in Parliament carries with it inherent dangers of misuse, and that in any robust assembly there will be instances of real misuse of this privilege.

5.35 Each House has an undoubted capacity to investigate and deal with any Member who is judged to have abused the privilege of freedom of speech. The very words of the 9th Article of the Bill of Rights - that "the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament" - forcibly remind us that it has always been open to Parliament to question the conduct of Members in debate. Ordinarily, this takes the form of an exchange in the House. Both Houses have been exceedingly cautious of taking matters further, for if it became the practice to formally examine - as by a reference to the Committee of Privileges - what Members say in a House, the essential freedom could be endangered. What is to be done?

5.36 Where the person attacked is a Member, he has the right of reply to which the same privileges attach. Those who are not Members find themselves in an entirely different position. If attacked, they can in theory exercise a public right of reply.[14] But how many can attract the attention of the media? And what is the use of the theoretical right of reply if it does not command the same media audience? A public statement to which little public attention is paid is a poor form of reply to a privileged attack which may attract wide and damaging publicity. Alternatively, the person attacked can seek the good offices of a Member to intercede on his behalf and to put his case under the same cloak of privilege. But how often can this be done? And what of those who do not know how to go about getting a Member's help or would be diffident about seeking such help, or who cannot interest Members in their plight?

5.37 Freedom of speech in Parliament has never been considered to "involve unrestrained licence of speech within the walls of the House".[15] There are a number of limitations on the absolute freedom of speech imposed both by standing orders and by practice. We furnish two examples.

By standing orders, Members are prohibited from using offensive words against other Members. A Member who wishes to make serious charges against another Member should do so only by way of substantive motion, although we must concede that there are many instances when this practice is not followed. The sub judice convention is an example of a practice which imposes a limitation on freedom of speech and which is applied with real rigour by the Chair. While there are rules, and practices, limiting the absolute freedom of speech, none of them help a Member of the public who has been at the receiving end of a Parliamentary attack.

5.38 Because of the concern that we feel for Members of the public who believe that they have been unfairly and damagingly attacked, and because of the concern that has been expressed over the years from outside Parliament about the misuse of freedom of speech, and because of the bedrock consideration of justice to a person who has been maliciously and badly dealt with, we have sought to devise some means of giving a form of redress to those injured by Parliamentary attack while at the same time retaining unimpaired the absolute immunity which Members enjoy and must enjoy. We considered a number of options, but in the end we think that if some formal means is to be devised for the purposes of giving redress, there are really only two alternatives. Either to adopt the kind of procedures suggested by Mr Anthony - a Parliamentarian of great experience - or to make provision for some kind of right of reply for non-Members who claim they have been unfairly dealt with by a Parliamentary attack. But if anything is to be done, we think it of fundamental importance to keep in mind the paramountcy of Parliament's claim to the full, free and untrammelled expression of opinions by its Members. Nothing should be done to erode this freedom and if this claim of paramountcy, which is made by Parliament on behalf of all Australians, conflicts irreconcilably with the right of Members of the public to their good reputations, and as a corollary, the right - which in principle they should have - not to be unfairly attacked, in our view Parliament's claim must prevail.

5.39 Mr Anthony proposed that a Member who had made an imputation of misconduct or impropriety against another Member could be called upon to produce evidence at least of a prima facie nature, and that if this evidence could not be produced the Member could be named. Mr Anthony noted that the model he proposed could be adopted to cover non-Members.

5.40 Mr Anthony's Parliamentary experience was such that any proposal coming from him on such a question of public concern requires the most careful evaluation. Nevertheless we think his proposal presents insuperable difficulties.

In the first place, there may be occasions - and in our view there would be occasions - when the public interest requires that a particular matter be raised, and when the Member raising it may lack prima facie evidence, although convinced of the accuracy of his material and the need to make it public, or may feel morally constrained not to reveal the nature of that evidence.
The latter could happen when a Member obtains information on the understanding that he will not reveal, directly or indirectly, the identity of his informant. Secondly, who is to judge what constitutes prima facie evidence? Thirdly, what sorts of rules are to be applied in making such a judgement? Fourthly, if procedures were established to give effect to Mr Anthony's proposal, the routine demand for evidence and its assessment could impede the progress of debates and be used deliberately as a means of obstruction. Lastly, if Mr Anthony's proposal was adopted, we believe there is a very real danger that it could lead to an erosion of freedom of speech. Members work under quite different constraints to those not in Parliament. Frequently they do not have the time to carefully prepare a case in the way a lawyer prepares a case for court. Members may have to speak at short notice and without an opportunity to fully investigate facts. Nevertheless they may believe it is essential that the facts, as they believe them to be, should be put before Parliament, and the Australian people. Examples of difficulties could be multiplied, but in short, to put Members under such constraints would in a very real sense trammel freedom of speech.[16] We are therefore of the opinion that Mr Anthony's proposal is not a practical solution to the ill it is designed to cure.

5.41 We think the only practical solution consistent with the maintenance in its most untrammelled form of freedom of speech and the rights of Members of the public to their good reputation may lie - and we emphasise the word 'may' - in adopting an internal means of placing on record an answer to a Parliamentary attack. If such an answer is to have any efficacy, we think it should become part of the record of Parliament so as to carry back to the forum in which the attack was made a refutation or explanation. As such, the answer would attract absolute privilege. It would be possible to adapt the petitioning process so as to allow Members of the public to forward by petition an answer to a Parliamentary attack.[17] But we do not favour adapting the petitioning process. If anything is to be done, we think the desirable course is to establish a specific mechanism.

5.42 What should be the essential elements of such a mechanism? Firstly, that complaints be subject to rigorous screening. Secondly, that there be clear limits on what may be put in an answer which is to be incorporated in Hansard. One option the Committee considered was to have complaints referred direct to the Presiding Officer with the Presiding Officer being required to decide whether to refer them on for consideration.

We think this course undesirable as it would place the Presiding Officer in the invidious position of taking responsibility for the threshold decision. We think the better course is that complaints be raised directly with the Privileges Committees. We choose the Privileges Committees because of their central role in examining complaints referred to them from within the Houses. We see no need to create additional Committees to deal with these specific matters. It may well be that the Privileges Committees would wish to operate through sub-committees. This could easily be accommodated through amendments to the standing orders. Generally, as is clear from our recommendation on this question, we have been reluctant to propose detailed procedures to control the Privileges Committees in these matters as the whole proposal is novel, and the Committees must be given some flexibility in determining how they are to discharge this function. This being said, it is obviously necessary that we propose some guidelines as to how the mechanism should work. We suggest the following as an appropriate model:

(a) The standing orders of each House be amended to enable its Privileges Committees, or an authorised sub-committee to deal with complaints made by members of the public to the effect that they have been subjected to unfair or groundless Parliamentary attack on their good names and reputations;

(b) Any complaints made should be directed to the relevant Committee;

(c) Complaints to the Committees:

  (i) should be succinct;

  (ii) should be confined to a factual answer to the essentials of the matter complained of;

  (iii) should not contain any matter amounting either directly or indirectly to an attack or a reflection on any Member of Parliament.

(d) The Committees in dealing with complaints:

  (i) should have complete discretion as to whether a complaint should, in the first instance, be entertained. For example, they may consider that the matter complained of was not of a serious

nature, or that it did not receive wide-spread publicity, or that the complaint is frivolous or vexatious.

(ii) should be empowered to deal with the complaint in whatever manner they think fit, including calling for supporting evidence, and making such amendments as they think fit to any answer proposed to be submitted to Parliament. In particular, they would have complete authority to determine the form in which any answer was to appear in the Parliamentary record. In doing so, they should have regard to the fundamental desirability of not causing, unnecessarily adding to, or aggravating any damage to the reputation of others, or the invasion of privacy of others.

5.43 In offering this suggestion we are aware that Members will be concerned not to permit anything that could in any way erode the freedom of debate. We share this concern. We do however think that some means should be sought to meet the legitimate concern of those who, regardless of the reasons, have been subjected to a damaging Parliamentary attack. However, we are conscious that it is not possible to know in advance how the Committees will work, how many complaints will be made to them, or whether what we propose will work in a way which is at once both practical and does not in any way affect Members' freedom of speech.

Recommendation 3

We therefore recommend that:

(a) The standing orders of each House be amended to enable its Privileges Committee , or an authorised sub-committee to deal with complaints made by members of the public to the effect that they have been subjected to unfair or groundless Parliamentary attack on their good names and reputations;

(b) Any complaints made should be directed to the relevant Committee;

(c) Complaints to the Committees;

(i) should be succinct;

(ii) should be confined to a factual answer to the essentials of the matter complained of;

(iii) should not contain any matter amounting either directly or indirectly to an attack or a reflection on any Member of Parliament.

(d) The Committees in dealing with complaints:

(i) should have complete discretion as to whether a complaint should, in the first instance, be entertained. For example, they may consider that the matter complained of was not of a serious nature, or that it did not receive wide-spread publicity, or that the complaint is frivolous or vexatious.

(ii) should be empowered to deal with the complaint in whatever manner they think fit, including calling for supporting evidence, and making such amendments as they think fit to any answer proposed to be submitted to Parliament. In particular, they would have complete authority to determine the form in which any answer was to appear in the Parliamentary record. In doing so, they should have regard to the fundamental desirability of not causing, unnecessarily adding to, or aggravating any damage to the reputation of others, or the invasion of privacy of others.

(e) That it should operate for an initial period to be determined by each House;

(f) That at the end of that period the Committee's functions should be reviewed.

5.44 As we have sought to make clear, we have no doubt that the absolute privilege of freedom of speech must be maintained. We believe that this privilege carries with it heavy responsibilities, and that Parliament and its Members must demonstrate an awareness of these responsibilities and a care for the reputations and rights of others when making claims or allegations that can significantly affect the rights and reputations of Members of the public. We believe the safeguarding of this privilege and the continuing demonstration of its necessity and its proper use is a duty of each Member. In the end, the real answer to the problem of misuse of the privilege lies in the care and responsibility of Members, their recognition of the legitimate rights of others, and the development of what one witness called a "corporate conscience". Therefore, and quite independently of the proposal we have outlined in paragraph 5.42, we recommend:

Recommendation 4

That at the commencement of each session, each House agree to resolutions in the following terms:-

(a) That, in the exercise of the great privilege of freedom of speech, Members who reflect adversely on any person shall take into consideration the following:

(i) The need to exercise the privileges of Parliament in a responsible manner;

(ii) The damage that may be done by unsubstantiated allegations, both to those who are singled out for attack, and to the standing of Parliament in the Community;

(iii) The very limited opportunities for redress that are available to non-Members;

(iv) The need, while fearlessly performing their duties to have regard to the rights of others;

(v) The need to satisfy themselves, so far as is possible or practicable, that claims made which may reflect adversely on the reputations of others are soundly based.

(b) That whenever, in the opinion of the Presiding Officer it is desirable so to do, he may draw the attention of the House to the spirit and to the letter of this resolution.

5.45 We conclude our examination of this most troubling area with these comments. Firstly, we repeat that each House has the undoubted capacity, where appropriate, to investigate and take any necessary action to deal with abuses such as the wilful and reckless misuse of privilege by a Member. We believe this capacity cannot be stressed too heavily. Secondly, we think that Members and others should be reminded that those who have been the subject of Parliamentary attack are at liberty to make the most robust answer to such an attack and in doing so will have the benefit of qualified privilege should the Member of Parliament elect to sue. "An attack made in Parliament is an attack made before the whole world, and an answer given by a Member of the public may be given to the whole world".[14]

Related matters: tabled papers

5.46 There is some concern that documents containing accusations of or reflections on individuals can be tabled and a motion authorising their printing or publication pursuant to the Parliamentary Papers Act can be agreed to with widespread dissemination of the damaging statements then taking place. This can - and does - happen without any real assessment being made by the House concerned before the motion is agreed to. Various ways of overcoming this kind of problem can be imagined.

It was put to us that notice could be given of the motion to authorise printing or publication, or alternatively, documents could be referred for appraisal to a Parliamentary Committee before the motion authorising printing or publication is agreed to. While sympathising with this kind of concern, we do not think that it is practicable or in the public interest to adopt such screening process before a motion is put under the Parliamentary Papers Act. It is essential that the Houses of Parliament are able to order the printing or to authorise the publication of documents. This decision is very much a decision of the House concerned and, while it does not happen in practice, it is open to a House to refuse to authorise printing or publication of a document. A great volume of material passes through each House. Sometimes this material is bunched together - particularly at the end of a sitting period. It would pose immense difficulties to the proper functioning of each House, and to the discharge of the tasks of Ministers, who, in the main, have the carriage of motions to authorise the printing or publication of documents, if a Committee had to consider each document before it got to the House. At the very least delays and real inconvenience would be experienced. Further than that, it is quite possible that the Committee charged with such a task - for example the Publications Committee - would become submerged under a deluge of written material with consequent delays causing real problems to the workings of Parliament and to the Government.

5.47 To require notice to be given of a motion to authorise the printing or publication of a document would also present difficulties. Members would need to have access to the documents to assess them and there would be great pressure to make them more generally available. This may not be an altogether bad thing, but in practice the demands of Parliamentary life are such that we think the giving of notice would be of little practical utility. The workload of Members is heavy and the demands on their time when Parliament is sitting to deal with matters currently before their Houses, coupled with Committee work, constituency work, and projects related to their Parliamentary and constituency work, would leave little time for prior and close examination of material proposed to be printed or published. And there is a real political difficulty, namely, most material put to the House is put by a Minister. In doing so he is reflecting the wishes of the Government. It would be unlikely - though not impossible - that a Government would agree to withdraw a report or other paper because of the damaging effects it, or parts of it, may have on individual reputations. In short, once the Government gets to the position of proposing that a paper be printed or published, it has made up its mind on the question and the likelihood of changing its mind is small. Any division could be expected to be resolved on party lines. We think however that, if the proposal put in paragraph 5.42 of this Report is accepted, the mechanisms there proposed could be applied to papers ordered to be printed or published under the Parliamentary Papers Act. We therefore recommend:

Recommendation 5

> That a person who claims that the contents of a paper authorised to be printed or published under the Parliamentary Papers Act contains an unfair or goundless attack on his good name and reputation, should have available to him the processes set out in Recommendation 3 for the purposes of seeking to have incorporated in Hansard an answer to the essentials of what is said about him.

5.48 An allied area of concern exists in respect of the large number of documents presented to Parliament over the years but which have been neither ordered to be printed as Parliamentary Papers nor authorised for publication pursuant to the Parliamentary Papers Act. Frequently, officers of Parliament are called on to make these papers available to Members. The question arises is this: when doing so, are they absolutely protected pursuant to Article 9 of the Bill of Rights? There has been no authoritative expression of opinion by either House on this question (although current thinking in the Attorney-General's Department is that officers doing so would be absolutely privileged). In any event, if sued for the publication involved in providing such a paper to a Member, or to a Member's staff, the Court hearing the action would take on itself the function of determining whether the protection applied. Putting to one side the possible potential for conflict between a ruling of the Court, and a ruling of Parliament, we note that some concern is felt by officers that they may only be protected by qualified privilege in such circumstances, i.e. a privilege arising out of reciprocity of interests between the "publishing officer" and the recipient. Whatever may be the correct interpretation to give to Article 9, we do think that there should be no doubt about the protection given to an officer handing out such a paper to a Member, or someone acting on his behalf. Once again, we think this is but an instance of how the modern Parliament works, and that absolute immunity should cover this matter. We add that we do not believe that this privilege should be extended to apply to the furnishing of such papers to other persons, for example, research scholars or Members of the media. We take this view because while we realise that such persons may have a very real interest in getting and using such papers, we are very reluctant to recommend that absolute privilege should be extended beyond the borders of what we regard to be fundamentally necessary for the workings of the Parliament.

Recommendation 6

5.49 We therefore recommend:

(1) That the present provisions conferring absolute immunity in respect of the printing of papers, and the authorisation of the publication of documents under the Parliamentary Papers Act, be maintained.

(2) That in any relevant legislation the opportunity should be taken to ensure that Officers of Parliament in making available copies of tabled documents to Members, or to the staff of Members, are protected by absolute immunity against any prosecution or action for defamation.

5.50 We add that, as in the case of Recommendations 1 and 2, we think that should there be any doubt as to whether or not a person is acting as an Officer of Parliament, that doubt should be resolvable by a certificate under the hand of the relevant Presiding Officer.

Related matters: repetition of statements made in Parliament

5.51 May observes:

> "The close relation between a proceeding in Parliament, such as a debate, and the publication of that proceeding seems to have mislead Members of both Houses and the courts into thinking that the same privilege protected both the proceeding and its publication".[18]

This is not so. What is said in a debate, or in proceedings in Parliament, stands on quite a different footing to the repetition of that statement. Where the repetition of Parliamentary material is absolutely protected it is absolutely protected because statutes so provide. Thus, certain broadcasts and re-broadcasts of the proceedings of Parliament are protected by the Parliamentary Proceedings Broadcasting Act, just as the Parliamentary Papers Act provides absolute immunity to those involved in the publication of the official Hansard record, and for certain other specific actions.

5.52 We are not aware of any decided cases in Australia on the re-publication by Members of what they have said in Parliament.

According to old decisions of the English Courts - given in 1857 and 1868 - a Member who publishes a speech separately for the information of his constituents is protected by qualified privilege on the ground of common interest between his act in publishing and their act in receiving, and in the absence of malice, no action lies against him.[19] However, according to these authorities, a Member who publishes his speech to the nation at large does not enjoy any qualified immunity and is in no different a position to anyone else who publishes a defamatory statement. We are inclined to think that these days the Courts would look afresh at the principles expounded in these old decisions and would take a broader view of the application of the defence of qualified privilege, especially when the subject of a Member's speech was one of national interest. However, we do not think any justification exists for proposing that special rules be made by statute for Members who re-publish their speeches. We believe that this is a matter best left to the Courts to determine in light of the common law principles of defamation so far as they may be applicable, and any relevant statutory rules. We have raised this question - and in doing so we are conscious that repetition of statements made in Parliament and reports of Parliamentary proceedings are two subjects which may be said to be at the peripheries of our terms of reference - because of the concern some Members feel on this subject, and the widespread confusion as to the state of the law.

5.53 There is an allied matter on which we think an opinion should be expressed. This relates to the defence of qualified privilege itself. We think it to be absurd that the publication by a Member to his constituents of a speech which they have an interest in knowing about, and which on the authorities is protected by qualified privilege, may be dealt with differently depending on the geographical location of the Member's constituency. This follows from the existence, actual or potential, of varying State and Territorial rules on qualified privilege. We do not think we should recommend that positive action be taken at this stage by the Commonwealth Parliament in this area, but we do express a very clear and decided view that statements emanating from the National Parliament should be governed by one set of rules for the purposes of the laws of defamation, regardless of where in Australia proceedings may be brought.

5.54 Next, broadly speaking, and without going into the intricacies of the various jurisdictional rules, the publication of fair and accurate reports of parliamentary proceedings and the publication of extracts from or abstracts of papers ordered to be printed or authorised to be published are protected by qualified privilege. In the great majority of cases reports of parliamentary proceedings and the publication of extracts from or abstracts of papers ordered to be printed or authorised to be published are made in the national media, and are the prime means of informing Members of the public of what Parliament is

doing. There is therefore a very great national interest in Members of the Australian public having access to such material. This factor reinforces the opinion earlier expressed by us as to the absurdity of having different rules as to the application of qualified privilege depending on where an action may be brought. In particular, the nature of the qualified privilege granted, and the onus of proving or of disproving malice may vary depending on where action is brought. But certainly, when dealing with extracts or abstracts of statements coming from the national Parliament, or reports of its proceedings, the same rules should apply. While we have no charter to conduct an investigation into such matters as the laws of defamation affecting the media, because of the close connection between absolute immunity for what is said in Parliament and the re-publication of that material, and because of our awareness of the close and vital relations between the national media and the Parliament, and the national interest that citizens should be informed of what is happening in Parliament, we believe the comment just made apposite. We therefore recommend:

Recommendation 7

> That the laws of qualified privilege as they apply to reports of proceedings in Parliament be modified to produce uniformity throughout Australia in respect of the following specific matters:
>
> (a) The publication of fair and accurate reports of parliamentary proceedings;
>
> (b) The publication of extracts from or abstracts of papers presented to Parliament, or papers ordered to be printed or authorised to be published.

We hope that the tenor of this recommendation (as well as the views expressed in para 5.53) will be taken up by those presently working on co-operative defamation legislation. We expressly refrain from entering into any question of detail such as where the burden of proof or disproof of malice should lie. But we are of the very clear opinion that if co-operative legislation does not achieve uniformity in these areas uniformity should be achieved by legislation of the national Parliament.

Broadcasting and televising arrangements

5.55 It is beyond our charter to comment in any substantive way on the desirability or otherwise of changes in the broadcasting arrangements for the Commonwealth Parliament or on the merits of televising proceedings or parts of proceedings.

Nevertheless our review of the law and practice of parliamentary privilege has heightened our awareness of the importance for Parliament, and for the community, of timely and accurate dissemination of proceedings in Parliament. Members of the committee, probably in common with hundreds of thousands of citizens, have for instance noted the incongruity evidenced when they are able to regularly hear excerpts from proceedings of the British House of Commons but are unable to hear the same excerpts in respect of our own Parliament. We are cognisant of the fact that the Joint Committee on the Broadcasting of Parliamentary Proceedings is currently undertaking an inquiry into the broadcasting and televising of proceedings of both Houses, and that, on the general questions, we should not stray into their territory. As a committee however we do record the view that, especially in relation to the broadcasting arrangements, we as individuals would all add our support to any recommendation the Joint Committee saw fit to make towards permitting broadcasting authorities or organisations generally to broadcast or re-broadcast excerpts of proceedings of their own choosing from either House.

5.56 It is appropriate however that we record our views on the questions of privilege that would arise in respect of any change in the broadcasting arrangements or in respect of televising. Currently absolute privilege is conferred in respect of the broadcast and re-broadcast of proceedings by the Parliamentary Proceedings Broadcasting Act, which, inter alia, provides:

> "No action or proceeding, civil or criminal shall lie against any person for broadcasting or re-broadcasting any portion of the proceedings of either House of the Parliament."

We will not go into the detail of the broadcasting arrangements but we observe that the re-broadcasting which does occur is within very strictly controlled guidelines and essentially is the re-broadcast of question time of the House not broadcast on a particular day, and is restricted, like the original broadcast, to the Australian Broadcasting Corporation. It is our strong view that, where Parliament requires an organisation such as the Australian Broadcasting Corporation to broadcast proceedings, absolute immunity should be conferred on the organisation involved. Similar justification would exist, we believe, in respect of any organisation required to televise proceedings. The situation is however quite different in respect to the mere approval for organisations to broadcast or re-broadcast or televise or re-televise segments of proceedings at their discretion. In these circumstances absolute immunity is not warranted and indeed could be harmful; qualified privilege is a much more appropriate level of protection.

We would consider it quite wrong for absolute immunity to be conferred in these circumstances - it would mean that a very small segment, perhaps containing a defamatory statement, could be used completely out of context, and perhaps repeated many times, yet those involved would be completely beyond reach. Qualified privilege, on the other hand, would give an adequate level of protection, but would not protect those acting with malice.

Use of Hansard and other Parliamentary records in Courts and other Tribunals

5.57 The two Houses have generally followed the former practice of the House of Commons of requiring persons who wish to use their records in Court proceedings - usually the Hansard record of debate - to first petition the House concerned to seek its permission to do so. Theoretically, this practice is linked to the protection conferred by Article 9 of the Bill of Rights. However, the practice appears to derive from a resolution of the House of Commons of 1818 which in fact only required leave of the House for the attendance in court of officers to give evidence concerning proceedings. Standing Orders of the Senate and of the House apply this principle to the Commonwealth Parliament. [20]

5.58 The practice that has developed is that leave is sought both for the attendance of officers and to refer to records of either of the Houses. These records not only include Hansard, but also reports of Committees, evidence before Committees and sub-committees (where it has been resolved that the evidence be authorised for publication), papers ordered to be printed or authorised to be published, and papers presented to the House not ordered to be printed or so authorised for publication.

5.59 In our view the present practice is no longer justifiable. At first sight it seems somewhat remarkable that Hansard itself should not be proved in Courts except with leave of the House concerned.[21] Debates in Parliament are constantly the subject of report, comment and criticism in the national media.

The dissemination of those debates, and comment on them is vital to an informed electorate. Yet, as the practice stands, if the Hansard record of a debate is to be admitted in evidence before a court , leave of the House from which it comes must first be obtained.

5.60 What interest is served by such a restriction? Regardless of whether or not such a restriction is to continue, when tendered in Court the Hansard record, or any other document emanating from the national Parliament, continues to attract the protection in undiminished vigour of Article 9 of the Bill of Rights. Thus, the debate cannot be called into question once the relevant record is tendered and it is the duty of the Court to ensure that this part of the law of the land is given full force and effect. That "the procedure by way of petition for leave and a subsequent order for leave has now become a meaningless formality and of little practical value in maintaining the privileges of the House" - to adopt the words of the Clerk of the House of Commons in his evidence to the Committee of Privileges reported to the House on 7th December, 1978 - appears undeniable. Certainly, that is the view taken by the House of Commons which by resolution of 31st October, 1980 resolved that while reaffirming the status of proceedings in Parliament conferred by Article 9 of the Bill of Rights, leave be given for reference to be made in future Court proceedings to the official record of debate and to published reports of evidence of Committees in any case in which, under the practice of the House, it was required that a petition for leave should be presented and that the practice of presenting petitions for leave to refer to Parliamentary papers be discontinued. The House of Commons has traditionally been very jealous of its privileges. We think it in the highest degree unlikely that it would agree to a course which in any respect or to any extent would diminish any of those privileges. Patently, it did not intend by its resolution to achieve that result, and patently it has not done so as the protection conferred by the Bill of Rights remains. Indeed, regardless of the views expresssed by the House in its resolution as to the status of that protection, it endures because it is part of the law of the land and cannot be altered by a resolution by the House of Commons or by resolution of our Houses.

5.61 We think therefore that no interest of Parliament is served by the maintenance of this ancient petitioning procedure. Looked at from the vantage point of Members of the public, their interests, and the interests of the administration of justice, lie in discarding this practice. It is quite possible that in an urgent case, there would be no time to go through the petitioning process and injustice might be occasioned. Even the possibility of such a consequence following from a practice which is of no practical utility should not be entertained.

We note that to overcome problems that can arise when Parliament is not sitting the Presiding Officers have been prepared to act on their own initiative and to report their actions thereafter to their Houses. In 1982, both the Speaker of the House of Representatives and the President of the Senate received and approved requests by the Royal Commission into the Australian Meat Industry to refer to portions of Hansard, having satisfied themselves that to do so would not in any way affect the privileges of Members.

5.62 The Committee took particular interest in the actions of Mr President McClelland and Mr Speaker Jenkins in 1983 in respect of the Royal Commission into Australia's Security and Intelligence Services - the Hope Royal Commission. Both Mr President and Mr Speaker received requests for permission for certain Hansard reports to be adduced into evidence, and with neither House sitting, permission was granted, however with the overriding effect of Article 9 of the Bill of Rights being stressed. Nevertheless, with the publication of a statement of issues to be resolved in respect of one part of the Commission's terms of reference, Mr Speaker became concerned that, in resolving certain of the issues, there was ground for concern that the privileges of the House could be affected. Mr Speaker's concern, which was shared by the Acting President, was conveyed to the Commission. Mr Speaker considered that the issues were of such significance that it was prudent to brief counsel on the matter. This was done, and Hon. T.E.F. Hughes, Q.C. was, on the 1st August 1983, granted leave to appear before the Commission when the general issue of Parliamentary privilege was argued. Submissions by Mr Hughes were accepted and the proposed issues to be addressed were accordingly modified. Mr Speaker, and the Acting President, were represented by junior counsel at other stages of the Commission's hearings when Members appeared as witnesses.[23]

5.63 The Committee commends the actions of the Presiding Officers in this matter. Insofar as it is aware, these circumstances are unique, however these actions serve as a timely reminder of the significance of the immunity potentially at threat. Further the actions of permitting reference to parts of the Hansard record in these circumstances, subject to the requirements of Article 9, and yet securing recognition of the real meaning of its provisions in such a case reiterate to the Committee the distinction that it believes can properly be made between the questions of form or procedure in these matters, and those questions of real substance.

5.64 We think therefore that for the Courts, and because of their status and the way in which they are constituted, and for Royal Commissions set up under State or Federal or territory laws, the petitioning process should be dispensed with.

As to other tribunals our view is that the general approach should be that no limitations are to be placed on the receivability of Parliament's records, and that the simplest procedure is to specify tribunals to which this general approach should apply, and to do so either by resolutions of the Houses or by regulations made under any appropriate statute.[22]

Recommendation 8

5.65 We therefore recommend

> That each House agree to resolutions in the following terms:
>
> That this House, while reaffirming the status of proceedings in Parliament conferred by Article 9 of the Bill of Rights, gives leave for reference to be made in future Court proceedings, or in proceedings before any Royal Commission constituted under Federal or State or Territory laws, to the official record of debate and to published reports and evidence of Committees and to any other documents which, under the practice of the House, it is presently required that a petition for leave should be presented and that the practice of presenting petitions for leave to refer to such documents be discontinued.

Recommendation 9

We further recommend:

> That, if for the purpose of giving effect to any of the recommendations contained in this Report a law is enacted by Parliament, provision be made for regulations under that law to specify tribunals to which the tenor of the last recommendation should apply; failing which the Presiding Officers be empowered by resolution of their Houses to consider and to act on requests from other tribunals, provided that they report the circumstances thereof to their respective Houses at the first convenient opportunity and they consult their Houses in cases where they consider consultation is desirable before action is taken.

Arrest in civil causes

5.66 While difficulties can arise, in practice the importance of this immunity has diminished very greatly as arrest in cases of an undoubtedly civil character has largely become a dead letter. In the past, the area of most importance was imprisonment for debt. This is now virtually non-existent in Australia. Nevertheless, we think that the immunity should be retained. The justification for this view is the need of Parliament to the first claim on the services of its Members, even to the detriment of civil rights of third parties. But we do not think there is any reason to retain the immunity's application to forty days on either side of the sitting of the House. The period of forty days before and after sessions of Parliament could in practice continue for years on end. The purposes of the immunity is to permit the Houses to have first claim on the services of their Members, not to permit Members - should they in any way be subject to arrest on civil process - to avoid that consequence even though their services are not needed by their Houses. Since the objective of the immunity is to enable Members to attend Parliament, and these days, as well, to enable Members to serve on Committees, we think it is met by limiting the application of the immunity to sitting days, to days on which a Committee or a sub-committee thereof of which the Member concerned is a Member and five days before and after such days. Such protection is ample. Opponents of the change that we contemplate would argue that there is no need to alter the immunities which apply in respect of arrest in civil causes (and similarly in respect of attendance as witnesses which latter matter is dealt with later in this Chapter). It is pointed out that the common law rule on the duration of the immunity means in practice that it always exists. Their views may be summed up by saying that they consider the proposed statutory provisions would create more anomalies and uncertainties than exist at present. They say that, for example, it may be difficult for a court to ascertain when a parliamentary Committee is meeting, and a Member could extend the duration of the immunity simply by ensuring that he is involved in a large number of Committee meetings. We think the reasons we have given on this matter speak for themselves, and that nothing further need be said.

5.67 We have pointed out that difficulties can arise in some cases as to whether the matter in question is civil or criminal in character. We think that these questions, if they arise in the future, are best left to the determination of the Courts and that we should not essay a comprehensive definition of what constitutes a civil cause. Our reasons are these: in the first place, there is but very limited opportunity these days to invoke the immunity.

In short, the relative unimportance of the matter does not merit attempting a comprehensive definition which, if formulated, in theory could apply to or impinge on all jurisdictions throughout our federal system. Secondly,over the years, within the Courts consideration has been given to the distinction between civil and criminal and civil and quasi criminal cases. We think it would be unwise to intrude by definition into this area - an area which can give rise to some very nice distinctions - and that the wiser course is to leave matters to the Courts. This leaves the possibility of a jurisdictional conflict in the future between Parliament and the Courts. Witness Mr Uren's case which could have given rise to such a conflict.[24] But we think that the risk of any real conflict is relatively small, and that its resolution could be left to the good sense of Parliament and the legal judgment of the Courts.

5.68 It has been suggested to us that the immunity should be extended to what might broadly be described as quasi criminal cases. The case of Senator Georges is illustrative. In 1979 Senator Georges was charged in the Brisbane Magistrate's Court with two offences : disobedience of a traffic direction given by a policeman and taking part in a procession without a permit under the relevant law. Senator Georges pleaded guilty, was fined and did not pay his fines within the prescribed period. He was arrested and imprisoned. However, the fines were paid and Senator Georges was released. The President of the Senate was not informed of Senator Georges' arrest. The Senate referred three questions to its Committee of Privileges : the failure of any appropriate authority to advise the President of the matter; whether the matter leading to the arrest and imprisonment of Senator Georges was of a civil or criminal character; and, if it was of a civil character, whether the matter constituted a breach of the privileges of the Senate. The Committee found that the matter was not civil in character and therefore could not attract the immunity but recommended the adoption by the Senate of a resolution asserting its right to be notified of the detention of any Senator and the duty of the Court so to notify it (a practice followed in Britain), and in February, 1980 the Senate agreed to such a resolution.[25]

5.69 By reason of the Federal character of our system there can be differences between the various jurisdictions in what constitutes an action that attracts the sanctions of the criminal law. While in Brisbane permits may be required for street processions, in other parts of the Commonwealth the same act may be perfectly legal without a permit. But this of itself does not suggest to us a reason why the present immunity should be enlarged. Nor in principle do we think that there is a case for the enlargement of the immunity. We see no reason why a Member of Parliament should, in respect of criminal matters, be placed on a footing different to any other Australian citizen.

We do think that his House should be notified of his detention, and whether that detention be in a civil or a criminal matter, but that is an entirely separate matter. It does not place Members in a privileged position vis a vis other citizens; it simply recognises that the Houses need to be informed of lawful impediments to a Member's presence and also need to be informed of any matter which might give rise to a breach of the immunity against arrest in civil causes. We therefore recommend:

Recommendation 10

(1) That the immunity from arrest in civil causes be retained, but be limited to sitting days of the House of which the Member concerned is a Member, and days on which a Committee or a sub-committee thereof of which the Member concerned is a Member is due to meet, and five days before and five days after such times.

(2) That where a Member is detained in custody, and regardless of whether or not the matter is of a civil or criminal character, the Court, or the officer having charge of the Member, shall forthwith inform the Presiding Officer of the Member's House of that fact, of the circumstances giving rise to his detention, and of the likely or possible duration thereof.

Jury service

5.70 Exemption from jury service, a traditional exemption, is now provided for by the Jury Exemption Act 1965 which exempts Members of the Parliament from jury service. The subordinate legislation extends the exemption to specified officers of the Parliament. The exemption of Members and certain officers from jury service can have no effect on the rights of individuals and we believe there is good justification for this practice and that it ought to be retained. We therefore recommend:

Recommendation 11

That the exemption of Members and specified officers from jury service be retained in its present form.

Attendance as witnesses

5.71 Members are exempt from attending Court as witnesses for the same periods as presently apply to the immunity from civil arrest. On occasions, the House of Commons has granted leave to its Members to attend as witnesses. This practice has not been adopted by our Parliament. Nevertheless the practice has come before the Commonwealth Parliament. In 1965 the Treasurer, Mr Holt, was served with a subpoena to attend before the Supreme Court of Victoria. The Speaker drew the Court's attention to the immunity and asked that the Treasurer be excused from attendance. The judge directed that the Treasurer be excused from attendance until the end of the sittings. The Committee understands that there have been a number of other occasions when the Speaker has received advice that a Member was required in court on a sitting day, and on which occasions the Speaker has communicated with the court advising that the House was sitting, and has asked that the Member be excused.

5.72 The immunity from attendance as a witness applies to both civil and criminal cases. If the immunity is to continue to apply with unabated force, it means that a Member who may be a vital witness in a criminal or civil case - he may, for example, be a vital witness to a defendant on grave criminal charges - is assured of virtual immunity from appearance in the witness box. If his evidence was first sought at the beginning of the Parliament, effectively the demands of justice could be denied at least for two or three years. That this state of affairs should continue seems to us wrong. We believe all Members would think it to be their duty to assist the administration of justice and to appear as witnesses where their evidence was relevant. We point out that subpoenas issued for merely vexatious purposes may be set aside, and the Courts can arrange their business so as to suit the convenience of witnesses who have other and pressing commitments. Where the witness is a Member of Parliament we believe that Courts should be encouraged to find times which are mutually convenient to the Courts and to Members.

5.73 How is the matter to be resolved? On the one hand there persists Parliament's paramount claim, a claim which we uphold, to the services of its Members. On the other there are the fair demands of the administration of justice. We think that the matter is resolvable as follows. Firstly, the immunity should be limited to the same times as that proposed for the immunity against arrest in civil causes. Secondly, it should be open to the Member to waive the immunity. In saying this, we fully understand that the immunity is held and exercised on behalf of Parliament. However, there seems to us to be no objection to making provision for Members themselves waiving the immunity since it could be expected that Members would only do so after considering their Parliamentary commitments and making appropriate arrangements.

Thirdly, it is possible to envisage cases where a Member's services are required as a witness, where it would inconvenience neither the Member in the discharge of his Parliamentary duties nor the House if his services were not to be available while giving evidence, but where for reasons of his own the Member may desire to avoid entering the witness box. We stress that this is a possibility only, but is one we think should be guarded against. We therefore think that provision should be made for application to the Presiding Officer of a Member's House to release a Member for the purposes of giving evidence. It would then be a question for the Presiding Officer to decide between the demands of the administration of justice and the needs of the House for the services of the Member.

Recommendation 12

5.74 We therefore recommend:

(1) That the exemption of Members from attendance as witnesses be retained, but that the period of exemption be confined to sitting days of the House of which the Member concerned is a Member, and days on which a Committee or a sub-committee thereof of which the Member concerned is a Member is due to meet and five days before and five days after such times.

(2) That where requested to attend to give evidence, or served with a subpoena to give evidence, the Member may, after paying due regard to the need of his House for his services, elect not to insist on the application of the immunity and instead to attend in Court.

(3) That in other cases, it shall be open for application to be made to the Presiding Officer of a Member's House for the purposes of obtaining agreement to the release of that Member to attend on subpoena. Any such application shall be supported by a statement of the reasons therefor, and shall be dealt with by the Presiding Officer in accordance with his views as to the competing claims of the House for the attendance of the Member and the due administration of justice in the Courts.

ENDNOTES

1. Gipps v. McElhone (1881) 2 NSWLR 18 at 21 per Martin C.J.

2. May, p 94

3. However it has been held that the publication of defamatory material by a Member to his Secretary was not actionable - see Holding v. Jennings [1979] VR 289 where Anderson J. of the Supreme Court of Victoria held that the publication of a statement to a person for the purpose of typing, printing, and compiling such statement in accordance with the reasonable and usual course of business has the same protection of privilege as the publication of the statement enjoys on the privileged occasion, whether such privilege be qualified or absolute. See also opinion of Attorney-General's Department, dated 27 July 1983.

4. Report from the House of Commons Committee of Privileges, HC (1956-57); H.C. Deb.591 (8.7.58).

5. The summary of the O'Connell Case is taken from Transcript of Evidence (21.4.83); Inquiry by the Joint Committee of the Legislative Council and Legislative Assembly upon Parliamentary Privilege (1983), Parliament of NSW.

6. Fleming, J.G., The Law of Torts, 5th ed., Law Book Co. Ltd., Sydney, 1977, pp.552-3.

7. We are conscious of the fact that the High Court had been reluctant to extend this head of privilege and that the Law Reform Commission in Report No. 11, Unfair Publication - Defamation and Privacy, PP140 (1979) para 136 has recommended that it be abolished.

8. See Goffin v. Donelly [1881] 6 QB 307 and also Dingle v. Associated Newspapers [1960] 2 QB 405.

9. In a Canadian judgment, it was stated obiter that "proceedings in Parliament" "... clearly ... cover proceedings in Committees of the House, wherever they may sit" (provided the Committee was sitting in Canada). (Re Ouellet (No. 1) (1976) 67 DLR (3rd) 73 at 85.)

10. The "writ of Parliament did not run in foreign countries ..." (View of Law Officers quoted by Clerk of the House of Commons in Essex University case - Report from the House of Commons Committee of Privileges, HC 308 (1968-69)38)

11. It is of course common, in our Parliament, when establishing a Committee, to formally confer on the Committee the power to appoint sub-committees and, for example, to "... refer to any such sub-committee any matters which the Committee is empowered to examine." It is also common to formally give Committees and sub-committees the power to move from place to place.

12. In Britain, the Privileges Committee of the House of Commons in 1969 found that the disruption of the proceedings of a sub-committee of a Committee of the House held at the University of Essex constituted contempt. It was of the opinion that the work of the sub-committee was part of the proceedings in Parliament, and that its immunities were not contingent on proceedings being conducted within Parliament's precincts. HC 308 (1968-69)

13. Kier, D.L., and Lawson, F.H., Cases of Constitutional Law, 4th ed., Clarendon Press, Oxford, 1967, p.125.

14. To which a wide qualified privilege attaches. See Adam v. Ward. [1917] AC 309 - see, in particular, comments of Lord Dunedin p324

15. Anson W.R., The Law and Custom of the Constitution: Part I Parliament, Clarendon Press, Oxford, 1892, p150

16. A good instance of the type of problem that could arise is provided by what took place in the House of Commons some years ago. A Member, convinced that he had information as to the identity of the so-called "third man" in a spy ring, and named him in the House. See; Report of 5th Conference of Commonwealth Speakers and Presiding Officers, Govt. Pr., Canberra, 1978, p.62.

17. Such a process would require amendments to the Standing Orders and procedures relating to petitions. Senate Standing Order 87 and House Standing Order 124 each specifically prohibit reference in petitions to debates in Parliament. Petitions have, we note, been held by the Courts - by very ancient precedent - to enjoy absolute immunity. See S.W. Lake v. King (1680) at 1 SAUND. 131. Furthermore the current practice in each House is for the terms of petitions to be incorporated in Hansard.

18. May, p85.

19. Davison v. Duncan (1857) 7 E. and B. 219 at 233; Wason v. Walter (1868), LR 4 QB 73 at 95.

20. Standing Orders 386 of the Senate and 368 of the House.

21. We note that there has been at least one occasion when a strictly limited reference has been made to the House of Representatives Hansard without permission of the House first being obtained. This was a case in which a Member was not a party. See Hennings and Anor v. Australian Consolidated Press, [1982] 2 NSWLR at pp.374.

22. For other views see 'Use of or reference to the records of proceedings of the House in the Courts, Report of Committee of Privileges (House of Representatives), PP 154 (1980).

23. H.R. Deb. (23.8.83)1-2.

24. See 'Commitment to prison of Mr. T. Uren, M.P.,' Report of Committee of Privileges (House of Representatives) PP 40(1971); see also correspondence from Premier of NSW and the Attorney-General of NSW incorporated in Hansard 23 August 1971. (H.R.Deb. (23.8.71) 526-529).

25. 'Imprisonment of a Senator,' Fifth Report of Senate Committee of Privileges, PP 273(1979).

CHAPTER 6

THE PROPER OPERATION OF THE PARLIAMENT

6.1 In the last chapter, we dealt with specific rights and immunities essential to the proper operation of Parliament. But we think other safeguards must be in force if Parliament, its Committees and its Members are to function effectively and freely. Many of the essential safeguards or conditions for the proper operation of the Houses and their Committees are provided for in various ways. For example, Committees may be given the powers to call for persons, papers and records, and the Standing Orders, and practice, provide for the way in which the Houses are to operate and for the operation of Committees. But there must, at the end of the day, be a means of enforcing the bedrock safeguards or conditions essential to Parliament's operation. We are not concerned with matters which might be categorised as irritants, but matters of substance. This brings us to Parliament's penal jurisdiction.

The penal jurisdiction

6.2 The ultimate sanction possessed by Parliament is its penal jurisdiction - the power of the Houses to examine and to punish any breach of their privileges or other contempt. Succinctly stated it may be said that the general power to punish for contempt encompasses acts which impede or obstruct the operation of the Houses and their Committees or which tend to do so, or which impede or obstruct Members in the discharge of their duties, or which tend to do so. However, what we have just said cannot be taken as an exhaustive definition of the contempt power. Rather, it is an attempt to express the essence of that power. The reach of the penal jurisdiction is almost without fetter. This follows, as we pointed out earlier, because it is open to Parliament to determine what constitutes a contempt of Parliament. Parliament is not confined to breaches of undoubted privilege such as those conferred by Article 9 of the Bill of Rights. It is the ultimate arbiter of what constitutes contempt and is bound neither by the Courts nor by precedent. If it finds an offender in contempt of Parliament it can admonish him, exclude him from the precincts of Parliament, or commit him for the remainder of the session. The effectiveness of the power of commitment, which has only been exercised by the Federal Parliament in the Browne and Fitzpatrick case, may be affected by the stage in a Parliament's life when a contempt is considered. At the beginning of a Parliament commitment for the balance of the session can be a very severe penalty, but in the dying days the position is otherwise. In the latter case however, when reconstituted, Parliament retains the power to recommit for the same contempt.

6.3 Over the centuries Parliament's powers have been exercised widely. Journalists, newspaper editors, lawyers, court officers, and even judges themselves have felt the power of Parliament.[1]

6.4 To meet what is considered to be a breach of its privileges or some other grave contempt, Parliament can still intervene directly against a Court. Indeed, it is theoretically possible for Parliament to imprison a judge. But such a course, so destructive of the constitutional balance between legislative and judicial powers, and so inimical to the independence of the judiciary, seems to us to be an historical anachronism quite out of keeping with these times. Nevertheless that power remains. Given the sweep of the penal power, the vagueness of its content, and the availability of the sanction of commitment, it is hardly surprising that in modern times the penal jurisdiction, and in particular the power to punish for contempt, has drawn great criticism.

6.5 In our view two questions need to be addressed. Firstly, is it practicable to define the matters that are to constitute contempt of Parliament? That is, to propose an exhaustive definition. Secondly, when should the penal jurisdiction be invoked?

6.6 The arguments in favour of a definition of what is to constitute or what may constitute contempt of Parliament are, at first sight, compelling. There can be no dispute that contempt of Parliament is, for reasons already touched upon, a very flexible concept. It is a general principle that laws should be certain, why should Parliament be exempt from this principle? But while on its face to provide a definition is attractive, and while in principle there is much to recommend it, the task of providing such a definition presents major difficulties.

6.7 It is easy enough, by concentrating on serious matters, to pick out actions which may be held to be contempts of Parliament. Few would quarrel with the inclusion as contempts of the following : the intentional disruption of proceedings in Parliament, or of proceedings of its Committees; improperly influencing Members as by bribes or by intimidation; molestation of Members by actions not themselves amounting to bribes or intimidation but designed and intended to influence them in carrying out their duties, or to prevent or to impair their capacity to carry out their duties; disobedience of the lawful directions of Parliament or its Committees; interference with witnesses appearing before Committees; the giving of false testimony before Committees; the publication of deliberately false and malicious reports concerning Parliament or its Committees; attempts or conspiracies to commit any of the foregoing offences.

6.8 But while it is easy enough to say that these matters may constitute contempts of Parliament - assuming a serious enough case is made out - and while it may be possible to define other offences which should also fall within the ambit of Parliament's contempt power, to provide an exhaustive definition of what should constitute contempt or what may constitute contempt is another matter. In the search for precision the necessary reach of the contempt power may be unintentionally narrowed, offences may be expressed too rigidly, flexibility may be lost, and matters which should be included may unintentionally be excluded. In short, we think that the wiser course is not to seek to define exhaustively the contempt power. We rest on the broad consideration that it is impossible, in advance, to define exhaustively the circumstances that may constitute contempt of Parliament. A good analogy is provided by the Courts. Superior Courts have a power to punish for contempt, not only for contempt committed in the face of the Court, but for contempts committed outside the Court. The exercise of this power has also been criticised, but the Courts consider it essential for the maintenance of the independence of the Courts and for the purposes of the proper administration of justice. The Courts have always been reluctant to define what constitutes contempt, other than by expressions couched in the broadest of terms[2]. Nor has our Parliament felt any need to circumscribe by precise definition what may or may not be punished as a contempt of court. Implicit in this failure to circumscribe the Court's power is, we think, the recognition that the power needs to be wide and flexible. It is not unlike a legislative unwillingness to define what may constitute a breach of the exercise of reasonable care. It has been observed by very eminent judges that the categories of negligence are never closed. They must remain open to admit of the application of general principles to particular circumstances as they may arise. So it is we think with the contempt power.

6.9 The question we have just addressed was considered by the 1967 Commons Committee. It also rejected the notion of an exhaustive definition of the contempt power. We agree with its reasoning, which is conveyed in the following paragraph:

> "It has been suggested to your Committee that the categories of contempt should be codified. They have given careful consideration to the proposal but have been compelled to reject it. The very definition of 'contempt' which they have proposed for the future guidance of the House clearly indicates that new forms of obstruction, new functions and new duties may all contribute to new forms of contempt. They are convinced therefore that the House ought not to attempt by codification to inhibit its powers ..."[3]

6.10 We have considered other means of seeking to give greater clarity to the subject. One possibility would be anticipatory rulings, i.e. rulings on the basis of hypothetical facts. There are two difficulties about such rulings. In the first place, a ruling given on a hypothetical set of facts is just that. If the facts emerge in any material respect differently to those hypothesised, the ruling is useless. Secondly, and more fundamentally, it is not open to Parliament to bind its future actions. However, we do understand and sympathise with the concern felt in some quarters for, at the least, some guidance as to the parameters of contempt. To meet this concern, we set out, in Chapter 8, our views as to what might be termed the more important elements of contempt.

Recommendation 13

6.10 We therefore recommend that, subject to what is said elsewhere concerning defamatory contempts, no substantive changes be made to the law of contempt.

6.11 We now turn to the second question: the circumstances in which Parliament's penal jurisdiction should be invoked. In doing so, we have particularly in mind the invocation of this jurisdiction when it is concerned not with a breach of an undoubted privilege, but when it is concerned with other and more general contempts.

Sparing exercise of the penal jurisdiction

6.12 In the past it has in theory been accepted that Parliament should use its powers to protect itself, its Members and its officers only to the extent "absolutely necessary for the due execution of its powers".[4]

6.13 However, we agree with the view expressed by the Commons Committee that it is doubtful whether this principle of self-restraint has been applied as rigorously in the past as it should have been. This may be no more than a reflection of the pressures of Parliamentary life and of the need, to which we shall refer later, under existing practices to raise any question of breach of privilege or other contempt at the earliest possible occasion. Nevertheless, this principle should be rigidly adhered to and the penal jurisdication should be invoked as sparingly as possible and only where it is essential to provide reasonable protection to the Houses, their Members and Committees, and officers. We agree with and endorse the views expressed on this question by the 1967 Commons Committee, which views were later endorsed by the House of Commons, and we therefore recommend that each House agree to resolutions in the following terms:

Recommendation 14

That the House should exercise its penal jurisdiction in any event as sparingly as possible and only when it is satisfied to do so is essential in order to provide reasonable protection for the House, its Members its Committees or its officers from improper obstruction or attempt at or threat of obstruction as is causing, or is likely to cause, substantial interference with their respective functions. Consequently, the penal jurisdiction should never be exercised in respect of complaints which appear to be of a trivial character or unworthy of the attention of the House; such complaints should be summarily dismissed without the benefit of investigation by the House or its Committees.

Defamatory contempts

6.14 A large number of complaints of breach of privilege or contempt have concerned reflections either on Parliament, one of the two Houses, groups of Members generally, or identified Members or groups of Members.[5] It should be noted that the Senate has taken a more relaxed view of criticisms of this kind. Some of the reflections have been trivial in nature, some not. Some have amounted to charges that Members drank too much or did too little work - hardly, we would think, matters of national importance. Yet these complaints were entertained and adjudicated upon. Parliament's power to treat such matters as contempts is as undoubted as the precedent is ancient. In 1701 the House of Commons resolved that to print or publish any books or libels reflecting on proceedings of the House was a high violation of the rights and privileges of the House and that to print or publish any libels reflecting on any Member of the House for or relating to his services therein was also a high violation of the rights and privileges of the House. It seems to us startling that on a question so basic to the workings of an informed democracy - public criticism of the actions of the Houses and their Members, no matter how trenchant, ill-informed or discourteous - Parliament should still exercise powers grounded on a precedent of almost three hundred years ago. In those days the House of Commons may be said to have been a genuinely privileged institution. The lineage of its Members was almost invariably privileged. Franchise was limited. Rotten boroughs were an established and accepted means of gaining and keeping a seat in Parliament. The lives of most Members were lived on a different plane to those of the bulk of the population and the House of Commons in sentiment, outlook and interest was very much a patrician institution.

Times have changed immeasurably, yet a public charge that Members are indolent, inattentive to their duties, or on occasion affected by drink, may bring the publicist to the bar of the House. Is this consonant with the dignity of the Parliament or its essential needs? Supporters of the status quo argue that statements defamatory of Parliament, its Houses or Members whether they are identified or not, may constitute real threats to the standing and operation of Parliament and that to abandon the capacity to pursue such statements would leave Parliament open to "attacks of the most dangerous kind".[6] It has been put that, if this facet of contempt were to be discarded, and it was later wished to write the provision back into the law, this could be quite a difficult task, notwithstanding the undeniable right of Parliament under s.49 to take such action if it thought to do so was necessary.

6.15 The case in favour of discarding this facet of Parliament's contempt jurisdiction may be shortly stated. It dates from different times and from different needs. Parliament has evolved greatly and the social, political and economic conditions affecting Australia have changed beyond recognition from those of England of the eighteenth century. Not only is the power unnecessary but it is fundamentally inimical to freedom of speech, especially when the subject of attack is an institution, or the Members of an institution, entitled to absolute immunity in the exercise of freedom of speech and thus able to defend itself and themselves in the most robust manner. Moreover, Parliament's record in exercising this facet of its contempt power arguably has done more to damage the Parliament than any attacks so far made on the Parliament or its Members and other Parliaments such as the New South Wales Parliament and the United States Congress which do not have this power appear to have managed well enough.[7]

6.16 In determining whether the power should be retained, discarded or modified one must ask this question: is it necessary for the proper operation of Parliament? Otherwise put, it may be asked whether the power to punish for defamatory contempts meets the test which has been applied to the United States Congress - to which the power to punish for defamatory contempts has been denied by the United States Supreme Court:

> "The power to punish for contempt rests upon the right of self-preservation; that is, in the words of Chief Justice White 'the right to prevent acts which in and of themselves inherently obstruct or prevent the discharge of legislative duty or the refusal to do that which there is inherent legislative power to compel in order that legislative functions may be performed'".[8]

If that test is adopted, and we think it should be, we think it leads to the conclusion that the protection of the dignity of Parliament in a superficial way is not of itself a sufficient justification for the power to deal with defamatory contempts.

6.17 In our opinion, the present vague but potentially wide-ranging capacity to punish libellous or derogatory statements about the Houses or their Members or groups of Members as contempts should not continue. The next question is whether Parliament would best be served by a modification of the power or its complete abandonment. The most obvious modification would be to provide for defences that could be raised to an allegation that a defamatory contempt had been committed. Such defences might include justification with the added requirement that it was in the public interest that the statement should be made in the way in which it was in fact made, and also a defence of fair comment. Indeed, the Committee considers that such defences should be the bare minimum. As matters now stand it seems to be no defence to a defamatory contempt that the defamatory statement was true and that it was in the public interest that it should have been made. This seems to us to be patently unjust and contrary to the public interest. For example, if it was said of a group of Members that they were conspiring to bring down the institution of Parliament and to further the interests of a foreign power, such a statement could most certainly be treated as a defamatory contempt and the maker of it punished accordingly. If true, it is manifestly in the public interest that it should be publicly stated, and contrary to justice and that same public interest that the maker of it could not prove its truth in defence to proceedings brought by Parliament. Another modification would be to provide a defence in circumstances where there is a reasonable belief in the truth of the statement made, it was only made after reasonable investigation, it was believed that it was in the public interest to make it and the publication was in a manner reasonably appropriate to that public interest.

6.18 However, the Committee does not believe that the halfway house these defences constitute is the answer. In our view, defamatory contempts should be discarded entirely. We note that:

- Identified Members who are the subject of defamatory statements will continue to have the same opportunity of recourse to civil action as does every other citizen;

- Apart from redress in the Courts, alternative means of satisfaction available to identified Members or groups of Members include rebuttal or correction within Parliament, recourse to the mechanisms of the Australian Press Council, and in the case of complaints

against particular journalists, raising the matter with the Ethics Committee of the Australian Journalists' Association.[9]

- Where what is said goes beyond the scope of reflections diminishing the respect given to or affecting the dignity of Members or the Houses, and constitutes intimidation or attempted intimidation full power to deal with such a matter as a contempt would remain.

- By virtue of the Crimes Act, 1914 and in particular, s.24A and s.24D the writing, printing, uttering or publication of words intended to "excite disaffection against ... either House of Parliament or the Commonwealth" may be punished by imprisonment for three years. This formidable power is something of a last resort but it remains available. It is notable that these provisions are qualified by s.24F which provides that they do not make it unlawful for a person "to point out in good faith errors or defects in Government, the Constitution, the legislation or the administration of justice". Certainly that qualification does not excuse defamatory contempts but it does underline the need for full and unfettered public discussion of the workings of Parliament, even if that discussion is sometimes ill-informed, malicious or grossly abusive in tone.

6.19 The arguments we have advanced in paragraphs 6.15 to 6.18 represent our conclusions on this question. Nevertheless we are bound to point out that in this most difficult area there are contrary views. It can be argued that to "abolish" the category of contempt by defamation is unnecessary and undesirable. It could be argued that if this were to be done by resolutions it would not be binding on the Houses in future, and if it were to be done by statute, there would be a risk of Court review of virtually every contempt case because of the fact that so often contempts involve publication in some form. Those who would argue thus consider that actions might be brought in the Courts to attempt to establish that contempts fell within the abolished category. It could be argued that it could be very difficult to distinguish between contempt by defamation and other forms of contempt such as intimidation. Such arguments we believe to be misconceived. The question of implementation of our recommendations is dealt with in Chapter 10.

However, we should point out that if our recommendation on this point was to be implemented by statute, Parliament would always remain in control of its contempt jurisdiction and does so by force of section 49 of the Constitution. Its hands are never tied. We most certainly do not hold the view that the Courts would be allowed to review every contempt case. Elsewhere in this Report we have been at pains to point to the need to diminish to the greatest extent possible any potential for clashes between Parliament and the Courts. The safeguard we propose later - in relation to warrants for committal - is, and very intentionally, limited in its effect, to only permitting the High Court to examine the words used in a warrant, and not permitting the Court to go behind the warrant and examine the facts relevant to the Houses' decision. Accordingly, if defamatory contempts were abolished by statute, and in the future, a House decides that some matter relating to publication should be treated as intimidation, that would be an end to the matter. Any statutory provision would need to make perfectly plain that the examination of contempt cases by the Houses should be immune from any kind of judicial consideration, save for the limited safeguard proposed in Recommendation 23.

6.20 We therefore recommend that:

Recommendation 15

> The species of contempt of Parliament constituted by reflections on Parliament, its Houses, Members of Parliament or groups of Members and generally known as libels on Parliament or defamatory contempt be abolished.

6.21 Alternatively should the Parliament be unwilling to adopt the foregoing recommendation:

Recommendation 16

(a) At all stages in the raising, investigation and determination of a complaint of defamatory contempt, the general principles of restraint expounded in recommendation 14 be observed.

(b) At all stages of the assessment of the complaint account be taken of the existence of possible alternative remedies that may be available, in particular proceedings in the Courts for defamation, and of the mode and extent of publication of the material in question; and

(c) That the defences of:

(i) truth, with the added requirement that it was in the public interest that the statement should be made in a way in which it was in fact made; or

(ii) an honest and reasonable belief in the truth of the statement made, provided that:

A. the statement had been made after reasonable investigation;

B. the statement had been made in the honest and reasonable belief that it was in the public interest to make it; and

C. the statement had been published in a manner reasonably appropriate to that public interest,

should be available.

The alternative defences which we have just recommended accord with the views expressed by the 1967 Commons Committee.

ENDNOTES

1. In 1689 Justices of the King's Bench were committed for their decision in a case known as Jay v. Topham. (1682-9) 12 St. Tr. 822.

2. This is, the Committee recognises, itself a difficult area and, of course, the Attorney-General has now referred the question to the Australian Law Reform Commission for investigation.

3. 1967 Commons Report, para 40.

4. May, p 71

5. For details concerning complaints of defamatory statements about the House or Members see Pettifer, J.A., (ed) Appendix 32 of House of Representatives Practice A.G.P.S., Canberra, 1981

6. Transcipt of Evidence (Mr H. Evans), pp.153-4.

7. For a useful brief summary of the arguments used on one occasion in 1800 in the US when this question arose see Bradshaw, K. and Pring, D., Parliament and Congress, Constable, London, 1972, pp.99-100.

8. Constitution of the United States of America, Annotated Edition, (1963), p116; prepared by the Librarian of the Congress pursuant to a joint resolution of the House and the Senate.

9. Transcript of Evidence, pp.665, 694-700, 726, 733-4, 738-43.

CHAPTER 7

THE PENAL JURISDICTION

The proper forum for the exercise of the penal jurisdiction

7.1 Before we get to the question of how the penal jurisdiction should be exercised, we must answer the threshold question: who should exercise that jurisdiction? This question must first be answered because the procedures that would apply on the one hand if Parliament is to exercise the jurisdiction, and, on the other, if some external body is to exercise the jurisdiction, would necessarily be different.

7.2 Critics of the existing system, and those who favour a transfer of all or much of Parliament's penal jurisdiction to some outside tribunal are many. The case against the existing system is well put in the Report of the 1908 Joint Select Committee of this Parliament (see paragraphs 4.2-4.3 above). Summarily stated, critics would say that it is neither dignified nor just for Parliament to be the judge, the prosecutor and the gaoler. Nor is the maintenance of this system consonant with our contemporary notions of justice. If the sanction of imprisonment is to remain - and for reasons later expressed we believe it should - how can Parliament continue to exercise a penal jurisdiction which is virtually unreviewable? Parliament is, moreover, a poor forum for a trial. It is not judicial by temperament and neither its constitution nor its practices suit it to the delicate and laborious task of assessing evidence and arguments with cool impartiality and coming to a decision which is as just as circumstances and human fallibility permit.

7.3 A number of alternatives to the existing system have been put to us. Mr C.R. MacDonald (then Managing Director of David Syme and Co.) proposed a Privilege Tribunal. This Committee should be made up of four Parliamentary Members with the Speaker or the President as Chairman, with at least two non-Members selected by the Parliamentary Members. Mr MacDonald envisaged the Presiding Officers referring matters to the Tribunal rather than the House doing this themselves[1]. The Defamation Committee of the Law Council of Australia proposed a Tribunal comprising six Members appointed for the life of the Parliament. Its Chairman would be a High Court Justice nominated by the Chief Justice, and the Houses would be required to approve reference of complaints to the Tribunal[2]. The most frequently suggested alternative to Parliamentary investigations is to transfer the jurisdiction to the Courts. This was suggested, with variations, in a number of submissions,[3] and, it will be recalled, the effect of the 1908 Joint Select Committee's proposals, if implemented, would have been to transfer out of Parliament the exercise of important parts of the penal jurisdiction.

7.4 We have found the proposals put to us and discussion of those proposals with the witnesses and amongst ourselves most valuable. But we do not think it necessary to examine in detail the various proposals. Instead, we think it is necessary to make an in principle decision between the continued exercise by Parliament of its penal jurisdiction or the transfer of that jurisdiction to the Courts. We think this is the choice which we face because if, as we think should be the case, imprisonment is to be maintained as an ultimate sanction against those who may commit serious breaches of privilege or other serious contempts of Parliament, in our view the only other appropriate forum for the determination of matters that may attract imprisonment would be the Courts. It may be that one could constitute a particular tribunal, clothe it with judicial characteristics, but call it something else. But in substance, if not in name, that tribunal would be exercising functions similar in all essential respects to those exercised by the Courts[4]. It is possible to leave to the external tribunal decisions on facts, and to Parliament the decisions on penalty. But so long as imprisonment is to remain a sanction, the decision on the facts on which the penalty is grounded is of great importance to those who have to justify what they have done or said. Hence, it would not be appropriate to transfer that exercise to a tribunal other than one possessing in full measure judicial characteristics. To do the reverse, and to leave with Parliament the decision on the facts, and to the external Tribunal the decision on penalty, is also possible, but clearly the only appropriate Tribunal to impose penalties would be a Court. And so, nomenclature aside, the issue resolves itself down to a choice between Parliament and the Courts.

7.5 There are, we admit, attractive and compelling arguments of the kind briefly canvassed, to support a transfer of the penal jurisdiction to the Courts. But we have decided that the jurisdiction should remain with Parliament. We are also of the view that major modifications need to be made to procedures for hearing complaints so that those procedures accord with fundamental requirements of natural justice. This matter is dealt with elsewhere.

7.6 We now set out the reasons why we think the penal jurisdiction must remain with Parliament.

7.7 Firstly, with the abolition of defamatory contempts, a major source of widespread concern and of possible conflict between Parliament and those who criticise Parliament and its Members vanishes. (Incidentally, we point out that while in this report, it is sought to isolate issues as much as possible, our reliance on this reason points to the interlinked nature of many of the recommendations in this Report.) Secondly, the basic rationale of the penal jurisdiction is that it exists as the ultimate guarantee of Parliament's independence and its free and

effective working. Where this jurisdiction is invoked, its exercise involves at least three steps: determining the relevant facts; deciding whether those facts constitute a breach of privilege or other comtempt; and if the first two elements are made out, deciding whether action is required and, if so, what it should be, or whether because of the trivial nature of the matter or of other reasons no action should be taken. Unquestionably Courts are ideally suited to determine the relevant facts. In some cases - for example, where the issue in question concerns a clear breach of an immunity forming part of the law of the land, such as Article 9 of the Bill of Rights - the Courts are also ideally suited to determine whether a contempt has been committed. But the same cannot be said of cases where the question at issue is not breach of an acknowleged specific immunity - a breach of the law of the land - but some other contempt. For example, persistent and malicious disruption of a Member's home and office telephone lines by a twenty-four hour publicly organised telephone campaign, obstructive both of the Member's constituency and Parliamentary work. The Court could be called on to determine whether this kind of action constituted a contempt. It would have no clear guidance such as would be available where it was confronted with a breach of an acknowledged immunity, and no acquired understanding of Parliamentary life to assist it. Its very separateness makes it difficult for a Court - or indeed for any external body - to determine whether the nature of an offence is such as to obstruct or impede Parliament or its Members in the discharge of their functions. Assuming it was unable to surmount this kind of difficulty, in no case is a Court, in our view, well suited to decide the question of penalty. By tradition and by constitutional doctrine, Courts are separate from Parliament and aloof from Parliamentary life. Here an analogy - not one on all fours but of some force - may be drawn with the power of the Courts to punish contempt of court. Certainly there is no other body that could exercise that power. But that consideration aside the Courts are uniquely placed to determine what constitutes a contempt and in particular, what may constitute obstruction or intended obstruction of the administration of justice. This follows because of the experience of Courts in the matter of the administration of justice; this is their sole function. Similarly, Members of Parliament are intimately bound up in the affairs of Parliament. They understand the workings of Parliament not as observers but as participants, and while their judgement may not always be right they are uniquely placed to understand how actions taken by others may obstruct or impede the workings of Parliament and of its Members.

7.8 Next, the Court of Parliament - as it may be called - may not always be wise but saving the case of Browne and Fitzpatrick it has never gone beyond such punishments as rebukes or admonishments[5]. Parliament has an inherent flexibility. Its mood and the penalties it may impose may be tempered by factors

the Courts could never entertain, chiefly the potent force of public opinion and the political consequences for Parliament and the principal Parliamentary actors if they act harshly, capriciously or arbitrarily when dealing with a complaint of contempt. A Court is denied this kind of flexibility. Its concern would be to determine the issues before it in accordance with legal rules - since that is all it can do - and when a case is made out impose, or refrain from imposing, a penalty. Inherently less flexible, the Courts might well be disposed to be more severe than Parliament has been. Even its critics concede that Parliament, in the imposition of penalties on outsiders, has been a lenient judge.

7.9 Fourthly, it is a cardinal feature of our system to separate powers and to minimise opportunities for clashes between the Courts and Parliament. The danger of such clashes to our democratic processes are obvious and great. If the Courts were to take over the exercise of Parliament's penal jurisdiction - and regardless of whether they took over the whole of the jurisdiction or the task of determining whether an offence has been committed or the imposition of penalties - a real potential would arise for clashes between the views expressed in Parliament and those expressed in the Courts. If the whole of the jurisdiction was transferred, or the task of determining whether an offence had been committed in defended cases, the aim of those defending would be to demolish the case put by Parliament. This would require rulings on questions such as whether a particular set of facts regarded by Parliament as offensive constituted contempt of Parliament. It could be that defendants would deal with Parliament's actions in caustic and dismissive tones, castigate the complaints as groundless and trivial, and invite the Court to agree. Even the most prudent judge might find himself disposed to express clear and reasoned disagreement with Parliament's decision to send the matter to the Courts and, possibly, disagreement with views expressed in debate in Parliament. In saying this, we point out that it seems to us quite impossible to take away from Parliament the preliminary decision, namely, whether a complaint should be referred to the Courts. We do not think it would be right to transfer the burden of this decision to the Presiding Officer, nor would it be proper to transfer it to anyone else. It is, fundamentally, a decision for the House concerned since it is the House that complains that its functions are being obstructed or impeded. No one else can make the complaint on its behalf. Even if only the jurisdiction to impose penalties was to be transferred, opportunities for clashes between the Courts and Parliament would emerge. A case being made out, submissions on penalty would go to the nature of the offence, to whether it was grave or trivial, and the Courts would be invited by the defendant to take the lightest possible view of the matters before it. This could easily lead to expressions of opinions by the Courts on cases before them contrary to the views of the House concerned which must be taken to have considered the matter before recommending that it be sent to the Courts. Nor

does this end opportunities for clashes. After a decision is made in the Courts, it would be open to Members of Parliament separately to express dissent and it would be open to the House that referred the matter by resolution to disagree with the Court's findings. More subtly, discontent with the handling of matters in Courts could emerge and focus on perceived deficiencies in the Courts and their understandings of Parliament and Parliamentary life.

7.10 Lastly, if the penal jurisdiction is transferred - and again whether in whole or in part - there is a risk that the transfer could also involve the transfer to the Courts of the odium that Parliament sometimes attracts when it exercises that jurisdiction. The exercise of the penal jurisdiction is inherently controversial and newsworthy and the issues thrown up are political in nature. We think it unwise to risk the Courts becoming embroiled in such controversy and exposed to the liability to criticism which the political nature of the issues could engender.

7.11 We therefore recommend:

Recommendation 17

That the exercise of Parliament's penal jurisdiction be retained in Parliament.

Penalties

7.12 Given our view that the penal jurisdiction should remain in Parliament, the question arises as to sanctions. What sanctions should Parliament have?

7.13 At present the Houses have the following sanctions. Firstly, either House may commit a person found guilty of breach of privilege or other contempt of Parliament. We have already pointed to the manifest inconvenience of the nature of this power, namely, the power to commit is limited to a period no longer than the duration of the current session although it may be reimposed by the House in the following session or when newly constituted after an election. Thus an order to commit for a fixed term is qualified by the fact that prorogation or dissolution would end the committal.[6] It was aptly observed by the 1967 Commons Committee that the effect of the rule limiting the power to commit to the life of the Session in question:

> ".... is that the period of imprisonment served by a person found guilty of contempt and committed to prison by way of penalty depends upon the fortuitous circumstance of the period between the date of the order and the end of the Session."[7]

Secondly, either House can admonish or reprimand an offender. Thirdly, a public apology may be required. This has been required in the past of newspaper publishers, and failure to comply with a direction to publicly apologise could itself be treated as a contempt of Parliament. Fourthly, as Parliament controls its own precincts, either House can make an order that Members of the public be excluded from the precincts. This sanction is of special importance to Members of the Parliamentary Press Gallery, as exclusion from the precincts of the Gallery has an obvious effect on their ability to work. Because of the division that exists within Parliament between the precincts under the control of the House and the precincts under the control of the Senate - and we put to one side for the present the question of authority over grey or common areas - an order made by one House has no effect in the precincts of the other. However, in a past case, where an apology was demanded by the Senate from representatives of a newspaper and no apology was forthcoming and those representatives were by order excluded from the precincts of the Senate, a complementary order was made by the Speaker of House.[8] Nowadays Members of the media working in the building require passes and these may be revoked by the Presiding Officers. In practice the Presiding Officers consult on these matters. In 1973, for example, the Gallery Pass of one journalist was withdrawn, although this was not in connection with a matter of privilege or contempt as such. Incidental to the execution of these powers, each House possesses the powers to do all such things as may be necessary

for giving effect to its orders. Thus, if (as in the Browne and Fitzpatrick case) orders are made for committal, the House making the orders can make whatever ancillary orders are necessary to give effect to the committal.

7.14 On the question of the power to impose fines a difference of opinion exists between the House and the Senate. The Senate Committee of Privileges, in its first report which was presented to the Senate on the 13th May 1971 asserted the Senate had the power to fine.[9] The contrary view has been taken by the House of Representatives Committee of Privileges which, in its report of the 7th April 1978 into an editorial published in "The Sunday Observer" pointed out that the power to fine, while once exercised by the House of Commons, fell into disuse about three hundred years ago and that the possession of the power to impose fines was denied by Lord Mansfield in the case of R. v. Pitt and R. v. Mead (1762) (3 Burr 1335). The Committee thought that the power of the House of Representatives to impose a fine "must be considered extremely doubtful". It also thought that "the impositon of fines could be an optional penalty in many instances of privilege offences."[10] The question of the power of the House of Representatives to impose a fine arose most sharply in the Browne and Fitzpatrick case. In the debate in the House on the motion to commit Browne and Fitzpatrick, the Leader of the Opposition, Dr Evatt, an eminent constitutional lawyer, said that while the power to fine had fallen into disuse or desuetude, he did "not agree that it has necessarily gone, and .... if the Parliament is of the opinion that it is desirable, it could declare that there is power to inflict a fine."[11] The Prime Minister, Mr Menzies, also an eminent constitutional lawyer, thought that the power to impose a fine was extremely doubtful.[12] Certainly, the balance of authority favours the view that the power to impose a fine either does not exist or is extremely doubtful.

7.15 It must be remembered that the Senate has no separate or additional powers to those which the House of Representatives has. Each derives its powers from an identical common authority, section 49 of the Constitution, which looks back to the powers of the House of Commons. In passing we note that the House of Lords claims the power to inflict a fine, asserting that it does so as a Court of Record. It last exercised that power in 1801.

7.16 Whether or not the House of Lords is a Court of Record for the purposes of fining those in breach of its privileges or otherwise in contempt of it is a nice question, but one that we are not called upon to resolve. We simply point out that its powers are irrelevant to the Senate's position.

7.17 We think the better view is that the power to fine does not exist. If that is so - and we intend to proceed on the basis that it is - it cannot be resurrected by resolution, but only by statute.

7.18 Where Members are guilty of breaches of the privileges of Parliament, or other contempts, the Houses have two further powers. Firstly, suspension for a period from the service of the House. As Mr Pettifer points out in his treatise on House of Representatives practice:

> "Action taken by the House to discipline its Members for offensive actions or words in the House is based on the privilege concept, but the offences are dealt with as matters of order (offences and penalties under the standing orders) rather than as matters of privilege."[13]

The position is the same in the Senate.[14] The other and most drastic sanction is the power to expel. On only one occasion has the power to expel a Member been exercised. This was the Mahon case of 1920 when a Member was expelled for what were said to be "seditious and disloyal utterances" made outside the House making him, in the judgment of the House, unfit to remain a Member.[15]

7.19 The Mahon decision was made on party lines and it is a decision which we find troubling. We believe that if the power to expel is to reamin - we will have something to say later on this question - it should be exercised only in the most outrageous and compelling of cases. This follows both from the great severity of the sanction and the consideration that it is for the electors to determine who should be in Parliament, rather than the Houses themselves. This latter consideration may be answered by the argument that it would be quite competent for the expelled Member to recontest his seat and to be re-elected. This argument overlooks the political reality that the mere fact of expulsion may so blight the expelled Member's political reputation that his prospects of successfully recontesting an election are negligible.

7.20 Having thus briefly canvassed the powers of the Houses to deal with breaches of privilege and other contempts we come to the question of what sanctions the Houses should have to deal with those matters.

7.21 In addressing this question we think that at the outset we should deal with the question as to whether sanctions of a truly penal kind should remain. It may be argued that no such sanctions should be available to the Houses, and that they should be content with their powers of reprimand, admonishment, and exclusion from the precincts - the last necessarily following from the Houses' powers over their own precincts. We believe there are basic flaws to this kind of approach. In passing we note that the debate on the question of sanctions is bedevilled by the emotionally charged issues that arise out of the exercise by Parliament of its penal jurisdiction against

those judged guilty of defamatory contempts. If our recommendation on this subject is accepted, defamatory contempts will cease to trouble Parliament.

7.22 We believe that if Parliament is to function effectively, the need for real sanctions remains. The Committee system provides a good instance. For that system to work effectively it must have the power to compel the attendance of witnesses, to obtain testimony from witnesses, and to compel the production of documents. In the absence of real sanctions it would be open to any witness summoned to appear before a Parliamentary Committee to ignore the commands of that Committee. It remains true that procedures could be established for the purpose of referring this kind of matter to the courts, but for reasons which we have already set forth, we do not believe courts should be involved in disputes of an essentially Parliamentary character. In brief, in important respects the Committee system could become paralysed. While it may be that in the majority of cases those requested to attend, to give testimony, and to produce documents, would do so anyway, there will always be cases where witnesses are reluctant to attend, to testify, or to produce documents. The more controversial or embarrassing the issue, the more the personal fortunes of those whose testimony is being sought is at stake, the more likely it is that a Committee system not backed by real sanctions would be unable to operate effectively. It is, of course, not for Committees to impose sanctions; they have no power to do this. Committees must turn to the Houses for that purpose. But by removing sanctions from the Houses, all a Committee could do if it ran into trouble with a recalcitrant witness would be to request the relevant House to reprimand or to admonish him. If the witness refused to give testimony, or to present documents, because he desired that the Parliament and the world should not know the truth on a matter of national importance, we think that he would be able to endure with fortitude a verbal rap over the knuckles. And, even if the course were to be taken to reprimand or admonish him, in the absence of real sanctions, how could his attendance before the bar of the House summoning him be compelled? That House would be left in the absurd position of admonishing or reprimanding in absentia, something which offenders could regard with some amusement.

7.23 And what of other cases? For example, that of the concerted harassment of a Member of Parliament for the purposes of intimidating him and obstructing him in the performance of his Parliamentary duties. It is true that he could go to the courts but to do so might well be a lengthy and complex process, and almost invariably expensive. In such a case should Parliament be powerless? We think not, and we believe that our opinion would be shared by most of those who are concerned to ensure the effective operation of Parliament as the ultimate forum of our nation.

7.24 It being our view that real sanctions should remain, what should they be? We think the sanction of imprisonment should remain, but that committal not to exceed a specified period should replace the power to commit for a maximum period of the duration of a session, and that the Houses should be given the power to impose fines. Our reasons are these.

7.25 The House of Commons Committee of Privileges in its Third Report (in 1977) recommended that if there was to be a power to fine, the power to impose a sentence of imprisonment should be abolished. It believed that "the House would nowadays be extremely reluctant to impose a sentence of imprisonment for an offence of contempt."[16] This recommednation has not been accepted, and the House of Commons powers remain in substance identical to those of our two Houses. At first sight, the substitution of the power to fine has attractions. We believe most Members of Parliament would agree that it would only be with the greatest reluctance that either Houses would move to imprison a person judged guilty of a breach of privilege or other contempt. But this does not mean that there may not be circumstances which will justify that course - a last resort though most certainly it is. And on examination, the aboliton of the power to commit and the substitution of a power only to fine presents some real problems. Firstly, how is the fine to be collected? A fine may be collected either by the use of special procedures set up by Parliament, or by use of procedures available through the courts. Decisons would need to be made on this point, but in either case where there is a failure or refusal to pay a fine the only alternative remedy, save for seizing and selling assets of the offender (which would be a cumbersome process and one desirably to be avoided) is an order of committal. Next, cases may arise where a power to fine is an inadequate remedy. For example, the witness may be quite willing to face the prospect of a fine for contempt of a Committee for refusing to produce documents when required to do so, but be markedly less enthusiastic about the prospect of a period of imprisonment. It would be anomolous and distasteful if the extent to which the sanctions of Parliament really had bite - and we repeat, it is our desire that these sanctions should always and only be ultimate remedies - should depend on the depth of the purse of the offender. Thirdly, the very existence of the sanction of committal is in itself calculated to deter individuals who may, for a wide variety of reasons, be willing either to breach the acknowledged privileges of Parliament or otherwise be contemptuous of the fair and reasonable requirements of Parliament. We well appreciate that there is in the community concern about the reach of Parliament's powers and the opportunities that undoubtedly exist for their abuse. Abuses of powers or privileges can never be eradicated; this is an inevitable result of the fallibility of human nature. But concern about abuses, or the potential for abuse, should never obscure the need for Parliament in the interests of the community at large to have the powers essential for its proper functioning.

7.26 The question of the length of committal by Parliament of those who breach its privileges or who are otherwise in contempt of it is a wholly different matter. For reasons which we have indicated we think it both anomolous and absurd that the length of imprisonment may depend on when an offence is committed, and the likelihood or unlikelihood of a new Parliament taking action to recommit a person who has been committed in the dying days of the old Parliament. We think it is much better to set an outer limit. We are conscious that any decision to set a maximum limit for an offence is necessarily arbitrary - this applies regardless of the nature of the offence. In the end, whenever the legislature imposes maximum terms for offences in its statutes the legislature is making a value judgment which it hopes reflects the needs of justice and of deterrance. On balance, we conclude that an outer limit of six months is adequate. We hope that Parliament will never need to consider the use of such a sanction, but if the need arises we believe it must be there.

Recommendation 18

We therefore recommend:

> That the powers of the Houses to commit for a period not exceeding the current term of the then session, and to recommit when newly constituted be abolished and that in its place the Houses should have the power to commit a person found to be in breach of the privileges of Parliament, or otherwise to be in contempt of Parliament, for a period not exceeding six months.

7.27 If the power to commit was the only real sanction open to the Parliament when faced with a real need to apply a sanction, we believe, as we have said, that nowadays Parliament would be most reluctant to apply that sanction. It is very much a sanction of last resort. This being so, we think it would be far better if Parliament had available to it the power to fine for breaches of privilege or other contempts. This kind of sanction is particularly apt for corporations for the good and obvious reason that a corporation cannot be imprisoned and one must look to its officers - a process that can be laborious and intricate when one comes to deciding which of the officers of the corporation are responsible for the refusal or failure of a corporation to accede to the proper demands of Parliament, whether those demands are made by one of the Houses, or by a Committee of either or both of the Houses. After considering a number of alternatives we are of the view that firstly, a distinction needs to be drawn between the maximum fine that may be levied against a corporation and the maximum fine that may be levied against an individual, and secondly that the maximum fine for a corporation should be $10,000 and for an individual

$5,000. We acknowledge, but do not apologise for, the fact that here again it is very much a matter of judgment as to what is proper. We add that in the case of individuals it should be obvious that a decision to impose a find should be an alternative to committal, and we again reiterate our view that the imposition of such a sanction is a tactic of last resort. We believe however that the existence of real sanctions makes it far more likely that the proper demands of Parliament and its Committees will be met without the need to resort to those sanctions.

Recommendation 19

We therefore recommend:

(1) That where a corporation is judged to be in breach of the privileges of Parliament, or otherwise in contempt of Parliament, it shall be liable to a fine not exceeding $10,000

(2) That where an individual is judged to be in breach of the privileges of Parliament or otherwise in contempt of Parliament he shall be liable to a fine of $5,000 and that to impose such a fine shall be an alternative to the imposition of a period of committal. In no case should both a period of committal and a fine be imposed.

Raising of complaints of breach of privilege or other contempts

7.28 In the House of Representatives, a Member may rise at any time to speak on a matter of privilege "suddenly arising". If he does so he shall be prepared to move without notice a motion declaring that a contempt or breach of privilege has been committed or a motion referring the matter to the Committee of Privileges. Where at any time a matter of privilege arises in the House it shall, until disposed of or until the debate on a motion on it has been adjourned, suspend the consideration and decision on every other question before the House. If the complaint concerns a statement in a newspaper, book or other publication the Member complaining shall produce a copy of that publication and shall be prepared to give the name of the printer or publisher.

7.29 The precedence accorded to debate on a motion claiming that a breach of privilege or other contempt has occurred is subject to two important qualifications. Firstly, the Speaker must be of the opinion that a prima facie case has been made out. Secondly, the Speaker must be of opinion that the matter has been raised at the earliest opportunity.[17]

7.30 The practice in the Senate is substantially the same.[18]

7.31 Where in the Presiding Officer's view it is clear that a prima facie case exists, and that the complaint was raised at the earliest opportunity he may be willing to rule forthwith on the matter. However, the more common practice is for the matter to be considered by the Presiding Officer outside the Chamber and for him to later give his decision to his House as to whether he will accord precedence to a motion in respect of the matter. (Usually the motion is to refer the matter to the Committee of Privileges of the House or Senate). The motion is then open to debate and is dealt with according to the rules of the House. Should the Presiding Officer rule against the motion the Member may himself give notice of motion which will then be listed under general business. In practice, this means that in the absence of a vote to give that motion priority its prospects of being debated and voted upon are remote.

7.32 The practice presently adopted by the Australian Parliament accords with the practice which used to be followed by the House of Commons. In our view the present practice has a number of serious defects. In the first place, the requirement that a complaint be made at the earliest opportunity can result in a rushed and ill-considered decision. The abolition of this requirement and its replacement by a more flexible rule would give a Member who may wish to complain opportunities for reflection, of more considered judgment, and of consultation with his colleagues. Furthermore, the earliest opportunity rule

can result in a matter not been accorded precedence where there is some doubt as to the facts and the Member wishes to check those facts before raising any question of breach of privilege. This happened in the House of Commons in 1977. A Member wished to complain of something which was said on the radio. To be sure of his facts he waited until the transcript of the broadcast was available - a course which seems to us to have been both just and sensible. However, the Speaker ruled that he was out of time because he had not raised the matter at the earliest opportunity.[19] While this was a matter which concerned an alleged libel on the House, the raising of a matter of breach of privilege or other contempt at the earliest opportunity applies to all matters which are claimed to be breaches of privilege or other contempts. Obviously enough Members should not be allowed to resurrect stale complaints. But we think it equally obvious that it is highly undesirable that a Member should feel compelled to rush to judgment. Once a complaint is made it is likely to receive wide publicity in the media. Damage to individual reputations can easily occur. Even if the complaint is not accorded precedence by the Presiding Officer - thus effectively ruling it out of consideration - the complaint being made, damage may have been done to an individual reputation which may never be wholly remedied. In principle, we see no reason why the complaint should in the first instance be made publicly. We think it would be far better if the complaint were made in writing to the Presiding Officer so that both he and the complainant then had an opportunity for reflection. The complainant may think it wiser to withdraw the complaint, or colleagues may advise him that it is groundless. We think it a very much better thing that ill-advised complaints should not see the light of day.

7.33 Next, the requirement that the Presiding Officer should rule whether a prima facie case has been made out is open to misinterpretation, both by the media and the public. It can easily be interpretated as a ruling of the Presiding Officer not just that there is a case which at first sight requires examination, but that some sort of case has already been made out against the person or organisation subject of a complaint. Potential for harm to reputations is clear. Moreover, when the Presiding Officer rules that a prima facie case has been made out, and that ruling is not accepted by his House, or is not accepted by the Privileges Committee to which the complaint is normally referred, or is ultimately not accepted when the findings of the Privileges Committee are considered, the possibility of a clash between the Presiding Officer and the House whose procedures he regulates can arise. Lastly, the emphasis placed on speed under present practices can force the House which has to decide a question of privilege into a decision without being fully aware of the facts or the arguments.

Recommendation 20

7.34 We therefore recommend:

That the following rules shall apply where a Member of either of the Houses wishes to raise a matter of privilege or other contempt:

(a) The Member complaining shall, as soon as reasonably practicable after the matter in question comes to his notice, give notice thereof to the Presiding Officer of his House;

(b) The Presiding Officer shall then consider the matter to determine whether or not precedence should be accorded to a motion relating to it;

(c) During the period while the complaint is under consideration by the Presiding Officer it shall be open to the Member to withdraw the complaint;

(d) If the Presiding Officer decides that precedence should not be given to the complaint he shall, as soon as reasonably practicable, inform the Member in writing of his decision, and he may inform the House. It shall still be open to the Member to give notice in respect of the matter, which notice shall not have precedence;

(e) If the Presiding Officer decides to allow precedence to a motion relating to the complaint, he shall advise the Member, inform the House of his decision, and the Member may then give notice of his intention to move on the next sitting day for referral of the matter of the complaint to the appropriate body;

(f) On the next sitting day such notice shall be given precedence over all other notices and orders of the day, provided that, if it is expected that the next sitting day will not take place within one week, a motion may be moved later in the day on which the Presiding Officer's decision is given, when it shall have precedence;

(g) The Presiding Officer's decision should be at his discretion but shall be given as soon as reasonably practicable.

7.35 These procedures follow those adopted by the House of Commons, as recommended in the Third Report of the Committee of Privileges of that House of 1976/77. Procedures along these lines have also been adopted in New Zealand and by the Legislative Assembly of Victoria. We emphasize the power of the House or the Senate to depart from the recommended procedures when it is thought desirable to do so. We think the need for the Houses to retain ultimate control over their own procedures in this area, as in other areas, to be so obvious as to require no further comment. However, based on our review of past cases within the two Houses, we expect - if our recommendations are accepted - that in the great majority of cases arising in the future the procedures we propose would be followed.

7.36 In view of the criticisms we have made of existing procedures and the reasons for those criticisms, we think that further comment on these recommendations can be limited to the following specific points.

7.37 Firstly, our reason for providing that the Presiding Officer may inform his House of his decision not to accord precedence to a complaint is to give to that Officer a discretion that he might want to use. (We think he would have this discretion in any event, unless specifically excluded, but we think it better to include such a discretion). He may, for example, think that his decision is very much on the margin, or that, because of the special circumstances of the matter it is necessary to draw the House's attention to the complaint which has been made to him. This is something best left to the Presiding Officer. Secondly, instead of ruling whether or not a prima facie case exists, the Presiding Officer rules instead whether or not precedence should be accorded to a motion relating to a complaint of a breach of privilege or other contempt. We think it very much better to adopt this practice so as to meet the kind of problems we have outlined earlier. Thirdly, we provide that referral of the complaint shall be to the "appropriate body". We do this so as to preserve flexibility and we have particularly in mind that complaints may arise which because of their special characteristics should be dealt with directly by the Member's House.

Procedures for Conduct of Privileges Committee Inquiries

7.38 There has been a good deal of criticism of the way Privileges Committees conduct hearings of complaints. We think much of the criticism is justified and that substantial changes need to be made so that the conduct of hearings and complaints accords with contemporary notions of natural justice. We shall therefore now set out the procedures that presently apply, say something about the powers of Committees, and then say why we think changes need to be made and what those changes should be. We are indebted to Mr Pettifer, the former Clerk to the House of Representatives, for the following statement of practice of that House, which is taken from the treatise on the practice of the

House of Representatives of which he was editor. Senate practice in the conduct of Privileges Committee inquiries is based on a much smaller number of references, and there is one significant difference in practice (and see 7.42 below).[20] Our proposals for change are made on the assumption that each House will continue to have a body, by whatever name it is called, which in essential respects carries out the functions which are carried out by the Privileges Committees of the two Houses.

7.39 The purpose of the Privileges Committee is to inquire into and to report on complaints of alleged breaches of privilege or other contempts or occasionally, on other matters referred to it by the House. As privilege questions are a matter for each House alone, the Committee currently has no power to confer with the Senate Committee of Privileges, but the two Houses could authorise their Committees to do so, or could appoint a Joint Committee to inquire into a general question of privilege affecting the Parliament should this be thought necessary. The power of the Houses to refer a matter to their Privileges Committees is virtually without fetter. Characteristically, matters referred to the Committee fall into certain broad (but not watertight) categories, namely, complaints made by Members in respect of matters that might generally be described as affecting individual Members, groups of Members, or Members as a whole, complaints concerning either of the Houses or Parliament at large or complaints arising out of the conduct of a Committee of one of the Houses, or of a Joint Committee of Parliament. We stress that what follows relates to inquiries by Committees of Privileges, and not to other Committees of either House or Joint Committees.

7.40 The Chairman of the Privileges Committee is ordinarily a back bench Member of considerable Parliamentary experience. Usually the Committee has a number of lawyers amongst its membership. The Committee does not have the power, as of right, to call for persons papers and records, but it is normally granted this power by the House for each inquiry it undertakes. It may investigate not only the specific matter referred to but also the facts relevant to it. It may receive written submissions and it is usual for the Clerk of the House to be asked to prepare a submission for the assistance of the Committee. The Clerk, in practice, acts as the Committee's principal adviser on the principles and law of Parliamentary privilege and has regularly given evidence to or conferred informally with the Committee at its request. On some occasions the Clerk has been permitted to attend meetings as an observer. On one occasion - an inquiry into the use of House documents in the Courts in 1980 - a leading Queen's Counsel was appointed a specialist adviser to the Committee.

7.41 It is established practice that both deliberative meetings and hearings of the Privileges Committee are held in camera. It is not usual to publish the Committee's evidence and in only one case has the full text of evidence been published by the Committee.[21] In the Browne and Fitzpatrick case the

Committee published extracts of evidence in its report. Minutes of the proceedings of the Committee are always tabled with its report to the House.

7.42 Witnesses may be examined on oath and are not usually permitted to be represented by Counsel. The present practice is not to permit witnesses to be represented by Counsel and there has been no instance of a defence by Counsel before the House of Representatives Committee of Privileges. Characteristically, Counsel are heard, if at all, only for very limited purposes. In the Browne and Fitzpatrick case Counsel was heard on his right to appear for a witness and on the Committee's power to administer an oath. His arguments were considered by the Committee but it did not accede to the application to appear. Members of the Committee have, in past cases, sought to change the practice relating to hearing Counsel. In 1959, in the Somerville Smith Case - the Report and Minutes of Proceedings of which were not printed - a motion was put that any accused person be given an opportunity to be legally represented. The motion was deferred and never voted upon. In the B.M.C. case in 1965, motions were unsuccessfully moved seeking a resolution of the Committee concerning rights of witnesses to be legally represented[22]. In effect, legal advisers are excluded from all participation before Privileges Committees of the House on matters affecting clients. The Senate, however, has departed from the practice followed by the House. These departures are embodied in a resolution of the 6th May 1971 of the Senate Committee of Privileges which stated:

> (i) That witnesses may be accompanied by their solicitor or counsel and may, with leave, seek advice from their solicitor or counsel during the answering of questions put by the Committee.
>
> (ii) That any submissions or representations made by witnesses be heard by the Committee.
>
> (iii) That the right of the solicitor or counsel to make any submissions be considered by the Committee when application therefor be made[23].

The Senate Privileges Committee then allowed a legal adviser to accompany a witness and to address the Committee.

7.43 A witness accused of breach of privilege or other contempt is not permitted to be present when other witnesses are giving evidence and has no right to cross-examine witnesses. Nor has he any right to a transcript of evidence of other witnesses. In the "Daily Telegraph" case of 1971, an accused witness was expressly refused permission to be present when other witnesses were giving evidence.[24]

7.44 By tradition - and this is a tradition which is usually observed - in considering and determining questions of breach of privilege or other contempts Mlmbers of the Committee do not act on Party lines.

7.45 When reporting on complaints, the Privileges Committee makes a finding as to whether or not a breach of privilege or other contempt of the House has been committed. Ordinarily it recommends to the House what action, if any, should be taken. However, in all respects the final decision lies with the House.

7.46 These being the powers and procedures of the Privileges Committee, the question must be asked - are they appropriate? We think not. We now set out our reasons.

7.47 Considered in terms of the operations of the Privileges Committee, complaints before it fall into one of two categories. Firstly, those in which the actions of one or more indentified individuals or organisations are the subject of the Committee's inquiries. Secondly, those in which at the outset - and perhaps throughout - the identities of those responsible for the matter of the complaint before the Committee are not known. An example of the latter would be the subjecting of a Member to harrassing telephone calls which are designed to, and succeed in, disrupting his constituency and Parliamentary work. The identity of the instigator of those calls may never be known.

7.48 Proponents of the status quo would, we think, argue that hearings of the Privileges Committee are not hearings into charges, but are merely hearings for the purposes of eliciting facts and making recommendations and that they should therefore be conducted in an inquisitorial manner. They would point out that the Privileges Committee itself has no power to inflict a penalty. They may also argue that in camera hearings conducted away from the glare of publicity or, indeed any form of public scrutiny, are more conducive to the cool and judicial weighing of facts. As to the intrusion of lawyers acting on behalf of persons or organisations whose conduct is the subject of complaint, we think it would be said that to allow the participation of professional lawyers would introduce undesirable elements of technicality and complexity and would inevitably lengthen hearings before the Privileges Committee.

7.49 This is but a thumbnail sketch of arguments for the maintenance of the status quo. But fundamentally, one's view of the desirability of retaining the present system depends on which of two alternative courses is thought to be in the interests of Parliament and those who attract the attention of the Houses on privilege matters. Either, in essential respects, things should remain as they are, or else the practices of the Privileges Committees should be reconstituted to meet basic requirements of natural justice.

7.50 We are conscious that the principles of natural justice and how the needs of those principles are met are not fixed and inflexible matters. What the requirements of natural justice are in any particular case depend on such matters as the occasion, the tribunal, and the gravity of the consequences that may flow from adverse findings by that tribunal. In essence natural justice imports the right to a fair and impartial hearing, a right to be heard, a right to know the case put against one and to test it, and a right to confront adverse witnesses. It does not necessarily import the right to legal representation, but however the functions of the Privileges Committees and of the

Houses are looked at it seems irrefutable that what is involved is a very serious matter for anyone whose conduct attracts the attention of one of the Houses and is brought before its Privileges Committee. Accordingly, the onus is on the Houses to accord to him the fairest of hearings, and the most complete opportunity to defend himself.

7.51 We therefore unreservedly support the view that the practices of the Privileges Committee should be reconstituted to meet basic requirements of natural justice. The case in support may be put in terms of a question. If the question be asked - these days, can the proposition be sustained that a person may be gaoled or fined a substantial sum - yet have no opportunity to confront witnesses, to cross examine those witnesses, to adduce evidence on his behalf, or to be represented by lawyers skilled in those matters - we think there can be only one answer.

7.52 While it is correct to say that the Privileges Committee has no power to inflict punishment, that there are no charges formally brought before it, and that its task is to inquire and to recommend, to say these things overlooks the very serious consequences that can flow from the mere fact of being brought before the Committee. So long as Parliament retains its penal jurisdiction and the power to commit - and, if our recommendations are accepted, has the power to fine - persons or organisations whose conduct is being examined by the Privileges Committee are, semantics aside, often in a very real sense "persons charged". That the Privileges Committee cannot itself inflict sanctions is irrelevant. It is the body which reports to its House; it is the body which states in its report the matters it considers material and which recommends, when it sees fit, appropriate action. Characteristically, its House will not conduct a retrial. It is not open to a person summoned before the Bar of the House after a report of the Privileges Committee has been given to it to dispute, in any real sense, the findings of the Committee. He may have the opportunity - and the fortitude to avail himself of that opportunity - to defend himself from the Bar of the House. But, except through his own assertions, he certainly has no opportunity to present to the House facts which the Privileges Committee may have overlooked, ignored or discarded as irrelevant. He can adduce no witnesses; he has no right to cross examine; his fate will be determined in the House, and speedily, one suspects.

7.53 Nor should it be forgotten that the very fact of having one's conduct investigated by such a Committee can seriously damage an individual's reputation. A full examination of the facts may demonstrate his innocence of any intent to breach the privileges of Parliament or otherwise to commit a contempt. Should not anyone so placed have a full opportunity to clear his name? An alleged contempt of Parliament, even on its face trivial, can attract serious consequences. By referring the

alleged contempt to the Privileges Committee the House expresses an interim judgment that the complaint deserves the most serious consideration. Given the very nature of the alleged offence, the powers of the Committee, the high authority of the body empowered to pass ultimate judgment, the sanctions that may be imposed, and the possible effect of adverse findings reflecting on reputations, does it not follow that the interests of justice require that those whose conduct brings them before the Privileges Committee should have the right to have their matters considered according to the rules of natural justice?

7.54 Turning to in camera hearings, it is our view that such hearings are undesirable. We do not suggest there has been any intentional unfairness by any Privileges Committee of either House in the conduct of past inquiries. But we do think that in camera hearings lend themselves to unintended abuses and can, by their nature, be intimidatory. The benefit of public scrutiny is that it acts as a spur and as a caution. It is a spur to guarantee the most exacting standards of fairness; it is a caution against departure from those standards. It is a maxim of the law that justice should not only be done but manifestly should be seen to be done. We think this maxim applies forcefully to the conduct of the hearings of a Committee whose findings may lead to the imposition of penal sanctions. Accordingly, in principle we think hearings of the Privileges Committee should be public.

7.55 We now turn to some particular matters which are relevant to the recommendations in this part of our report.

7.56 Persons or organisations whose conduct is in question before the Privileges Committees are entitled to know the substance of the matters to be put against them. We view with some scepticism any suggestion that in the past those who have come before the Privileges Committee have not known what, in effect, were the cases they had to meet. Nevertheless we think it to be undeniable that those who may be affected by the findings of the Committee should have the right to be fairly apprised of the case they have to meet and that the Committee should ensure that the issues are adequately defined and that those who may be affected by the Committee's findings are advised as soon as practicable and that the issues, as defined, are made part of the public record of the Committee.

7.57 We also think that adequate time for preparation by those whose conduct is to be investigated is essential. Once again we do not suggest abuses in past cases before the Privileges Committees. But in our view, it should be a requirement that a fair opportunity be given to a person or organisation whose conduct is the subject of complaint to prepare his case. We do not suggest anything remotely approaching court procedures, and we emphasise that what amounts to a fair opportunity must remain a matter for the judgment of the Committee.

7.58 We have made plain our distaste for in camera hearings. However, with some reluctance, we think it necessary to preserve the power to hold in camera hearings - a right of all Committees. For example, if in the future a question relating to the disclosure of secret or confidential information were to arise, it is easy to see that such a question might require the Committee either in the national interest, or for the purposes of the protection of individuals, to hold hearings in camera. We hold however, to the general rule that hearings be in public. (Nothing we say on this matter deals with deliberative meetings; these, of course, will continue to be held in private).

7.59 We have made clear that in the conduct of hearings we think persons or organisations whose conduct is being examined should have the right to be present, the right to cross examine, and the right to adduce relevant evidence.

7.60 While, as a general rule, we can see no good reason why a person against whom a complaint is made should not be present throughout the hearing, we acknowledge it is possible that circumstances might arise which will make it desirable for him to be excluded from the hearing, just as circumstances may arise which will make in camera hearings desirable.

7.61 From time to time Committees will be called on to decide disputed questions of fact. In that exercise they may be greatly assisted by cross examination, and cross examination from the camp of one who has an interest to protect is likely to be far more pointed and far better informed than cross examination from, say, counsel assisting the Committee who is, and properly should be, disinterested in the outcome. As to the right to call witnesses, it seems obvious that this should be available when any question of fact is in dispute. For example, the issue may be an alleged attempt to improperly induce a Member not to speak in the House on a particular subject or not to advance certain views. Should not the person against whom this allegation is made be entitled to demonstrate that the case made against him is false? The Committee will have ample power to prevent abuses of this right.

7.62 We turn now to the role of legal representatives. It is our view that those whose conduct is being inquired into should have full rights to legal representation. Their representatives should be able to examine and cross examine witnesses and to put submissions on behalf of their clients. We are not fearful that the presence of lawyers will lead to endless complexity, technicality, and to great protraction in hearing times before the Committee. Members of Parliament are not, by nature, shrinking violets. They are quite capable of controlling lawyers and making sure that matters stay on the rails. In many cases, where the facts are not in dispute, the role of the lawyer may be quite limited. But when facts are in dispute it is through the examination and cross examination of witnesses by those

skilled in this trade that truth is most likely to emerge. And, when one comes to submissions at the end of a hearing we think trained lawyers should add relevance and point to what is before the Committee. The Committee, of course, is always entitled to seek such legal advice or assistance as it desires. However, the position of the complaining Member is different. He is merely the vehicle setting in train the penal jurisdiction of his House and we see no reason why he should need legal representation. No doubt, if it was thought that legal representation on his behalf was desirable, the Committee would so provide.

7.63 We have pointed out that it is not the practice to publish the transcript of the proceedings of the Committee. In our view this practice should be changed. The transcript of the proceedings - especially, oral testimony - may be highly relevant for the purposes of the House's consideration of the matter when it comes back to the House from the Privileges Committee. But, consistently with our view that there may be special circumstances which require that hearings should be in camera, so should there be a discretion in the Committee not to publish or to prevent the publication of the transcript of such in camera proceedings.

7.64 We turn now to costs. If our recommendation as to the allowance of legal representation is adopted, we think that the Committee should have a discretion to make a recommendation for costs to be met in favour of any person who is represented before it. There is good precedent for the allowance of costs to those whose actions are being investigated in what amounts to an investigation made in the public interest and it is easy to visualise cases where it would only be just to make provision for costs. For example, it may be determined after a lengthy examination of a disputed question of fact that a person thought to be in contempt of Parliament was wholly innocent. If so, he should not be put to expense for the purposes of establishing that fact. Or, a Member or some other person not the subject of the complaint may have his conduct examined in the course of a hearing. Because of the gravity of the allegations made legal representation may be permitted by the Committee. (The question of legal representation for third parties in considered later.) Here again, if legal representation was warranted in the first place, and the matters that touch or concern the action of that person are demonstrated not to reflect adversely on him, a discretion should be open to the Committee to have him reimbursed for the costs of protecting his reputation. We are not proposing raids on the public purse. What we do propose is that, when the interests of justice so require, the Committee should have power to make appropriate recommendations for the payment of costs of legal representation. The payment or reimbursement of any agreed fees could either be made from funds available to the Parliament, or from Executive funds. In a practical sense, the Executive has much greater funding flexibility and so could meet any request with less difficulty

than Parliament. Nevertheless privilege matters are of deep significance to the Parliament. It would be inappropriate in principle for either of the Houses to have to go to the Executive to get funds to meet costs its Privileges Committee has determined should be met. The better course is that any recommendation should be made to the relevant Presiding Officer, who should, if he agreed, endorse payment out of Parliamentary funds.

7.65 The changes we propose in the procedures of the Privileges Committees, coupled with the retention of the Houses' penal jurisdiction and the availibility of substantial penalties, reinforce the unique nature of the responsibilities of the Privileges Committees. In effect, the workings of the Privileges Committees combine the traditional inquisitorial functions of Parliamentary Committees with duties that are of a judicial or quasi judicial character. There is an inherent tension between these two functions, however the Committee considers that it should not attempt to prescribe in any greater detail than it has done in its proposals those specific procedures and sequence of steps to be followed by Privileges Committees in the course of their deliberations. Within the parameters we propose, Privileges Committees of the future must be entrusted with the responsibilities of conducting their inquiries with wisdom and fairness. We do however think that the role of the Chairman requires specific mention. Standing Orders 304 and 336 of the Senate and the House, respectively, provide in detail for the sequence of questioning of witnesses. They require that the Chairman first puts his questions in an uninterrupted series and then calls on other Members. We do not think that the Chairman - or indeed the Members - of Privileges Committees should be constrained by this practice. Depending on the nature of the case, in the future the Chairman of a Committee of Privileges might wish to take a very different role. He may not wish to lead the questioning. He may not wish to question at all. He may wish to hand over to counsel retained to assist the Committee the task of questioning all or some witnesses. Other Members may wish to engage in more active participation in the process of questioning. We leave these sorts of procedural questions for determination by future Privileges Committees. It is better that they should be left with a wide and flexible discretion in such matters.

Recommendation 21

7.66 We therefore recommend that:

(a) The hearings of the Privileges Committee shall be in public, subject to a discretion in the Committee to conduct hearings in camera when it considers that the circumstances are such as to warrant this course;

(b) The whole of the transcript of evidence shall be published, and shall be presented to its House by the Committee when it makes its Report, subject however to a discretion to exclude evidence which has been heard in camera and to prevent the publication of such evidence by any other means;

(c) Issues before the Committee should be adequately defined so that a person or organisation against whom a complaint has been made is reasonably apprised of the nature of the complaint he has to meet;

(d) A person or organisation against whom a complaint is made should have a reasonable time for the preparation of an answer to that complaint;

(e) A person against whom a complaint is made, and an organisation through its representative, should have the right to be present throughout the whole of the proceedings, save for deliberative proceedings and save where in the opinion of the Committee he or she should be excluded from the hearing of proceedings in camera;

(f) A person or organisation against whom a complaint is made should have the right to adduce evidence relevant to the issues;

(g) A person or organisation against whom a complaint is made should have the right to cross examine witnesses subject to a discretion in the Committee to exclude cross examination on matters it thinks ought fairly to be excluded such as matters of a scandalous, improper, peripheral or prejudicial nature;

(h) At the conclusion of the evidence, the person or organisation against whom a complaint is made should have the right to address the Committee in answer to the charges or in amelioration of his or its conduct;

(i) A person or organisation against whom a complaint has been made shall be entitled to full legal representation and to examine or to cross examine witnesses through such representation and to present submissions to the Committee through such representation;

(j) In its Report the Committee shall set forth its opinion on the matter before it, the reasons for that opinion, and may, if it thinks fit, make recommendations as to what if any action ought to be taken by its House;

(k) Subject to the foregoing, the procedures to be followed by the Committee shall in all places be for the Committee to determine;

(l) The Committee shall be authorised in appropriate cases and where in its opinion the interests of justice so require, to recommend to the Presiding Officer payment out of Parliamentary funds for the legal aid of any person or organisation represented before the Committee or reimbursement to such person or organisation for the costs of legal representation incurred by him, and

(m) The Committee shall be entitled to obtain such assistance, legal or otherwise, in the conduct of its proceedings as it may think appropriate.

Seven days' notice to be given of any motion for the imposition of penal sanctions

7.67 When the Privileges Committee's report on any complaint of breach of privilege or other contempt is presented to the House it is the practice for the Report to be ordered to be printed. The House may "then order that it be taken into consideration at the next sitting or on a specified day. In order that Members may consider the report and the questions of privilege involved, the practice of the House has been to consider the report at a future time, but because of the importance of the House reaching decisions, particularly in respect of persons found by the Committee to be guilty of committing a breach of privilege or contempt, early consideration is given by the House".[25] The small number of references to the Senate Committee of Privileges makes it difficult to make an authoritative statement of Senate practice.

7.68 But it does not follow that, in the past, adequate time has been given for consideration of reports of the Privileges Committee. We pointed out earlier (paragraph 4.6) that a scant two days after the report on Browne and Fitzpatrick was presented to the House (in which report Browne and Fitzpatrick were each found by the Committee to be guilty of a serious breach of privilege), motions were put and carried to the effect that each, being guilty of a serious breach of privilege, should be imprisoned for a period of three months or until earlier prorogation or dissolution of the House, unless the House should in the meantime order his discharge.

7.69 We think it undeniable that when a motion is to be proposed which, if carried, will result in punishment by a fine or imprisonment, the interests of justice require that due consideration be given it. We therefore think it requisite that there be a cooling-off period between the time when any such proposal is suggested, and the time when it is considered by the House in question. Such a cooling-off period would enable Members to inform themselves fully on the question, consult with colleagues, and take soundings of the public reaction to what is proposed. A seven day cooling-off period seems appropriate. However, there may be cases, for example, when the subject matter comes before a House immediately before prorogation or dissolution when seven days' notice would be inappropriate. Our recommendation takes this into account. We do not think any special rule should be provided for cases where a motion is proposed for a sanction of a non-penal character.

Recommendation 22

7.70 We therefore recommend that:

> As a general rule, seven days' notice must be given of any motion for the imposition of a fine or the committal of any person for breach of privilege or other contempt.

Form of resolutions and warrants of committal

7.71 As we have said the practice is for a warrant of committal to state the basis of the committal in perfectly general terms. The manner in which the offence is stated in the warrant is based on the resolution on the House. In the case of Browne and Fitzpatrick, the warrants, in all material parts being in similar terms, simply stated that each had been guilty of a serious breach of privilege and be for his offence committed to the custody of the person for the time being performing the duties of Chief Commissioner of Police at Canberra. Applications for writs of habeas corpus directed against the person for the time being performing the duties of Chief Commissioner of Police at Canberra were refused by the High Court as the warrants were, on their face, consistent with a breach of privilege.

7.72 In ruling as it did, the High Court was following settled principles,[26] just as the House of Representatives was following settled principles in causing warrants to be issued stating the offences of Browne and Fitzpatrick in general terms. As the Privy Council pointed out in a case in 1871, which involved the commitment by the Legislative Assembly of Victoria of a man claimed by that Assembly to have committed a contempt and breach of privilege:

> "Beyond all doubt, one of the privileges - and one of the most important privileges of the House of Commons - is the privilege of committing for contempt; and incidental to that privilege, it has, as has already been stated, been well established in this country [the U.K.] that the House of Commons have the right to be the judges themselves of what is contempt, and to commit for that contempt by a warrant, stating that the commitment is for contempt of the House generally, without specifiying what the character of the contempt is."[27]

7.73 A warrant issued under the authority of one of the Houses and expressed in perfectly general terms for the commitment of a person to prison, is open to the obvious criticism that effectively it is unreviewable, however, if the warrant states the cause of committal, it seems that the courts

can review the validity of the decision to commit. This point was acknowledged by the High Court in the Browne and Fitzpatrick case (see 4.7) and was trenchantly made as long ago as 1811 by Chief Justice Ellenborough in Burdett v. Abbott who said that if the House of Commons

> "did not profess to commit for a contempt, but for some matter appearing on the return, which could by no reasonable intendment be considered as a contempt [of the House] committing, but a ground of commitment palpably and evidently arbitrary, unjust, and contrary to every principle of positive law, or national (sic) justice; I say, that in the case of such a commitment...we must look at it and act upon it as justice may require from whatever Court it may profess to have proceeded"[28]

Hypothetically, a House could act on a completely trivial ground, or could quite misconceive its functions, and commit on a basis which under no circumstances could properly be regarded as a breach of privilege or other contempt. Should anything be done to overcome this kind of problem?

7.74 We here enter a most difficult area. On the one hand there is the claim of the Houses - a claim which we consider right and which our recommendations uphold - to enforce the privileges of the Houses and to punish, by penal sanctions if need be, those who breach those privileges or who otherwise commit contempts of the Houses. Furthermore, the practice of issuing general warrants is old and well established. But it seems to us difficult to justify the proposition that the Houses should have the power to commit for up to six months (on the basis of our recommendations), or for the life of the session and then to recommit if such a course is thought desirable (as at present) but under no circumstances should the imposition of that penalty be reviewable. We have concluded that the absence of any kind of review is unjust and should not continue. We think that some power - although of a limited nature - to review Parliament's actions is needed. In our opinion the best answer lies in requiring that the ground of commitment be stated in the resolution for commitment and in the warrant that is to be issued pursuant to that resolution and that it should be open to the Full High Court, and only to the Full High Court, to examine the question of whether the ground stated in the resolution and in the warrant is capable of amounting to a breach of privilege or other contempt. In exercising its review the Court should be empowered only to declare whether or not the exercise of the power to commit is on a ground, as stated in the warrant, which is capable of constituting a breach of privilege or other contempt. It should not be entitled to make consequential orders. We do not think it wise that there should be any power for the Court to make consequential orders - for example, orders

against the person holding the offender in custody and which, if not complied with, could be treated as contempt of court. We take this course because we desire to avoid, or at least minimise to the greatest possible extent, the occasion for any clash between the Houses and the High Court. Thus, if a declaration were to be made by the High Court that a particular warrant for commitment was beyond the power of the House from which it issued because the ground stated was not capable of constituting a breach of privilege or other contempt, it would then be a matter for the House to decide what course it should take.

7.75 In support of the recommendation we now propose to make, we point out that what is proposed is analogous to the wide powers of the High Court to review the constitutionality of acts of Parliament.

7.76 There is the added consideration that the need to specify in the resolution of committal from which the warrant flows the ground on which commitment is to be made would make the Houses all the more conscious of the need for care and judiciousness when dealing with alleged breaches of privilege or contempts of such seriousness as prima facie to warrant imprisonment. Certainly, there is no hardship imposed on a House if it has to specify the grounds of committal in the resolution - if it does not know the grounds of committal it should not commit.

7.77 We do not believe the same considerations apply to the imposition of fines: in this area our concern is the liberty of the subject. However, since it is possible that a resolution directing the payment of a fine could, on non-payment of the fine, lead to a further resolution that the person who has failed to pay the fine be committed, we think that in such latter cases the resolution of committal should state, and the warrant issued pursuant to that resolution should state, the ground on which the fine was imposed as it is on that ground that the further resolution for commitment is based. In such cases it should be open to the Full High Court to determine whether the ground stated in the warrant is capable in law of constituting a breach of privilege or other contempt of Parliament. (We add that, of overseas legislatures, the South African Parliament provides a relevant analogy. In its Powers and Privileges of Parliament Act, 1963, by sub-section 13(1), it is provided that the warrant that may be issued to enforce, by arrest or imprisonment, a contempt decision of the Parliament "... shall specify the nature of such contempt."). Once again, this is a question on which there are differing views. The Committee acknowledges this, and, in particular, the comment that can be made to the effect that, if the Houses are to be trusted with the power to deal with contempts, there is no point in inviting the High Court to rule on particular cases of contempt. What we propose should not, however, be read as an invitation to the High Court to rule on decisions of the House.

Rather we have proposed what we see as a safeguard and one which is very carefully circumscribed so that the role of the Full High Court, and only the Full High Court, is not to review the conclusion of a House, but rather, if required to do so, to satisfy itself for the purposes of answering one question only, namely, whether the grounds stated in the warrant are capable of constituting a breach of privilege or other contempt. It therefore follows that should a House act on a ground which was plainly misconceived - and we hope this would never happen - then, so long as the terms of the warrant were conformable with the test that the matter stated was capable of constituting a breach of privilege or other contempt, that would be an end to the matter.

Recommendation 23

7.78 We therefore recommend that:

(a) Where a person is committed for breach of privilege or other contempt, the resolution of the House and the warrant for committal shall each state the grounds of the commitment;

(b) Where a person is committed for failure to pay a fine imposed by a resolution of one of the Houses, the further resolution for commitment and the warrant for committal shall state the grounds of the commitment;

(c) In each of the foregoing cases it shall be open to the Full High Court to declare that the grounds stated in the warrant for committal was not capable of constituting a breach of privilege or other contempt of the House;

(d) Such a declaration shall only be made by the Full High Court;

(e) Where the Full High Court makes such a declaration, it shall not be capable of making any ancillary order or orders for the purposes of giving effect to that declaration, compliance with the views expressed by the High Court in any declaration made by it being entirely a matter for the House in question.

The Privileges Committees' operations and the reputations of third persons

7.79 We think it necessary to say something on the position of persons whose reputations become an issue in a hearing before the Privileges Committee of the House or the Senate, but who are not directly concerned - as the subject of the complaint - in those proceedings.

7.80 The closest analogy we can think of is court proceedings. In those proceedings, where the reputation of a person becomes an issue and that person is not a party to the proceedings then, regardless of the gravity of the allegations and regardless of the extent to which his reputation may be harmed, no legal representation will be allowed to him. But generally, although not invariably, in such a case it is in the interests of at least one party to the proceedings, be they civil or criminal, to maintain the reputation under attack. It is understandable enough that courts will not permit intervention in support of a reputation. This could lead to endless protraction of the proceedings and to saddling parties to those proceedings with unnecessary costs. Moreover, our legal system proceeds on an adversary basis, whereas our Privileges Committees organise their affairs on an inquisitorial basis although with judicial or quasi-judicial overtones. There is a further difference between court proceedings and proceedings before a Privileges Committee. While court proceedings frequently attract wide publicity, we think it fair to say that the nature of Privileges hearings, the issues raised, and the forum which must finally dispose of those proceedings are likely to guarantee the widest possible media attention, and the widest possible media coverage, and consequently enhance risks of damage to the reputation of those whose reputations are called into question. If our earlier recommendations are adopted, persons or organisations whose actions form the subject matter of complaint will be able to be legally represented and to meet through their own lawyers any questions bearing on their reputations. But outsiders are in a wholly different position. If called as a witness, a person whose reputation is put at issue may be able to give an answer, even if only of a limited kind, to imputations made against his reputation. But it is quite possible he will be afforded no real opportunity to give an answer. And as matters now stand, a person who is named and is not a witness will have no opportunity to answer imputations against his reputation regardless of how damaging they are and how widespread the publicity given to them.

7.81 We do think this state of affairs should continue. We do not propose an open door policy but rather that there should be a discretion vested in Privileges Committees to permit representation to a person whose reputation may be substantially in issue, and to permit him to adduce evidence or to cross

examine witnesses, whether directly, or through his legal representative. We deliberately restrict our recommendations to individuals. We do so because of our concern to protect personal reputations and because it is damage to the reputations of individuals, rather than to corporate reputations, which is the more likely to arise before Privileges Committees. We emphasise that it is our intention that the proposed procedures be very much under the control of the Committee. Costs of legal representation, when allowed, should be governed by the considerations that apply to persons the subject of a complaint. This matter is encompassed within Recommendation 21(1).

Recommendation 24

7.82 We therefore recommend that:

> Where it appears to the Privileges Committee that the reputation of a person may be substantially in issue, the Committee may advise that person that his reputation may be substantially an issue and may permit him such rights as the Committee considers just in all the circumstances such as the right to attend private hearings (if any), to examine the transcript of any evidence taken in private, to adduce evidence, to cross examine witnesses, to make submissions, and for any or all of these or other purposes to be legally represented.

Expulsion of Members

7.83 The most drastic of sanctions available against Members is expulsion.

7.84 May describes the power to expel in these terms:

> "The purpose of expulsion is not so much disciplinary as remedial, not so much to punish Members as to rid the House of persons who are unfit for membership. It may justly be regarded as an example of the House's power to regulate its own constitution. But it is more convenient to treat it among the methods of punishment at the disposal of the House".[29]

7.85 Over the years, Members of the Commons have been expelled for a variety of reasons.[30] These include being in open rebellion (in 1715), forgery (1726), perjury (1702), frauds and breaches of trust (1720), misappropriation of public money (1702), conspiracy to defraud (1814), fraudulent conversion of property (1922), corruption in the administration of justice (1621), corruption in the administration of public offices (1711), corruption in the execution of duties of Members of the

House (in 1667, 1694 and 1695), conduct unbecoming the character of an officer and a gentleman (1796 and 1891), and contempts, libels and other offences committed against the House on various occasions. The last occasion when the House of Commons exercised its power to expel was in 1947. The offender was a Mr Allighan who was found guilty of a grave contempt. Mr Allighan had written an article for a newspaper in which he claimed some Members of the House of Commons were paid - in money or in kind - for leaking information. Ironically, the Privileges Committee found Mr Allighan guilty of the practice he had imputed to his colleagues. It said "In the case of Mr Allighan, this contempt was aggravated by the facts that he was seeking to cast suspicion on others in respect of the very matter of which he knew himself to be guilty, and that he persistently misled the Committee".[31] The publishers of the newspaper in which these allegations were printed were summoned before the Bar of the House and severely reprimanded.

7.86 The United Kingdom has no written constitution. There, under statute or under customary law, persons may be disqualified from serving in the Commons either by reason of what they are, or by reason of what they have done. The first category includes certain Members of the clergy, peers, minors, and persons disqualified by office or service. The latter category includes persons found guilty of corrupt or illegal practices at Parliamentary elections (who are disqualified for various periods according to the nature of the offence either for the constituency for which the election was held or for any constituency) and persons convicted of treason (who cannot be elected or sit or vote until they have suffered the allotted or any substituted punishment or have been pardoned). However, persons convicted of other offences, and regardless of the nature of the offence or punishment exacted, are not by virtue of that fact disqualified from being elected to or sitting in the Commons. Where a Member is convicted of such an offence it is for the House to judge whether he should be expelled from it.

7.87 In Australia the position is wholly different. Our Constitution provides specifically for qualifications of Members (by s.34) and for disqualification (by ss.44 and 45).

7.88 Under s.44 a person is incapable of being chosen or sitting as a Senator or Member of the House of Representatives who

> is under any acknowledgement of allegiance; obedience or adherence to a foreign power;
>
> is a subject or a citizen or entitled to the rights or privileges of a subject or citizen of a foreign power;
>
> is attainted [convicted] of treason;

has been convicted of any offence punishable under the laws of the Commonwealth or of the States by imprisonment for one year or longer;

is an undischarged bankrupt or insolvent;

holds any office or profit under the Crown, or any pension payable during the pleasure of the Crown out of any of the revenues of the Commonwealth; or

has any direct or indirect pecuniary interest in any agreement with the public service of the Commonwealth otherwise than as a Member and in common with the other Members of an incorporated company consisting of more than twenty-five persons.

7.89 By s.45 if a Member of the House of Representatives:

becomes subject to any of the disabilities mentioned in s.44;

takes the benefit whether by assignment, composition or otherwise of any law relating to bankrupt or insolvent debtors; or

directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State,

his place thereupon becomes vacant.

Sections 39 and 69 of the Commonwealth Electoral Act contain some further detailed provisions as to qualifications and disqualifications relating to sitting as a Member in either of the Houses. It is unnecessary to refer to the details of these provisions.

7.90 It will be seen that the Constitution makes detailed provision for disqualification from being or remaining a Member of Parliament. The provisions embodied in ss.44 and 45, and their automaticity of operation, should be contrasted with the position in the United Kingdom and most notably the consequences of conviction there for a criminal offence. Putting treason to one side, as we have said, conviction of a serious criminal offence does not of itself debar a person from

being or remaining a Member of the House of Commons, whereas in Australia, conviction of an offence punishable by imprisonment for twelve months or more automatically results in lifetime disqualification.

7.91 We earlier pointed out that on one occasion only has the power of expulsion been exercised by the Federal Parliament. The year was 1920, the House the House of Representatives, and the expelled Member Mr Mahon. On Thursday 11 November, 1920, Prime Minister Hughes moved, as a matter of privilege:

> "That, in the opinion of this House, the honourable Member for Kalgoorlie, the Honourable Hugh Mahon, having, by seditious and disloyal utterances at a public meeting on Sunday last, been guilty of conduct unfitting to him to remain a Member of this House and inconsistent with the oath of allegiance which he has taken as a Member of this House, be expelled from this House."[32]

The Prime Minister moved speedily as the speech in question had been given by Mr Mahon on the Sunday before the motion was put. It was a speech given at a public meeting on Richmond Reserve, Melbourne. In it, Mr Mahon had expressed sympathy for the Irish Republicans and opposition to British policy in Ireland. At the meeting a motion reportedly had been put and passed censuring the actions of the British Government and urging that Australia break its ties with Britain and constitute itself a republic. At this distance it is not possible to establish precisely what Mr Mahon said. He did not attend to answer the expulsion motion, and in those days the House did not have a Privileges Committee. No considered attempt was made to put before the House material for its examination. Assertions, and counter—assertions, were made. Apparently the Prime Minister had "affidavits," as he called them (more likely they were statutory declarations) from four journalists who had been at the meeting. He declined to read them and relied only on one passage from one affidavit which recorded Mr Mahon as saying:

> "The worst rule of the damnable Czars was never more infamous. The sob of the widow on the coffin would one day shake the foundations of this bloody and accursed Empire."

According to the Prime Minister this statement was completely corroborated by the other three affidavits. From the Prime Minister's long and passionate speech it seems that this statement, coupled with an attack on "those who are now obeying the orders of the King" who, so the Prime Minister said, were described by Mr Mahon as "thugs and murderers", constituted the

gravamen of the charge. Mr Mahon, he said "cannot attack the Empire and yet be loyal to his oath of allegiance". Taking the worst view of the case against Mr Mahon, his actions did not, we think, amount to a hanging matter. But the House thought otherwise. The Leader of the Opposition, Mr Tudor, moved an amendment to the motion to omit all words after "That", and substitute:

> "this House, whilst being opposed to all sedition and disloyalty and the subversion of constitutional means for the redress of grievances, is of opinion that the allegations made against the Honourable Member for Kalgoorlie, the honourable Hugh Mahon, should not be dealt with by this House for the following reasons:
>
> (a) The allegations made against the honourable Member do not concern his conduct in Parliament or the discipline of Parliament.
>
> (b) That Parliament is not a proper tribunal to try a charge of sedition arising from the exercise of civilian rights of free speech at a public assembly of citizens.
>
> (c) That the judicature is especially established and equipped and has ample power under the law to bring any person to public trial for the offence of sedition alleged against the honourable Member.
>
> (d) That every citizen so charged is entitled to a public trial by a jury of his peers, where he would have the right to exclude by challenge biassed persons from the jury panel, and that this fundamental principle of British justice should not be departed from in this case."

7.92 The matter was debated and the amendment defeated. When another amendment was about to be moved the debate was gagged and the Prime Minister's motion carried in a division on Party lines. A subsequent resolution declared the seat vacant. In the by-election which followed Mr Mahon stood for re-election; he was defeated.

7.93 Looking back to the Mahon case one is struck by these features: the speed with which the motion was brought on; the limited time for debate; the haste in which such an important matter was determined; and the vote on Party lines.

7.94 The Mahon case focusses on the danger inherent in the present system - the abuse of power by a partisan vote. This danger can never be eradicated and the fact that the only case in federal history when the power to expel was exercised is a case when, we think, the power was demonstrably misused is a compelling argument for its abolition. But the argument for abolition of the power to expel does not depend simply on the great potential for abuse and the harm such abuse can occasion. There are other considerations. Firstly, the detailed provisions in the Constitution to which we have referred cover many of the grounds which have attracted the use of the sanction of expulsion by the House of Commons. In short, we already have something approaching a statutory code of disqualifications. Secondly, it is the electors in a constituency or in a State who decide on representation. In principle, we think it wrong that the institution to which the person has been elected should be able to reverse the decision of his constituents. If expelled he may stand for re-election but, as we have said, the damage occasioned by his expulsion may render his prospects of re-election negligible, Thirdly, the Houses still retain wide powers to discipline Members. Members guilty of a breach of privilege or other contempt may be committed, or fined, (if our recommendation on this point is accepted). These sanctions seem drastic enough. They may also be suspended or censured by their Houses.

7.95 The most notorious expulsion case of recent times was the expulsion, in 1978, by the Indian Lok Sabha of Mrs Gandhi. The Lok Sabha invoked its penal powers on the basis that, so it was claimed, she had, in common with other persons, committed a breach of privilege and contempt of the House, inter alia, by causing obstruction, intimidation and harassment of officers collecting information for an answer to a question. She also refused to take an oath or make an affirmation before the Privileges Committee and allegedly cast aspersions on the Committee. It is well known that Mrs Gandhi survived this temporary fall in her political fortunes.

7.96 While we have found it a troubling question, our view is that the balance of the argument favours the abolition of the power in the Houses to expel Members. The contrary view may be put by saying that if Parliament can be trusted with its powers in relation to contempt, the Houses should retain the power to expel their own Members. It would be pointed out that our views may rely on an occasion wherein it might appear that the power was misused by the House of Representatives. Although the Mahon precedent is hardly encouraging, our conclusion on this matter does not rest on that case but rather on considerations of the general and worrying potential for abuse, on the specific constitutional provisions in Australia to which we have referred, and on the basic consideration that it is for the electors, not Members, to decide on the composition of Parliament. We therefore recommend:

Recommendation 25

That the power of the Houses to expel Members be abolished.

Consultations between the Privileges Committees of the Houses

7.97 Looking back over the history of complaints raised as breach of privilege or other contempts, one observes a number of cases which would, on their face, be of potential interest to each House, either because they dealt with Members in a generic sense or because they concerned the Parliament as a whole.

7.98 These considerations make the concept of a Joint Committee of Privileges an appealing one. But while there is much to be said for a Joint Committee as this should give rise to a common view on privileges questions, we think the balance of the argument is against the establishment of such a Joint Committee. We instance these problems. Firstly, to whom would the Joint Committee be responsible? Secondly, what would happen if the Senate took one view on a report by a Joint Committee, and the House took another? Thirdly, what of cases where something was said or done which affected both Houses equally but one House decided not to bother itself with the matter while the other took a far more serious view. These kinds of practical difficulties can be multiplied and they lead to the conclusion which we have already expressed. We think however, that there is much to be said for consultation between the Privileges Committees of the two Houses so that a more common view on privilege matters could develop. Moreover, we think there are obvious advantages in the interchange of views between Members of the two Committees.

7.99 There is already a model for joint consideration by separate Committees. Senate Standing Order 36 and House of Representatives Standing Order 28 permit the Publications Committees of the two Houses to confer, and this takes place very regularly. Indeed this is a common course and separate meetings of the Senate and House Publications Committees are the exception. Following joint meetings the practice is for the Chairmen of the two Committees to report to their Houses. The Committee believes that Standing Orders of both Houses should be amended to permit such consultation by Privileges Committees.

Recommendation 26

The Committee recommends:

> That the Standing Orders of each House be amended so as to permit the Privileges Committees of each House to confer with each other.

ENDNOTES

1. Transcript of Evidence, p801

2. Transcript of Evidence, pp867-8

3. Transcript of Evidence, pp422, 502, 633

4. And see s.71 of the Constitution: it could be argued that s.71 requires that only courts may exercise judicial functions.

5. Although there have been occasions on which press gallery passes have been withdrawn by the Presiding Officers.

6. The resolutions agreed to by the House of Representatives in the Browne and Fitzpatrick case explicitly recognised this:

> "1. That Raymond Edward Fitzpatrick, being guilty of a serious breach of Privilege, be for his offence committed to the custody of the person for the time being performing the duties of Chief Commissioner of Police at Canberra in the Australian Capital Territory or to the custody of the keeper of the gaol at such place as Mr Speaker from time to time directs and that he be kept in custody until the 10th day of September 1955, or until earlier prorogation or dissolution, unless this House shall sooner order his discharge.
>
> 2. That Mr Speaker direct John Athol Pettifer, Esquire, the Serjeant-at-Arms, with the assistance of such Peace Officers of the Commonwealth as he requires, to take the said Raymond Edward Fitzpatrick into custody in order to his being committed to and kept in custody as provided by this resolution.
>
> 3. That Mr Speaker issue his warrants accordingly."
> (Emphasis added) VP 1954-55/269-71

7. 1967 Commons Report, para. 193

8. S. Deb (2.6.42) 1806, 1818-9; S. Deb. (3.6.42) 1897; H. R. Deb. (3-4.6.42) 2187.

9. (Articles in The Sunday Australian and The Sunday Review of 2 May 1971', Report of Senate Committee of Privileges, PP 163(1971).

10. 'Report relating to an editorial published in the Sunday Observer of 26 February 1978', Committee of Privileges (House of Representatives), PP 120(1978)3-4.

11. H.R. Deb(10.6.55)1633.

12. Press statement issued by Prime Minister, 13 June 1955.

13. Pettifer, J.A., (ed.) House of Representatives Practice, A.G.P.S., Canberra, 1981, p668. (hereafter House of Representatives Practice)

14. Senate standing orders 438 ff.

15. V.P. 1920-21 /423, 425, 431. Mahon had spoken at a public meeting critical of actions of the British Government (in connection with Ireland). During debate on the motion, (in Mahon's absence) an amendment to the effect that Parliament was not a proper tribunal to try a charge of sedition arising in such circumstances was defeated.

16. Recommendations of the Select Committee on Parliamentary Privilege: Third Report from the Committee of Privileges (House of Commons) HC 417(1976-77)viii-ix (hereafter 1976-77 Commons Report)

17. House of Representatives Standing Orders 95, 96 and 97.

18. Senate Standing Orders 11, 438, 425 - 7

19. 1976-77 Commons Report, para. 10

20. See House of Representatives Practice, pp 671-674 Standing Order 26 of the House of Representatives and Standing Order 33A of the Senate.

21. 'Report relating to an article published in The Daily Telegraph 27 August 1971', Committee of Privileges (House of Representatives), PP 242(1971)9, 39.

22. PP 210 (1964-66) 9, 10, 11

23. Report upon articles in The Sunday Australian and The Sunday Review of 2 May 1971', Senate Committee of Privileges, PP 163(1971)8-9. It is understood that there has been no subsequent occasion on which this question has arisen.

24. PP 242 (1971) 9.

25. House of Representatives Practice, p. 674

26. R.v. Richards Ex parte Fitzpatrick and Browne 92 CLR 157-170. An application for special leave to appeal to the Privy Council was refused. The Privy Council considered the judgment of the High Court unimpeachable

27. The Speaker of the Legislative Assembly of Victoria v. Glass, (1871) LR 3PC 560 at 572.

28. 1811 14 East at 150.

29. May, p 139.

30. May, pp 139-40

31. HC 138 (1947), para 23

32. VP 1920-21, 431-3, H.R. Deb. (11.11.20), 6382-89.

CHAPTER 8

OFFENCES AGAINST PARLIAMENT

8.1 Offences of concern to Parliament fall into two broad categories. Firstly contempts of the Houses, which, as we explained in Chapter 3, include breaches of undoubted or specific privileges of Parliament - such as the rights and immunities conferred by Article 9 of the Bill of Rights - and any other act or omission which impedes or obstructs the operation of the Houses, and their Committees or which tends to do so, or which impedes or obstructs Members in the performance of their duties, or which tends to do so. Secondly, offences at statute or common law which may involve Parliament or its Members.

8.2 We will return to the first group. Before doing so, we will deal briefly with the other two.

Offences at statute or common law

8.3 It is a mistake to confuse offences against the powers, privileges and immunities of Parliament with offences that may involve Parliament or its Members. The two areas may overlap, but conceptually they are quite distinct. This may be illustrated by reference to the Crimes Act.[1] That Act provides for a number of offences which may involve Members, and which may be of direct concern to the protection by Parliament of its privileges. By s.28 it is an offence, by violence, threats, or intimidation, to hinder or interfere with the free exercise by any person of any political right or duty. By s.73A (1) it is an offence for a Member to ask for, receive or obtain any property or benefit for himself, or another, on any understanding that he will be influenced in the discharge of his duties. By s.73A (2) it is an offence to give any property or benefit to a Member to influence him in the discharge of his duties. The "electoral offences" provisions of the Commonwealth Electoral Act provide further examples of offences which may be of concern to Members.[2]

8.4 Acts falling within these provisions attract the ordinary process of the Federal criminal system. By this, we mean that, as with any breach of a Federal law, the decision to prosecute, and all steps taken thereafter by the Commonwealth law authorities, are part of the ordinary process of administration of the Federal criminal system. Parliament has no concern with these matters.

8.5 This does not mean that Parliament may not be directly concerned in the facts that attract the interest of the Commonwealth law authorities.

Clearly, any facts falling within s.73A (1), or s.73A (2) of the Crimes Act, or threats made against a Member within s.28 would, prima facie, constitue a serious contempt of Parliament as the gravamen of the criminal offence would involve an actual or attempted stifling of the discharge of a Member's duties to Parliament and the people. It would, therefore, be open to the Member's House to move against the offender, regardless of whether or not criminal proceedings had been taken. But this course would be open to the Member's House not because of any alleged or established breach of the criminal law, but because of the intrinsic nature of the acts themselves. Putting to one side the disqualifying provisions of the Constitution to which we have already referred, it may generally be said that the Houses are never concerned with breaches of the criminal law as such, but only with acts which may infringe their powers, privileges and immunities.

8.6 Some may say that where statute expressly provides for criminal sanctions, the Houses should not be able, independently, to take action. This view overlooks the existence of two quite separate functions, one being the administration of the criminal law and the prosecution of offenders, the other the protection of the privileges of Parliament.An example gives point to the differences in function. Assume that a Member had solicited a bribe on the promise that he would seek to get a favourable result from an investigative Committee of one of the Houses. Assume further that the facts became known, the Member confessed to the police, but there were delays in the bringing or finalisation of criminal proceedings against him. Should the Member's House have to await the outcome, and be itself prevented from dealing with the Member? We think not. This kind of situation has not arisen in the past, and, should it arise in the future, we think it should be left to the good sense of Parliament to resolve, with justice, any problems which may emerge. We express the same view as to common law offences that may encompass facts which may also infringe Parliament's privileges.

8.7 Common law offences which may involve Parliament or its Members is an area to which little attention has been given. This defect of scholarship - if such it be - is not one we intend to remedy. We content ourselves with observing that offences in this area which could involve Members, and so involve the Houses, would include conspiracy. For example, conspiracy to procure the giving of false evidence before a Parliamentary Committee or to prevent by menaces or physical restraint a Member from attending his House.

8.8 From what we have just said it will be understood that we do not think our terms of reference require or permit us to embark on an examination of offences at statute or common law which, while they may embrace facts which themselves amount to

infringements of Parliament's privileges, are properly characterised as criminal offences, and as so characterised truly extraneous to our terms of reference.

Offences against Parliament

8.9 We now return to breaches of acknowledged privileges, and other contempts. For reasons already given, we have decided that the exercise of the penal jurisdiction should remain with the Houses, and that there should be no attempt made to give an exhaustive statement of those matters which may constitute a contempt of Parliament. However because of the difficulties presented by this area of Parliamentary privilege, we think we should offer some further guidance regarding the essential elements of the contempt power. We have pointed out that contempt encompasses any act or omission which impedes or obstructs the operation of the Houses, and their Committees, or which tends to do so, or which impedes or obstructs Members in the performance of their duties, or which tends to do so. Parliament's contempt powers protect officers as well as Members and, as we have made clear, an act or omission may be treated as a contempt even though there is no precedent for the offence. The width and generality of the contempt power is, we acknowledge, unhelpful for those who search for precision. But, for the reasons we have given, we do not think this is an area which admits of precision. The common law offence of contempt of court forms a good analogy, including as it does any act which may tend to hinder the course of justice or show disrespect to the courts' authority - a fairly general charter.

Desirability of clarification

8.10 While the need for flexibility is undoubted, we think that we ought to go as far as possible in informing Members of Parliament, and the community, of the more important matters that may be punished as contempts. The extensive, varied and rich collection of precedents of actions and omissions which have been held over the years to constitute contempt, particularly in the House of Commons, is not helpful to those who seek some reasonably clear guidelines. These precedents are not always easy to apply, they are not well known to Members and others involved in the work of Parliament, and some are of doubtful relevance to the operation of today's Parliament. One eminent witness (then) Professor G.S. Reid, when asked whether the law (relating to privilege generally) was not in fact clearer than many people had claimed, replied:

> ".... it is not clear. It is easy to say that, but it is not clear to participants in Parliament, or either active observers of Parliament.

> Privilege is seen to be an esoteric mysterious area of parliamentary activity that gives rise to difficulty but which people really do not give time to. I think amongst the officials of Parliament, for example, over the years that I have watched Parliament, only a very small number have become really versed in all the difficulties and interpretations of the House of Commons and their applications in Australia.[3]

8.11 We outline hereunder major heads which cover areas where protection is, we believe, undoubtedly required. If the categories of contempt we now set out and the consequential recommendations are agreed, with the acknowledgement that they are made for guidance only, Parliament will have taken an important step and one which must benefit the institution itself, individual Members, and all involved with, and interested in, its work. We add, however the qualification that while the categorisation of contempts under heads is of some conceptual value it is - because of the very flexibility of the contempt power - of limited practical utility. The importance of categorisation rests more in the guidance it offers. In the interests of clarity we have deliberately employed the negative term in our recommendations under the heads below - ie., we have said what must not be done.

Independence of Members

8.12 The free and proper operation of the Parliament depends in a fundamental way on the freedom of its Members. This necessary freedom is linked to freedom of speech, however much more is written and spoken about freedom of speech than about the more general issue of the independence of Members.

8.13 The difficulty for the Committee, and for Members, is to distinguish what, in contemporary politics, must be put down to, and accepted as part of, the reality of political life, from that which can properly be considered an improper attempt to influence a Member. The traditional stress on the complete independence of Members, as do so many aspects of Parliamentary life, reflects the environment of the House of Commons of times long past, when party organization was either non-existent, or in a very primitive stage of development. These days, virtually without exception, Members are elected as nominees of parties, rather than as individuals elected on their personal merits. Both before and after election they are, as all the world knows, subject to varying degrees of party influence, discipline and pressure. The sanctions for those who disregard these realities can be severe. In practice some very difficult decisions may have to be made, bearing in mind the kind of issues that can arise, the emotions engendered, and the reality of party and group dynamics, both within the Parliament and in the extra-parliamentary processes.

In such matters restraint and realism will serve the Parliament better than an overly ready propensity to invoke whatever mechanisms may be available against persons offending or possibly offending. The issues may be considered under two heads: improper influence of a physical kind, and improper influence of a non-physical kind. But here - as in so much of human affairs - it is not easy to construct watertight compartments. For example, the borderline between a threat of violence, and its infliction, can be a very fine one. A necessary condition which must apply before action is taken in respect of an alleged offence is that the act in question must concern the Member in his capacity as a Member. This has been emphasised in the past[4] and is a very important condition if the community is to appreciate that all rights, immunities and protections are only enjoyed by Members in order to protect and support the proper operation of the Parliament - they are not personal perquisites of Members.

8.14 Improper influence includes bribery and the offer of inducements or benefits, and fraud, threat or intimidation. Such actions can be directed to influencing the voting of a Member, to influencing the views he might or might not express, or to attempting to secure his absence from Parliament. Inevitably, the circumstances of each case will be critical. A finding by Mr Speaker Jenkins on a matter raised on 8 November 1983 illustrated this point. Based on media reports, it was claimed that the Prime Minister had intimidated Government Members in the party-room consideration of policy on uranium mining. Mr Speaker referred to the principle of restraint followed in the House of Commons and noted that arrangements within political parties were unlikely to raise matters of contempt.[5]

8.15 We note, and endorse, the resolution of the House of Commons following an inquiry by its Privileges Committee in 1947 involving a Member (Mr Brown) who had been Parliamentary General Secretary of the Civil Service Clerical Association - a position which involved him in a contractual relationship with the Association and for which he was paid. The inquiry arose out of a dispute between Mr Brown and the Association. The House of Commons resolved that:

> "... it is inconsistent with the dignity of the House, with the duty of a Member to his constituents, and with the maintenance of the privilege of freedom of speech, for any Member of this House to enter into any contractual agreement with an outside body, controlling or limiting the Member's complete independence and freedom of action in Parliament or stipulating that he shall act in any way as the representative of such outside body in regard to any matters to be

> transacted in Parliament; the duty of a Member being to his constituents and to the country as a whole, rather than to any particular section thereof".[6]

8.16 Improper influence by physical means, as by physical violence or physical constraints inflicted on a Member as a Member clearly amounts to a contempt. Such actions would almost without exception (we can think of none) constitute criminal offences.

8.17 Our recommendations in this area reveal the inherent tension between providing detail and retaining flexibility. We note however that our recommendations concerning defamatory contempts should help assuage the concern of those who might be concerned at the scope of the contempt power. We also think the general principles of restraint expounded by us in relation to the exercise of the penal jurisdiction will be of substantial assistance in the assessment of complaints under this head. Finally, we note that there has also been a number of cases in State Parliaments of interest in this area.

Recommendation 27

We therefore recommend that guidelines be adopted by the Houses pointing out that the following matters may be treated as contempts:

> Interference with the Parliament
>
> > A person shall not improperly interfere with the free exercise by a House or a Committee of its authority, or with the free performance by a Member of his duties as a Member.
>
> Improper influence of Members
>
> > A person shall not, by fraud, intimidation, force or threat of any kind, by the offer or promise of any inducement or benefit of any kind, or by other improper means, influence a Member in his conduct as a Member, or induce him to be absent from a House or a Committee.

Molestation of Members

> A person shall not inflict any punishment, penalty or injury upon or deprive of any benefit a Member on account of his conduct as a Member or engage in any course of conduct intended to influence a Member in the discharge of his duties as a Member.

Contractual arrangements, etc.

> A Member shall not ask for, receive or obtain, any property or benefit for himself, or another, on any understanding that he will be influenced in the discharge of his duties as a Member, or enter into any contract, understanding or arrangement having the effect, or which may have the effect, of controlling or limiting the Member's independence and freedom of action as a Member, or pursuant to which he is in any way to act as the representative of any outside body in the discharge of his duties as a Member.

Orders of the Houses and Committees

8.18 In the performance of their functions there will be many occasions on which the Houses make orders, and it is imperative that there be means of ensuring compliance with such orders. (The House of Representatives Practice at pp. 653-4, and May, 20th Ed., at pp. 145-7 expound on the circumstances in which disobedience of an order may be, and has been, pursued as a contempt or possible contempt). Failure to comply with a House's orders, or orders made by a Committee, has not featured as prominently as some other forms of contempt. However its significance hardly needs elaboration - suffice it to say that without this power the Houses could expect to be continually frustrated in the performance of their duties.

8.19 There will be occasions when the recipient of an order of a House may either not be able to comply with it (for example he might not possess documents sought) or when there is reason for doubting the order's validity. Therefore any recommendation must be qualified to take account of circumstances which constitute a reasonable excuse for non-compliance. In order to ensure compliance with orders properly given, there must also be a capacity to deal with persons who might obstruct or interfere with a person carrying out an act on behalf of a House or Committee.

8.20 The power of properly constituted and authorised Committees to be able to seek and obtain information is absolutely essential to their operations and this power must be enforceable. The Committee is aware that, in the very great majority of cases, any problems that may be encountered during the conduct of an inquiry will be resolved in one way or another before the ultimate force of the penal jurisdiction comes into play. Crown privilege and conflict between the Executive's claim to uphold that privilege with a House or Committee seeking information is considered later,[7] and, other than to acknowledge that it may be an issue in respect of Committee operations, the Committee has nothing to add here to the views expressed below. It emphasises again that the capacity to pursue and determine a matter as a possible contempt is that of the Houses, rather than Committees, which may only report the circumstances to the relevant House. There are good reasons for this, in terms of the status of Committees as creatures of the Houses, and in terms of the opportunities for the filtering of, and possible resolution of, any problems. The protection of witnesses is dealt with in detail in Chapter 9 where we make specific recommendations concerning the rights and protection of witnesses. Nevertheless we include offences concerning witnesses in our enumeration of contempts as the Houses themselves and Committees must be able to pursue problems involving witnesses.

Recommendation 28

We therefore recommend that guidelines be adopted by the Houses pointing out that the following matters may be treated as contempts:

Disobedience of orders

A person shall not, without reasonable excuse, disobey a lawful order of either House or of a Committee.

Obstruction of orders

A person shall not interfere with, or obstruct, another person, who is carrying out a lawful order of either House or of a Committee.

Interference with witnesses

A person shall not, by fraud, intimidation, force or threat of any kind, by the offer or promise of any inducement or benefit of any kind, or by other improper means, influence another

person in respect of any evidence given or to be given before either House or a Committee, or induce another person to refrain from giving such evidence.

Molestation of witnesses

A person shall not inflict any penalty or injury upon or deprive of any benefit another person on account of any evidence given or to be given before either House or a Committee.

Offences by witnesses

A witness before either House or a Committee shall not:

(a) without reasonable excuse, refuse to make an oath or affirmation or give some similar undertaking to tell the truth when required to do so;

(b) without reasonable excuse, refuse to answer any relevant question put to him when required to do so; or

(c) give any evidence which he knows to be false or misleading in a material particular, or which he does not believe on reasonable grounds to be true or substantially true in every material particular.

A person shall not, without reasonable excuse:

(a) refuse or fail to attend before either House or a Committee when summoned to do so; or

(b) refuse or fail to produce documents or records, or to allow the inspection of documents or records, in accordance with a requirement of either House or of a Committee.

A person shall not wilfully avoid service of the summons of either House or of a Committee.

A person shall not destroy, forge or falsify any document or record required to be produced by either House or by a Committee.

Unathorised publication of material and false reports of proceedings

8.21 The unauthorised publication of Parliamentary Committee material, such as draft reports, is a breach of the standing orders and may be pursued as a matter of contempt. A number of instances of this problem have occurred in the Commonwealth Parliament.

8.22 It was put to us that this category of contempt should be abandoned. We do not agree. Reports and draft reports are the province of a Committee until the time comes for their publication. Drafts may be altered, findings reversed, criticisms of individual actions muted or expunged. Premature and unauthorised publication may devalue or distort a Committee's work, may unfairly damage individual reputations, and, possibly influence a Committee's ultimate findings. We do not think any incentive should be given to the breaching of the private deliberations of Committees.

8.23 We do stress, however, that we recognize the authority of Committees to authorise for publication material such as discussion papers, and would not want our recommendation on this matter to in any way stifle media interest in Committee activity. The Committee also notes that there are usually ample opportunities for media representatives to attend public hearings and follow the work of parliamentary Committees, and that an effective prohibition on the reporting of unauthorised material is unlikely to prove a real difficulty to a serious investigative journalist.

8.24 A related point concerns false or misleading reports of proceedings of a House or Committee. Readers of Hansard will know that there are numerous occasions when Members claim to have been misreported and misrepresented. Nevertheless, the records of the Commonwealth Parliament do not reveal that any claim, in respect of either House or any Committee has ever been resolved as a matter of contempt. It may well be that such a case will never arise. However, wilful misrepresentation of proceedings can have grave consequences - the public may be misled on important issues and public debate become distorted.

Recommendation 29

We therefore recommend that guidelines be adopted by the Houses pointing out that the following matters may be treated as contempts:

Publication of in camera evidence

> A person shall not publish any evidence taken in camera by either House or by a Committee without the approval of that House or Committee.

Premature publication of reports

> A person shall not publish any report or draft report of either House or a Committee, without the approval of that House or Committee.

False reports of proceedings

> A person shall not wilfully publish any false or misleading report of the proceedings of either House or of a Committee.

Protection of the Houses from physical disturbance/disruption

Direct disruption

8.25 It is patently obvious that the Parliament must be protected from physical disruption and obstruction. There is no doubt that the Houses are currently able to protect themselves, and as well there is the undoubted general application of the criminal law within Parliament House.[8] In a recent case, appealed to the A.C.T. Supreme Court, the chain of authority down to the local police from the Presiding Officers in respect of the precincts was endorsed, and the conviction of a person charged with having obstructed a police officer because of his failure to obey a request to move from the landing area at the front steps (during a demonstration) was upheld.[9] As all Members would be aware, the practice is to deal with certain actions, although they may technically constitute contempts, either through administrative action under the authority of the Presiding Officer - for example the removal of persons from the galleries, or by remitting the matter to the law authorities for criminal proceedings. These matters are not usually pursued by the ordinary mechanism for the investigation and determination of breaches of privilege or contempts, and there are very good reasons for this. Many cases may in fact be of a trivial nature and the employment of the mechanism of inquiry by the Privileges Committee would be entirely inappropriate, perhaps serving to provide extra publicity or notoriety to the perpetrator of an essentially insignificant action. Other cases, perhaps quite serious, may, for varying reasons, such as the nature of the matter - for example an assault - be best pursued through the *ordinary course of the law.*

8.26 But in this area we are concerned on two points: firstly there is some doubt as to the extent of the application of certain statutory provisions - for example the application of the Public Order (Protection of Persons and Property) Act within the Chambers, secondly the absence of an authoritative delineation of the precincts of Parliament.[10] The Committee considers that both points of concern should be remedied. The question of the application of particular laws could be achieved either by the amendment of statutes, which have in themselves no special application to Parliament, or, should a statute be enacted to give effect to certain of our recommendations, specific provisions could be incorporated in it. The delineation of the precincts (both in the present Parliament House and in the new building) could be done either by statute, or by resolutions by the Houses. The difficulty with resolutions is that they would essentially be no more than the expression of opinions of the Houses, and accordingly delineation of the precincts by statute is preferable. Any delineation of the precincts by statute should contain a provison for variation in the future, and also some form of delegation for the Parliament, or the Presiding Officers, to be able to declare that a particular place is or is not to be considered a part of the precincts. This would obviate the necessity for amendment to any statute to cover, for example, the temporary occupation of another building for parliamentary purposes.

Recommendation 30

We therefore recommend that a guideline be adopted by the Houses pointing out that the following matter may be treated as a contempt:

Disturbance of Parliament

(1) A person shall not wilfully disturb a House or a Committee while it is sitting, or wilfully engage in any disorderly conduct in the precincts of a House or a Committee tending to disturb its proceedings or impair the respect due to its authority.

Recommendation 31

We therefore recommend:

That:

(1) the areas of doubt concerning the application of particular laws within the precincts be clarified and resolved;

(2) the precincts of the present Parliament House and of the new Parliament House, be defined authoritatively.

Indirect disruption

8.27 Indirect disruption can have a serious impact on the operation of the Parliament. In 1975 in London a two week strike over a pay claim by civil servants (not apparently staff Members of the Parliament) led to picketing of the Houses of Parliament. Heating services were affected as was the delivery of parliamentary publications. However the Parliament continued to operate. When the delivery of mail was threatened a matter of privilege was raised. Mr Speaker ruled that he knew of no precedents for the House having reached a decision upon, or indeed even having formally considered, a similar case. He went on to note the reluctance in recent years to extend the limits of contempt and, while noting the importance of the issues involved, did not accord precedence to a motion in respect of the matter. In 1978, due to an industrial dispute, deliveries of mail to, and despatch of mail from, Parliament House, Canberra, ceased and this action was raised as a matter of privilege in the House. Mr Speaker noted that the strike was not directed towards Parliament but affected the whole of Canberra. He concluded that

> "although important issues are involved affecting the efficiency and workings of the House and its Members, in this case the matter raised does not constitute a prima facie case of breach of privilege."[11]

8.28 We agree with the views expressed by the two Speakers. While allowing for very exceptional cases which may possibly arise in the future, our general view is that Parliament should be very reluctant to extend the contempt power, and should, in particular, be exceedingly restrained when it comes to actions which may affect the operation of Parliament but are not directed against Parliament.

Service of process within the precincts

8.29 There are ample precedents for the service, or attempted service, of process within parliamentary precincts to be dealt with as contempt.[12] The Committee considers that the important issue here is not so much the actual service of process, but rather the other call on a Member or an officer's services which it may represent. In assessing this issue, the Committee acknowledges that the prohibition may be seen as sometimes serving to obstruct the reasonable aspirations of others - for example a party to a proceeding desiring the attendance of a witness. In the ordinary course of

administration, quite apart from the activities of Members, officers of the parliamentary departments may sometimes need to receive, and be prepared to receive, subponeas (for example in respect of cases in the Family Law Court which may involve staff Members). Nevertheless it would be most unfortunate, indeed unacceptable, if process servers were able to harass or obstruct Members or officers. The Committee has therefore concluded that this matter ought still be able to be treated as an offence. The reality is that this is not a major issue.

Recommendation 32

> We therefore recommend that a guideline be adopted by the Houses pointing out that the following matters may be treated as contempts:
>
> Service of writs, etc.
>
> > A person shall not serve or execute any criminal or civil process in the precincts of either House on a day on which that House sits except with the consent of that House.

8.30 Finally, it is necessary that, in giving guidance on those matters which may attract the exercise of the Parliament's penal jurisdiction, there must be a capacity to pursue attempts or conspiracies made or entered into in respect of matters falling within the recommendations in this chapter. We add, however that some do not easily admit of attempts or conspiracies. For example, it is difficult in practice to see how a witness could be guilty of an attempt to refuse to be sworn - he either takes the oath or makes an affirmation, or does not.

Recommendation 33

We therefore recommend that guideline be adopted by the Houses pointing out that the following matters may be treated as contempts:

> Attempts and conspiracies
>
> > Generally, attempts or conspiracies made or entered into in respect of matters set out in the foregoing recommendations may be dealt with as contempts.

8.31 The Committee wishes to acknowledge the valuable assistance it has had from Senator Button's Offences against the Parliament Bill 1981. The greater part of the specific elements in our recommendations have been taken from that Bill.

ENDNOTES

1. Crimes Act 1914
2. Commonwealth Electoral Act 1918, Part XVII
3. Transcript of Evidence, p 608-9
4. House of Representatives Practice, p 643 May, p 143; 1967 Commons Report, para 12
5. H.R. Deb. (8.11.83) 2362; (9.11.83) 2460-1
6. Journals of the House of Commons. 15 July 1947
7. Paragraphs 9.11-9.15
8. Rees v. McKay, 1975 25 FLR, 228; Bradlaugh v. Gosset (1884) 12 QBD
9. O'Dea v. Castle No. SC 1305 of 1982
10. Transcript of Evidence, pp 243, 319-21, 331, 49-51
11. H.R. Deb (15.3.78)760
12. May, p 54-5

CHAPTER 9

THE CONDUCT OF PARLIAMENTARY INVESTIGATIONS

9.1 The Commonwealth Parliament's committee system, particularly that of the Senate, has developed to a high level, and this development seems likely to continue to increase. The increase over the years of its importance may be gauged by the following figures; between 1901 and 1969 an average of eight reports were presented by committees each year to the Parliament; for the period 1970 to 1975 the figure increased to 56; and for the period 1976 to 1982 it rose to 76. (These figures exclude non-investigatory committees such as the Publications Committee in its ordinary role). We have dealt elsewhere with contempt of committees and with the consequences of such contempt. Here we are concerned with two separate matters. The protection of witnesses, and the rights of witnesses.

Protection of Witnesses

9.2 Witnesses before properly constituted committees of the Parliament are absolutely protected from prosecution or suit for defamation in respect of their evidence. This derives, as does the freedom of speech of Members, from Article 9 of the Bill of Rights:

> "Such persons may be regarded as being participants to that extent in proceedings in Parliament, which, as Article 9 of the Bill of Rights declares, 'ought not to be impeached or questioned in any court or place out of Parliament."[1]

Standing orders 390 and 362 of the Senate and the House, respectively, provide that witnesses before the Houses, and their committees:

> "... are entitled to the protection of the [Senate/House] in respect of anything that may be said by them in their evidence."

Furthermore, as we have already pointed out, it is a contempt for any person to seek to interfere with a witness, by intimidation force or threat, or to inflict any injury on a witness in consequence of his having given evidence before a committee. Unquestionably, a committee has full powers to treat such matters as contempt. The question is; are the existing powers sufficient? Is it sufficient to rely on committees to protect witnesses by taking their case to the relevant House; or is some means of protection required? The 1972 *Greenwood* - Ellicott report, which we have already mentioned, observed:

> "It is difficult to speak of the standing orders, by themselves, as affording to witnesses legal rights. A right is only of this character if it is enforceable in a Court of law. Standing orders can, as indicated, create procedures designed to protect witnesses, but a breach of those standing orders is, of itself, a matter for the House."[2]

9.3 In the United Kingdom, the Parliament, as long ago as 1892, thought that other means of protection should be available to witnesses. In that year the United Kingdom Parliament enacted the Witnesses (Public Inquiries) Protection Act. That act provides that every person who:

> "...threatens, or in any way punishes, damnifies, or injures, or attempts to punish, damnify, or injure any person for having given evidence upon an inquiry, or on account of the evidence which he has given upon any such inquiry, shall, unless such evidence was given in bad faith, be guilty of a misdemeanour, and be liable, on a conviction thereof...",

is liable to be fined or imprisoned. By that Act it is also provided that the court should have power to award costs and compensation to a person who has been injured. Inquiries, under the Act, include Parliamentary committee inquiries.[3]

9.4 In 1980, the House of Representatives Committee of Privileges, following on complaints concerning the treatment of a witness who had given evidence to a committee, had this say:

> "The Parliament has a clear responsibility to monitor Executive Administration closely. It does so to a large extent through its committees whose activities depend largely on the availability and willingness of competent witnesses to appear before them. If the Parliament fails to provide the protection to which these witnesses and prospective witnesses are entitled, the effectiveness of the committees, and through them, the Parliament and the nation will suffer....
> The committee believes that the Parliament should consider the enactment of a Parliamentary Witnesses Protection Act which would both provide for the prosecution of persons who tamper with, intimidate or discriminate against witnesses who give (or have given) evidence before a Parliamentary

> Committee or the House; and also provide a statutory cause of action in which witnesses who have suffered intimidation or discrimination would have the right to sue for damages those responsible...."[3]

9.5 If our earlier recommendations are accepted, in the exercise of the penal jurisdiction the Houses will have a power to fine, or to imprison for a period not exceeding six months. But, as we have observed, there is an inherent reluctance in the Houses to use real penal sanctions. We think the position of witnesses demands special attention, and that legislation of the kind which exists in England and as suggested by the 1980 committee should be enacted. If our view on this question is accepted it would mean that there would co-exist the power to treat interference with witnesses as contempt together with a specific sanction under the criminal law. We do not think that co-existence of these two sanctions presents real practical difficulty. Such sanctions have co-existed in the United Kingdom since 1892, without so far as we know, occasioning trouble. In our own Parliament, by virtue of sections 19 and 32 of the Public Accounts Committee and the Public Works Committee Acts, respectively, statutory form is given to the protection of witnesses before those committees, yet these provisions appear to have created no problems. Should any question arise in the future as to whether a matter should be treated as a contempt, or whether there should be a prosecution, we think it should be left to the good sense of the committee in question and its House to resolve. Certainly, we do not think that double sanctions should apply.

9.6 Turning to compensation, where a person suffers as a result of giving evidence to a committee, and suffers as a result of the deliberate actions of others, should he not have some form of redress available to him? We do not suggest that he should have the right of action for injured feelings, but we do say that if a witness has suffered damages quantifiable by the courts, such as loss of a job, or loss of an opportunity for advancement, he should have quite independently of the outcome of any prosecution the right to sue for damages in the civil courts. We think too that the existence of this further remedy may tend to dissuade some who, in future, might be minded to penalise witnesses.

Recommendation 34

We therefore recommend:

(1) <u>That Parliament enact a Witnesses Protection Act.</u>

(2) That in such act it should provided that anyone who threatens or punishes or injures, or attempts to threaten or punish or injure, or who deprives of any advantage (including promotion in employment) or who discriminates against a witness by reason of his having given evidence before any committee shall be guilty of an offence and shall be liable to damages at the suit of that witness which may be awarded by the Court before which a person may be convicted of such an offence, or awarded in civil proceedings brought by the witness.

(3) Those convicted be punishable by imprisonment for a maximum period of twelve months, or a maximum fine of $5,000 for an individual, and $25,000 for a corporation.

9.7 We have two further observations. Firstly, we think it appropriate that the maximum period of imprisonment should be more than the maximum period of six months as recommended in the exercise of the penal jurisdiction. This follows because we would expect that prosecutions would be taken in serious, not trivial cases, and because prosecutions before courts have all the judicial protections available in the courts, some of which, necessarily, are not available in the exercise of Parliament's penal jurisdiction. Secondly, we think that the question as to the measure of damages in any action brought by a witness is one which is best left to the courts who have had vast experience in such matters.

Rights of Witnesses

9.8 We now turn to the subject to the rights of witnesses who appear before committees.

9.9 The development of the committee system in Parliament in recent years has resulted in the accumulation of a great deal of experience in the operation of Parliamentary Committees. Generally speaking - the special case of Privileges Committees excepted - the committees of Parliament have adopted procedures which enable due regard to be paid to the rights of witnesses.

9.10 We do not propose to provide a detailed analysis of the recommendations which follow, since we think they are self explanatory. They are based substantially on a statement of Senate practice supplied by the Senate department and they provide, we think, a sound set of guidelines. We acknowledge that as guidelines they will not be universally applicable - for example, to the Joint Committees on Public Works and of Public Accounts because of the provisions of sections 23 and 11 of the respective acts regulating those committees.

> the matter. Where the committee is satisfied that those facts disclose that a witness may have been improperly influenced or subjected to or threatened with penalty or injury in respect of his evidence, the committee shall report those facts to the Senate/House/either House.

Crown or executive privilege

9.11 Over the years, in Parliament, and indeed in the courts, clashes have arisen between the claim of the Executive to confidentiality and the claim of others to know the facts. We are here concerned with clashes between the Executive and the Houses, and more particularly between the Executive and Committees, since while committees are creatures of the Houses and can only report back to their Houses, it is at that level that clashes are most likely to take place.

9.12 Much has been written and said on this issue. And while clashes most certainly have occurred, and whilst these past such clashes concerned matters of real importance, and while the question as to the proper balance between the Executive and Parliament is one of very great importance, we observe that there has yet to be a major constitutional crisis resulting from such clashes. This may not be a comforting observation because it does not exclude the possibility of such a crisis arising in the future. Thinking in this area has evolved considerably in recent times. In particular, there have been major developments with regard to claims for crown privilege in respect of court proceedings. In the leading case Sankey v. Whitlam and others[5] simply put, it is evident that the trend has been away from ready recognition of claims for crown privilege and towards the position where the High Courts asserted its rights to examine documents in dispute in order to determine itself from the documents whether or not the claims should be upheld - a case of competing "public interest" considerations being weighed. We would expect that a similar evolution in thinking might be evident in respect to future claims by the Parliament. This is frankly a presumption on our part and one that may not prove correct. What are the alternatives? There are two. Firstly, to allow matters to stand as they are; secondly, to propose means for resolution of future crises.

9.13 Some Parliaments have mechanisms for resolving disputes between the Executive and the Parliament concerning the production of executive documents, or the provision of information by members of the Executive, or by public servants. We instance the Parliamentary Powers and Privileges Act of Papua New Guinea and the Legislative Assembly (Powers and Privileges) Ordinace of the Northern Territory. By these laws procedures are provided to the effect that if an objection is taken to the answering of questions or the production of documents the matter is not proceeded with for a specified period. The Speaker or the

Chairman reports the matter to the National Executive Council (in Papua New Guinea) or to the Administrator (in the Northern Territory) and asks whether the objection is supported. It is then for the Head of State, within a fixed period, to certify whether it is or is not. If he certifies that it is, that is an end to the matter. If he declines to certify, the documents must be supplied or the information given. While there is some superficial attraction to such procedures, we do not think that these kind of procedures, or any other kind of procedures involving any concession to Executive Authority, should be adopted, as implicitly such a course would involve a concession which the Commonwealth Parliament has never made - namely, that any authority other than that of either House of Parliament ought to be the ultimate judge of whether or not a document should be produced or information given.

9.14 In this area we think the best course is to leave matters as they are. Some assistance will be found in the guidelines we have just proposed (see in guideline 14), and we are aware of very detailed proposed guidelines for official witnesses issued by the Government in 1978, which we understand to be currently under revision.

9.15 Guidelines may reduce the area of contention to a more narrow confine; but they can never be eliminated. This follows from the different functions, the inherent characteristics, and the differing interests of the Parliament and the Executive. In the nature of things it is impossible to devise any means of eliminating contention between the two without one making major - and unacceptable - concessions to the other. It is possible that some third body could be appointed to adjudicate between the two, but such a course, quite rightly, neither would find acceptable. We think therefore that in the end the resolution in this area of clashes between Parliament and the Executive - a quintessentially political issue - must be left to be resolved through the political process.

Rather, in the ultimate, procedural questions such as whether evidence should be heard in camera, the degree to which counsel should be involved, and the admissibility of questions must be left to the committees and beyond them to the Houses. We believe that committees would take care to have due regard to the rights of those who appear before them. We think it likely that if in future committees were to become too intensely inquisitorial, to use the words of one witness, or to display continuing disregard for the reasonable expectations of witnesses, their standing as microcosms of the Houses, and consequently the standing of the Houses would be devalued and their actions the subject of public scrutiny and of public criticism. The importance of public scrutiny and of public criticism to redress abuses in this area should never be underestimated.

Recommendation 35

We therefore recommend:

> That, in principle, guidelines to the following effect (allowing for all necessary or desirable modifications that circumstances may require or suggest) be adopted:
>
> That, in their dealings with witnesses, all investigatory committees of the Senate/House of Representatives and joint committees of the Parliament shall observe the following procedures:
>
> (1) A witness shall be invited to attend a committee meeting to give evidence. A witness shall be summoned to appear only where the committee has resolved that the circumstances warrant the issue of a summons.
>
> (2) A witness shall be invited to produce documents or records relevant to the committee's inquiry, and an order that documents or records be produced shall be made only where the committee has resolved that the circumstances warrant such an order.
>
> (3) A witness shall be given reasonable notice of a meeting at which he is to appear, and shall be supplied with a copy of the committee's terms of reference and an indication of the matters expected to be dealt with during his appearance. Where appropriate a witness may be supplied with a transcript of relevant evidence already taken in public.
>
> (4) A witness shall be given the opportunity to make a submission in writing before appearing to give oral evidence.

(5) A witness shall be given reasonable access to any documents or records which he has submitted to a committee.

(6) A witness who makes application for any or all of his evidence to be heard in camera shall be invited to give reasons for such application, and may do so in camera. If the application is not granted, the witness shall be given reasons for that decision in public session.

(7) Before giving any evidence in camera a witness shall be informed that the committee may subsequently decide to publish or present to the Senate/House/either House the evidence and that either House has authority to order the production and publication of evidence taken in camera.

(8) A committee shall take care to ensure that all questions put to witnesses are relevant to the committee's inquiry and that the information sought by those questions is necessary for the purpose of that inquiry.

(9) Where a witness objects to answering any question put to him on any ground, including the grounds that it is not relevant, or that it may tend to incriminate him, he shall be invited to state the ground upon which he objects to answering the question. The committee may then consider, in camera, whether it will insist upon an answer to the question, having regard to the relevance of the question to the committee's inquiry and the importance to the inquiry of the information sought by the question. If the committee determines that it requires an answer to the question, the witness shall be informed of that determination, and of the reasons for it, and shall be required to answer the question in camera, unless the committee resolves that it is essential that it be answered in public: Where a witness declines to answer a question to which a committee has required an answer, the committee may report the facts to the Senate/House/either House.

(10) Where a committee has reason to believe that evidence about to be given may reflect on a person, the committee shall give consideration to hearing that evidence in camera.

(11) Where a witness gives evidence in public which contains reflections on a person or an organisation and the committee is not satisfied that it is relevant to the committee's inquiry the committee may give consideration to ordering that the evidence be expunged from the transcript of evidence, and to resolve to forbid the publication of that evidence.

(12) Where evidence is given which reflects upon a person, that committee may provide a reasonable opportunity for the person reflected upon to have access to that evidence and to respond to that evidence by written submission or appearance before the committee.

(13) A witness may make application to be accompanied by counsel and to consult counsel in the course of the meeting at which he appears. If such an application is not granted, the witness shall be notified of reasons for that decision. A witness accompanied by counsel shall be given reasonable opportunity to consult counsel during a meeting at which he appears.

(14) A departmental officer shall not be asked to give opinions on matters of policy, and shall be given reasonable opportunity to refer questions asked of him to his superior officers or to the appropriate Minister.

(15) Reasonable opportunity shall be afforded to witnesses to request corrections in the transcript of their evidence and to put before a committee additional material supplementary to their evidence.

(16) Where a committee has any reason to believe that any witness has been improperly influenced in respect of evidence before a committee, or has been subjected to or threatened with any penalty or injury in respect of any evidence given, the committee shall take steps to ascertain the facts of

ENDNOTES

1. May, p88.

2. Greenwood and Ellicott, op.cit p18.

3. Witnesses (Public Inquiries) Protection Act, 1892

4. 'Report relating to the alleged discrimination against and intimidation of Mr David E. Berthelsen in his public service employment because of evidence given by him to a Sub-committee of the Joint Committee on Foreign Affairs and Defence', Committee of Privileges (House of Representatives), PP 158 (1980)12.

5. (1978) 142 CLR 62-4.

CHAPTER 10

IMPLEMENTATION OF THE COMMITTEE'S RECOMMENDATIONS

10.1 In our view, in is unarguable that, if our Recommendations are supported by Members, they should be implemented. To do otherwise, and to consign this report to gathering dust on a shelf specially reserved for studies into *such arcane matters as Parliamentary Privilege would be to* acknowledge that the Committee's work has been pointless and that it is futile to contemplate changes to the law and practice of Parliamentary privilege, and the means of enforcing Parliaments' privilege. Nor is any answer to be found in deferral or in the reference of our Recommendations to some other Committee for a further report. The issue of change cannot be avoided. We do not advocate change for the sake of change but only when after careful analysis we think change is needed, so that the law and practice of Parliamentary Privilege reflects the needs of our times and of Parliament as the ultimate custodian and protector of the rights of the Australian people. It is for Members of Parliament, acting in the best interests of the people of Australia and Parliament, to make the ultimate decision on our recommendations. We do not suggest this decision should be rushed, and it is for this reason that we take the step of putting before Parliament an Exposure Report so that the most careful consideration can be given to our recommendations before they are debated. But we express the view as forcefully as we can that once the debate has taken place, then if Parliament's opinion favours our recommendations no time should be wasted in implementing them.

10.2 How should our recommendations be implemented? A distinction needs to be drawn between those recommendations which change the law itself and truly fall within the words of s.49 of the Constitution - "the powers, privileges and immunities of the Senate and the House of Representatives", and matters related to those powers, privileges and immunities but not truly forming part of the substance of that concept. Where the subject matter of a recommendation has its source in the law of the land, that is, where it falls within the Constitutional expression "powers, privileges and immunities", change can only be made by statute. Although s.49 says that the powers, privileges and immunities of the Houses shall be such as are "declared" by Parliament, it does not mean declared by some form of resolution of the Houses. It will be recalled that as long ago as 1704 it was agreed and established that the House of Commons could not by any resolution "create to themselves any new privilege". It would require very clear words in the Constitution to give to the Houses the power to alter their privileges by resolution. Effectively, this would amount to legislation by resolution which is not only contrary to the *forms and procedures of the House of Commons, but is*

fundamentally inconsistent with the Constitutional processes of this country. Where s.49 refers to a declaration of the "Parliament" by this it means the Parliament as constituted by s.1 of the Constitution as consisting of both Houses and the Queen. If the position were otherwise, the singular consequence would follow that one of the Houses, by resolution, could greatly extend its privileges and could do so in a way that impinged on the rights of Australian citizens. Should any residual doubt remain, we think it should be set at rest by the words of the High Court in R. v. Richards, ex parte Fitzpatrick and Browne (1955) 92 CLR 157 at 164. In its joint judgment the High Court said this:

> "... s.49 says that, until the powers, privileges and immunities of the Houses are declared by act of Parliament, the powers, privileges and immunities of the Houses shall be those of the Commons House of the Parliament of the United Kingdom at the establishment of the Commonwealth". (emphasis added)

10.3 At this point we think it necessary to say something further about the form any statute should take. We are not concerned with the details, but rather with the words of the Constitution which provides that the powers, privileges and immunities shall be those formerly held by the House of Commons until Parliament otherwise declared. In R. v. Richards, ex parte Fitzpatrick and Browne (1955) 92 CLR 157 at 168, the High Court said:

> "What the earlier part of s.49 says is that the powers, privileges and immunities of the Senate and of the House of Representatives shall be such as are declared by Parliament. It is dealing with the whole content of their powers, privileges and immunities, and is saying that Parliament may declare what they are to be. It contemplates not a single enactment dealing with some very minor and subsidiary matter as an addition to the powers or privileges; it is concerned with the totality of what the legislature thinks fit to provide for both Houses as powers, privileges and immunities."

However, in our opinion it does not follow from the High Court's judgment that Parliament must make specific provision for each of its privileges in a statute passed pursuant to s.49 of the Constitution. Instead, it is perfectly competent for the Parliament to legislate, to quote the words of the Honourable T.E.F. Hughes, Q.C.:

> "....making specific provision with respect to particular subject matters and by enacting in express terms that except to the extent of such specific provision, the privileges etc., of the two Houses shall be those of the House of Commons at Westminster as at a particular date."[1]

10.4 It follows that the form of any statute enacted to give effect to those of our recommendations which require to be embodied in statute should expressly reserve, save insofar as expressly affected by the terms of the statute, all of the powers, privileges and immunities otherwise possessed by Parliament. In the interests of Constitutional consistency, we think that the powers, privileges, and immunities so reserved should continue to be those of the House of Commons at the establishment of the Commonwealth.

10.5 There is one subsidiary point we think we should mention. It may be suggested that one of our recommendations, namely Recommendation 7, which deals with the uniform application of the laws of qualified privilege does not properly fall within s.49 of the Constitution. We would not agree with this view as we think it is quite competent for Parliament to make special rules applicable to the republication of material which emanates from Parliament. But it is in any event unnecessary to pursue this question as, plainly, changes to the law of defamation may only be made by statute.

10.6 There is one other general observation we desire to make. We hope that we have made plain that what we propose is <u>not</u> a statutory codification of the powers, privileges and immunities of the Houses. The very word "codification" conjures up in the minds of some Parliamentarians the fear that Parliament may inadvertently find itself in a straitjacket. For our part, we think that the difficulties of codification are frequently exaggerated and that the merits of the arguments for and against codification were neatly summarised by the Honourable T.E.F. Hughes, Q.C. (in the opinion to which we have already referred) when he said that:

> "codification ...means the achievement of relative certainty at the price of a degree of inflexibility; whereas the continuation of the status quo means relative flexibility at the price of a degree of uncertainty."[2]

The course we have adopted, and here we refer to those of our recommendations which require to be embodied in statute, amounts to the preservation in essential respects of flexibility, while at the same time setting the parameters of the powers, privileges and immunities of Parliament in a way which better reflects the needs of the times and the workings of the contemporary Parliament.

Recommendations which require implementation by statute

10.7 In our opinion, the recommendations which require to be implemented by statute are:

Recommendation 1

(Proposed expanded definition of proceedings in Parliament - 5.28)

Recommendation 2

(Parliament to determine status of officer and document, if necessary, in determination of application of proposed definition of proceedings - 5.32)

Recommendation 6(2)

(Removal of any doubt concerning protection of staff in supplying documents - 5.49)

Recommendation 7

(Laws applying to reports of proceedings - 5.54)

Recommendation 9

(Leave for reference to Parliamentary documents in courts - 5.65, so far as that recommendation refers to the enactment of a law by Parliament specifying tribunals to which the record of debates and other Parliamentary documents may be furnished without a petition for leave.)

Recommendation 10(1)

(Modification of duration of immunity from civil arrest - 5.69)

Recommendation 12(1)

(Modification of immunity from attendance as a witness - 5.74)

Recommendation 15

(Abolition of defamatory contempts - 6.20)

Recommendation 18

(Modification of Houses' power to commit - 7.26)

Recommendation 19

(Power for Houses to impose fines - 7.27)

Recommendation 23

(Statement of grounds of contempt and review by High Court - 7.78)

Recommendation 25

(Abolition of power to expel - 7.96)

Recommendation 31

(Delineation of precincts - 8.26)

Recommendation 34

(Witnesses Protection Act - 9.6)

10.8 Those recommendations which require changes in the detailed procedures of the Houses, of the Privileges Committees, and of committees generally, should be achieved by means of amendment to the standing orders. The recommendations in this category are as follows:

Recommendation 3

(Proposed committees to deal with complaints from persons arising out of statements about them in Parliament - 5.43)

Recommendation 5

(Rights for persons reflected on in reports - 5.47)

Recommendation 20

(Procedures for raising complaints of breach of privilege or contempt - 7.34)

Recommendation 22

(Requirement for seven days' notice for motion of committal or imposition of fine - 7.70)

Recommendation 26

(Consultation between Senate and House Privileges Committees - 7.99)

10.9 A number of recommendations can best be achieved by resolutions of the Houses. Chief among these are the recommendations relating to attitudes and procedures to be adopted by the Houses (and Privileges Committee) in considering complaints of breach of privilege or other contempts, our guidelines on contempts, and the principles we espouse in respect of the use of the privilege of freedom of speech. We stress that substantially identical resolutions should be passed by each House. Given general agreement, identical resolutions cannot compromise the independence of the Houses, and for those involved in the work of Parliament, and the wider community, differing resolutions in this area would be at best puzzling and at worst exceedingly confusing.

10.10 The critical factor in determining the suitability of this means of implementation of our recommendations is the nature of the recommendation in question. Resolutions would be quite inappropriate for some matters; for example it is obvious that resolutions cannot change the law of the land. But for other matters - and in particular when a House wishes to state a decision, declare a policy or attitude or make a statement of a practice to be followed, resolutions are the best means to achieve these ends.

10.11 This means of implementation may be seen by some as lacking in force and possibly not binding on "successor Houses". This latter point is not of relevance in respect of the proposed resolution on misuse of privilege, as we recommend that this should be considered at the commencement of every session. There is still some substance in this criticism - as resolutions certainly do not have the force of legislation. Nevertheless, resolutions of the Houses can give continuing effect to a wide variety of matters.

10.12 Our opinion as to the suitability of the use of resolutions to implement certain of our recommendations is reinforced by the fact that the House of Commons chose this means to implement a number of recommendations resulting from the review by its Committee of Privileges in 1977 of the recommendations of the 1967 Select Committee. On the 6th February 1978, the House resolved that it:

> ".... agrees with the Committee of Privileges and declares that the recommendations contained in paragraphs .... of the Report and those in paragraph .... which do not require legislation for their supplementation, shall have immediate effect"[3]

This approach was also used in the Commons to give effect to the decision to discontinue the practice of requiring leave to be granted for reference to House documents in court proceedings.

10.13 Recommendations of the committee to be implemented by resolutions of the Houses are:

Recommendation 4

(Proposed resolution concerning use of privilege of freedom of speech - 5.44)

Recommendation 8

(Leave for reference to Parliamentary documents in courts - 5.65)

Recommendation 9

(Leave for reference to Parliamentary documents in courts and, in the absence of legislation, empowering the Presiding Officers to make certain relevant decisions - 5.65)

Recommendation 10(2)

(Requirement for Houses to be notified of detention of member - 5.69)

Recommendations 12(2) and (3)

(Modifying in certain cases the application of immunity from attendance as witness - 5.74)

Recommendation 14

(Resolution urging sparing use of penal jurisdiction - 6.13)

Recommendation 16

(Alternative recommendation concerning defamatory contempts - defences etc - 6.21)

Recommendation 21

(Conduct of inquiries by Privileges Committees - 7.66)

Recommendation 24

(Rights of persons mentioned in Privileges Committee inquiries - 7.82)

Recommendations 27-30, 32, 33

(Matters which may constitute contempt - Ch 8)

Recommendation 35

(Protection and rights of witnesses before committees - 9.10)

10.14 We add that a number of significant recommendations require no specific action as we recommend the maintenance of the status quo. We instance our recommendation that the Parliament retain its penal jurisdiction.

J.M. SPENDER
Chairman

7 June 1984

ENDNOTES

1. Opinion of Hon. T.E.F. Hughes, Appendix III, 'Use of or reference to the records of proceedings of the House in the Courts', Report of Committee of Privileges (House of Representatives), PP 154 (1980) 101.

2. ibid.

3. 234 Journals of the House of Commons 170.

A P P E N D I C E S

APPENDIX 1

JOINT SELECT COMMITTEE ON PARLIAMENTARY PRIVILEGE

TERMS OF APPOINTMENT

32ND PARLIAMENT

(1) That a joint select committee be appointed to review, and report whether any changes are desirable in respect of:
   (a) the law and practice of parliamentary privilege as they affect the Senate and the House of Representatives, and the members and the committees of each House,
   (b) the procedures by which cases of alleged breaches of parliamentary privilege may be raised, investigated and determined, and
   (c) the penalties that may be imposed for breach of parliamentary privilege.

(2) That the committee consist of 10 members, 3 Members of the House of Representatives to be nominated by the Prime Minister, the Leader of the House or the Government Whip, 2 Members of the House of Representatives to be nominated by the Leader of the Opposition, the Deputy Leader of the Opposition or the Opposition Whip, 2 Senators to be nominated by the Leader of the Government in the Senate, 2 Senators to be nominated by the Leader of the Opposition in the Senate and 1 Senator to be nominated by any minority group or groups or independent Senator or independent Senators.

(3) That every nomination of a member of the committee be forthwith notified in writing to the President of the Senate and the Speaker of the House of Representatives.

(4) That the members of the committee hold office as a joint committee until the House of Representatives is dissolved or expires by effluxion of time.

(5) That the committee elect as chairman of the committee one of the members nominated by either the Prime Minister, the Leader of the House or the Government Whip, or by the Leader of the Government in the Senate.

(6) That the committee elect a deputy chairman who shall perform the duties of the chairman of the committee at any time when the chairman is not present at a meeting of the committee, and at any time when the chairman and deputy chairman are not present at a meeting of the committee, the members present shall elect another member to perform the duties of the chairman at that meeting.

(7) That 5 members of the committee constitute a quorum of the committee.

(8) That the committee have power to send for persons, papers and records, and to move from place to place.

(9) That the committee have power to authorise publication of any evidence given before it and any document presented to it.

(10) That the committee be provided with necessary staff, facilities and resources.

(11) That the committee have leave to report from time to time.

(12) That the foregoing provisions of this resolution, so far as they are inconsistent with the standing orders, have effect notwithstanding anything contained in the standing orders.

APPENDIX 2

JOINT SELECT COMMITTEE ON PARLIAMENTARY PRIVILEGE

TERMS OF APPOINTMENT

33rd PARLIAMENT

(1) That a joint select committee be appointed to review, and report whether any changes are desirable in respect of—

(a) the law and practice of parliamentary privilege as they affect the Senate and the House of Representatives, and the Members and the committees of each House;

(b) the procedures by which cases of alleged breaches of parliamentary privilege may be raised, investigated and determined, and

(c) the penalties that may be imposed for breach of parliamentary privilege.

(2) That the committee consist of 10 members, 3 Members of the House of Representatives to be nominated by the Prime Minister, the Leader of the House or the Government Whip, 2 Members of the House of Representatives to be nominated by the Leader of the Opposition, the Deputy Leader of the Opposition or the Opposition Whip, 2 Senators to be nominated by the Leader of the Government in the Senate, 2 Senators to be nominated by the Leader of the Opposition in the Senate and 1 Senator to be nominated by any minority group or groups or independent Senator or independent Senators.

(3) That every nomination of a member of the committee be forthwith notified in writing to the President of the Senate and the Speaker of the House of Representatives.

(4) That, in addition to electing a chairman, the committee elect a deputy chairman who shall perform the duties of the chairman of the committee at any time when the chairman is not present at a meeting of the committee, and at anytime when the chairman and deputy chairman are not present at a meeting of the committee the members shall elect another member to perform the duties of the chairman at that meeting.

(5) That 5 members of the committee consitute a quorum of the committee.

(6) That the committee have power to send for persons, papers and records, and to move from place to place.

(7) That the committee have power to consider and make use of the evidence and records of the Joint Select Committee on Parliamentary Privilege appointed during the previous Parliament.

(8) That the committee have power to authorise publication of any evidence given before it and any document presented to it

(9) That the committee have leave to report from time to time.

(10) That the foregoing provisions of this resolution, so far as they are inconsistent with the standing orders, have effect notwithstanding anything contained in the standing orders.

APPENDIX 3

LIST OF WITNESSES:

(In each case we have indicated the occupations, of or offices held by, witnesses at the time of their appearance.)

Mr G.D. Bates, Legal Adviser, John Fairfax & Sons Ltd

Mr P.A. Costigan, President, Federal Parliamentary Press Gallery

Mr A.R. Cumming Thom, Clerk of the Senate

Mr H. Evans, Principal Parliamentary Officer, the Senate

Professor J.L. Golding, Professor of Law, Macquarie University

Mr B.M. Hogben, Group General Manager, Editorial, News Ltd.

Mr M.C. Jacobs, Member, Australian Journalists' Association

Mr J. Lawrence, Federal President, Australian Journalists' Association

Mr C.R. Macdonald, Managing Director, David Syme & Co. Ltd.

Professor D.C. Pearce, Professor of Law, Australian National University

Mr J.A. Pettifer, C.B.E., former Clerk of the House of Representatives

Professor G.S. Reid, Vice-Chancellor, University of Western Australia

Miss D.D. Ross, Vice Chairman, Australian Press Council

Emeritus Professor G. Sawer, Chairman, Australian Press Council

Hon. G.G.D. Scholes, M.P.

Mr M.V. Suich, Chief Editorial Executive, John Fairfax & Sons Ltd.

Mr B.G. Teague, Member, Law Council of Australia

Mr B.K. Wheeler, Editor-in-Chief, Australian Associated Press

Mr W. Wodrow, Private Citizen

APPENDIX 4

LIST OF SUBMISSIONS

(In each case we have indicated the occupation of, or office held by, witnesses at the time the submissions in question were lodged.)

Persons and organisations who made written submissions

Rt. Hon. J.D. Anthony, C.H., M.P., Deputy Prime Minister

Senator B.R. Archer, Chairman, Joint Committee on Publications

Mr I.R. Arnold, John Fairfax & Sons Ltd

Mr I.J. Booth, Private Citizen.

Mr D.M. Connolly, M.P., Chairman, Joint Committee of Public Accounts

Mr. P.A. Costigan, President, Federal Parliamentary Press Gallery

Mr. A.A. Deme, Private Citizen

Department of the Senate

Dr. Hon. D.N. Everingham, M.P.

Professor J.L. Golding, Professor of Law, Macquarie University

Hon. R. Groom, M.P.

Mr J. Guest, M.L.C., Parliament of Victoria

Mr B.M. Hogben, Group General Manager, Editorial, News Ltd.

Hon. Mr Justice Kirby, Chairman, Australian Law Reform Commission

Mr J. Lawrence, Federal President, Australian Journalists' Association

Mr R. Lucas, Canberra College of Advanced Education

Mr C.R. Macdonald, Managing Director, David Syme & Co. Ltd.

Mr M. Maher, M.P.

Professor D.C. Pearce, Professor of Law, Australian National University

Mr S. Perry, Private Citizen

Mr F.E. Peters, Private Citizen

Mr J.A. Pettifer, C.B.E., Clerk of the House of Representatives

Professor G.S. Reid, Vice-Chancellor, University of Western Australia

Emeritus Professor G. Sawer, Chairman, Australian Press Council

Mr. G.G.D. Scholes, M.P.

Mr R.F. Shipton, M.P., Chairman, Joint Committee on Foreign Affairs and Defence

Mr P.B. Stapleton, Private Citizen

Mr D. O'Sullivan, Western Australia Newspapers

Mr A.F. Smith, Member, Law Council of Australia

Mr B.K. Wheeler, Editor-in-Chief, Australian Associated Press

Mr W. Wodrow, Private Citizen

In addition, the Standing Orders Committee of the House of Representatives resolved to refer to the Joint Committee the matter of unsubstantiated allegations made in the House which the House had referred to the Standing Orders Committee on 16 March 1982.

APPENDIX 5

The Committee sought detailed information from a wide range of overseas Parliaments as, with the exception of the House of Commons, the documentation available to the Committee was not as detailed as it wished.

National parliaments from which additional information was received were:

Canada

Federal Republic of Germany

India

Israel

Italy

Japan

Netherlands

New Zealand

Norway

Papua New Guinea

South Africa

Sweden

In addition, useful material was received from State Parliaments, and notes from the 1982 Conference of European Speakers, in London, were very useful.

APPENDIX 6

COMMONWEALTH STATUTES WHICH RELATE DIRECTLY TO THE PARLIAMENT'S OPERATIONS

The Parliament has enacted the following statutes which relate directly to its operation:

Parliamentary Papers Act 1908
Parliamentary Proceedings Broacasting Act 1946
Public Accounts Committee Act 1951
Public Works Committee Act 1969
Jury Exemption Act 1965

The Parliamentary Papers Act 1908 provides for either House to authorise the publication of papers laid before it. The Act authorises the Government Printer to publish parliamentary papers, unless there is a contrary order. Where a paper is ordered to be printed, the protection of the Parliamentary Papers Act applies only in respect to the publication printed by the Government Printer as a parliamentary paper and not to the publication of the paper in any other form.

The Act grants protection from civil and criminal proceedings to any persons publishing any document or evidence published under an authority given pursuant to the provisions of the Act. It is under this Act that the publication of the complete Hansard report of debates of each House is covered by absolute privilege. Further, it is lawful for a Committee of either or both Houses to authorise the publication of any document laid before it or of any evidence given before it.

The Parliamentary Proceedings Broadcasting Act 1946 governs the broadcasting of proceedings of the House of Representatives, the Senate, or any joint sitting.

At the beginning of the first session of every Parliament a Joint Committee on Broadcasting of Parliamentary Proceedings is appointed pursuant to the Act. The Committee is empowered to recommend the general principles under which the parliamentary broadcasts take place and to exercise control over broadcasts according to the principles adopted by each House. Determinations made by the Committee remain in force on a continuing basis until varied or revoked by a later Joint Committee.

Members are covered by absolute privilege in respect of statements made when the House is being broadcast. Absolute privilege also applies to persons authorised to broadcast or re-broadcast parliamentary proceedings. The Act requires the Australian Broadcasting Corporation to broadcast proceedings. The Act was amended in 1974 in respect to the broadcasting and televising of a joint sitting.

The Public Accounts Committee Act 1951 and the Public Works Committee Act 1969 provide for the appointment of these Committees at the commencement of each Parliament. Each Act defines the functions, constitution and powers of the respective Committees. The powers of the two Committees are similar.

Each Committee may summons a person to appear before it to give evidence and provide documents. If a witness who has been summonsed fails to appear or fails to continue in attendance, without proof of reasonable excuse, a warrant may be issued for his apprehension.

A person summonsed to appear before either Committee may not, without just course, refuse to be sworn or make an affirmation, answer any question put to him by the Committee or any Member, or produce a document required by the Committee.

A witness before each Committee has the same protection and privileges as a witness in proceedings in the High Court. A witness is protected against defamation proceedings in respect of anything said during an inquiry in relation to the matter under investigation. Both Acts also provide a witness with legal protection against any physical harm which may be inflicted on him on account of his giving evidence. Penalties are specified in both Acts for failure to comply with their provisions. Wilfully giving false evidence on oath or affirmation is punishable by five years imprisonment. Other penalties may include monetary fines and/or short terms of imprisonment.

The Jury Exemption Act 1965. The right of Parliament to the service of its Members in priority to the claims of the courts is one of the oldest of parliamentary privileges, from which derives the exemption of Members from jury service. The duties of a Member in Parliament are held to supercede the obligation of attendance in a court. This exemption has been incorporated in the Act. Certain officers of the Parliament are exempted from jury service by way of regulations under the Act.