

## Parliamentary privilege

... the word "privilege" has in modern times acquired a meaning wholly different from its traditional Parliamentary connotation. In consequence its use could convey to the public generally the false impression that Members are, and desire to be, a "privileged class". It is out of keeping with modern ideas of Parliament as a place of work and of the status of its Members as citizens who have been elected to do within that place of work their duty as representatives of those who elected them.<sup>1</sup>

### PRIVILEGE DEFINED

*May* describes parliamentary privilege as:

... the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Thus privilege, though part of the law of the land, is to a certain extent an exemption from the general law.<sup>2</sup>

### THE COMMONWEALTH PARLIAMENT'S PRIVILEGE POWERS

The Commonwealth Parliament derives its privilege powers from section 49 of the Constitution which provides that:

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

In addition, section 50 of the Constitution provides that:

Each House of the Parliament may make rules and orders with respect to—

- (i) The mode in which its powers, privileges, and immunities may be exercised and upheld.
- (ii) The order and conduct of its business and proceedings either separately or jointly with the other House.

### Statutory provisions

In 1987 Parliament enacted comprehensive legislation under the head of power constituted by section 49 of the Constitution. The *Parliamentary Privileges Act 1987* provides that, except to the extent that the Act expressly provides otherwise, the powers, privileges and immunities of each House, and of the Members and the committees of each House, as in force under section 49 of the Constitution immediately before the commencement of the Act, continue in force. The provisions of the Act are described in detail in this chapter.

In addition, the Parliament has enacted a number of other laws in connection with some specific aspects of its operations,<sup>3</sup> although it has been said that certain of these may be 'more properly ... referred' to section 51(xxxix.) of the Constitution, which

<sup>1</sup> *House of Commons Select Committee on Parliamentary Privilege, Report*, HC 34 (1967–68) vii.

<sup>2</sup> *May*, p. 69.

<sup>3</sup> E.g. *Parliamentary Papers Act 1908*; *Parliamentary Proceedings Broadcasting Act 1946*; *Public Accounts Committee Act 1951*; *Public Works Committee Act 1969* and other legislation making provisions in relation to certain committees.

deals with the power to make laws with respect to matters which are incidental to the execution of any power vested, inter alia, in the Parliament or either House.<sup>4</sup>

### Judicial interpretation of section 49

The original privilege powers of the Commonwealth Parliament were tested and confirmed in a significant High Court judgment arising from the case of Browne and Fitzpatrick. On 10 June 1955, the House of Representatives judged Mr F. C. Browne and Mr R. E. Fitzpatrick guilty of a serious breach of privilege<sup>5</sup> (see p. 702 for details of this case). On the warrant of the Speaker the two men were committed to gaol for three months. Subsequently, action was taken by the legal representatives of the offenders to apply to the High Court for writs of habeas corpus. The High Court heard the argument between 22 and 24 June and delivered its judgment on 24 June.<sup>6</sup>

The Chief Justice first dealt with the question of whether the warrants issued by the Speaker were a sufficient return to the writs of habeas corpus. He held that such warrants if issued in England by the Speaker of the House of Commons would have constituted sufficient answer, being drawn up in accordance with the law there which was finally established in the case of the *Sheriff of Middlesex* in 1840.<sup>7</sup> The law was established authoritatively by the decisions of the Privy Council in *Dill v. Murphy* in 1864<sup>8</sup>, and in the *Speaker of the Legislative Assembly of Victoria v. Glass* in 1871.<sup>9</sup>

The Court stated that:

... 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 judgment of the House is expressed by its resolution and by the warrant of the Speaker. 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.<sup>10</sup>

The warrants issued by the Speaker stated the contempt or breach of privilege in general terms and not in particular terms but accorded with the law, as each stated that the person concerned had been guilty of a serious breach of privilege, recited the resolution of the House to that effect and stated the terms of committal.

Having established that it was not necessary to go behind the warrant, it remained for the court to determine whether the law as stated above was applicable to the Commonwealth Parliament through section 49 of the Constitution.

Arguments advanced by counsel for Browne and Fitzpatrick urging a restrictive construction or modified meaning of the words of section 49 were, broadly:

- that the Constitution of Australia is a rigid federal Constitution and it is the duty of the courts to consider whether any act done in pursuance of the power given by the Constitution, whether by the legislature or executive, is beyond the power assigned to that body by the Constitution;
- that the Constitution adopted the theory of the separation of powers and that the power of committal by warrant belonged to the judicial power and ought not to be conceded upon the words of section 49 to either House of the Parliament;

4 *R. v. Richards; ex parte Fitzpatrick and Browne* (1955) 92 CLR 168.

5 VP 1954-55/267, 269-71; H.R. Deb. (10.6.55) 625-65.

6 (1955) 92 CLR 157.

7 11 Ad & E 273 [113 ER 419].

8 1 Moo. PC (N.S.) 487.

9 LR 3 PC App 560.

10 (1955) 92 CLR 162.

- that the power contained in section 49 was a transitional power which ceased when Parliament declared some of its powers, privileges, and immunities in two statutes, the *Parliamentary Papers Act 1908*, and the *Parliamentary Proceedings Broadcasting Act 1946*;
- that the powers under section 49 are contingent upon the Houses exercising their authority under section 50, which provides that each House might make rules and orders with respect to:
  - the mode in which its powers, privileges, and immunities might be exercised and upheld, and
  - the order and conduct of its business and proceedings.

The High Court rejected, in turn, each of these arguments. In relation to the first proposition, the court declared:

The answer, in our opinion, lies in the very plain words of s.49 itself. The words are incapable of a restricted meaning . . . It is quite incredible that the framers of s.49 were not completely aware of the state of the law in Great Britain and, when they adopted the language of s.49, were not quite conscious of the consequences which followed from it.<sup>11</sup>

In relation to the second argument on the separation of powers, the court stated that:

. . . in unequivocal terms the powers of the House of Commons have been bestowed upon the House of Representatives. It should be added to that very simple statement that throughout the course of English history there has been a tendency to regard those powers as not strictly judicial but as belonging to the legislature, rather as something essential or, at any rate, proper for its protection . . . It is sufficient to say that they were regarded by many authorities as proper incidents of the legislative function, notwithstanding the fact that considered more theoretically perhaps one might even say, scientifically they belong to the judicial sphere.<sup>12</sup>

Then, in relation to the third contention, the court made it clear that it did not regard the *Parliamentary Papers Act* and the *Broadcasting of Parliamentary Proceedings Act* as affecting the operation of section 49. The court held that section 49:

. . . 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.<sup>13</sup>

Finally, in relation to the argument on the interrelationship of sections 49 and 50, the court declared that it was clear that section 49 had an operation independent of the exercise of the power of section 50. In a final summing-up, the court declared:

. . . all the arguments which have been advanced for giving to the words of s.49 a modified meaning, and the particular argument for treating them as not operating, fail.<sup>14</sup>

Browne and Fitzpatrick petitioned the Judicial Committee of the Privy Council for special leave to appeal against the decision of the High Court. However, the decision of the Privy Council was that the judgment of the Chief Justice of Australia was unimpeachable and leave to appeal was refused.<sup>15</sup>

## Reference to House of Commons practice

Whilst the Commonwealth Parliament has passed legislation in this area, and although the House of Representatives has developed its own practice and created its own precedents in respect of most of its operations, in the area of parliamentary privilege<sup>16</sup> there is a value in some cases in referring to the practice and precedents of the

<sup>11</sup> (1955) 92 CLR 165–6.

<sup>12</sup> (1955) 92 CLR 167.

<sup>13</sup> (1955) 92 CLR 168.

<sup>14</sup> (1955) 92 CLR 170.

<sup>15</sup> *R. v. Richards; ex parte Fitzpatrick and Browne* (1955) 92 CLR 171 (PC).

<sup>16</sup> For a full list of House of Representatives privilege cases see Appendix 25.

House of Commons<sup>17</sup>, from which the House's privilege powers are substantially derived.

This chapter does not attempt to record the history of the development of the law, practice and procedure of privilege, nor does it attempt to treat in detail all questions of privilege that may arise. It is limited to a general description and a summary of the more important aspects of the subject.<sup>18</sup>

*May* is recognised as the most authoritative and comprehensive work on matters pertaining to the law, privileges, proceedings and usage of the British Parliament. It brings together in one volume a comprehensive summation of all important cases of the House of Commons in privilege matters and it is to *May* that Members and officers turn for precedents and guidance concerning the House of Commons when questions of privilege or contempt arise.

## FURTHER COMMENT ON THE NATURE OF PRIVILEGE

### Its meaning and necessity

Parliamentary privilege relates to the special rights and immunities which belong to the Parliament, its Members and others, which are considered essential for the operation of the Parliament. These rights and immunities allow the Parliament to meet and carry out its proper constitutional role, for Members to discharge their responsibilities to their constituents and for others properly involved in the parliamentary processes to carry out their duties and responsibilities without obstruction or fear of prosecution.

Privileges are not the prerogative of Members in their personal capacities. It has been stated:

In so far as the House claims and Members enjoy those rights and immunities which are grouped under the general description of "privileges", they are claimed and enjoyed by the House in its corporate capacity and by its Members on behalf of the citizens whom they represent.<sup>19</sup>

Breaches of privilege or contempt are punishable—*May* states:

When any of these rights and immunities is disregarded or attacked, the offence is called a breach of privilege and is punishable under the law of Parliament. Each House also claims the right to punish as contempts actions which, while not breaches of any specific privilege, obstruct or impede it in the performance of its functions, or are offences against its authority or dignity, such as disobedience to its legitimate commands or libels upon itself, its Members or its officers.<sup>20</sup>

The privileges of a legislative assembly would be entirely ineffectual to enable it to discharge its functions, if it had no power to punish offenders, to impose disciplinary regulations upon its members, or to enforce obedience to its commands.<sup>21</sup>

Despite the immunity from suit or prosecution which Members have in respect of what they say in the Parliament in carrying out their duties, ultimately they are still accountable to the House itself in respect of their statements and actions. It is within the power of the House to take action to punish or penalise Members, for example, for some form of extreme obstruction of the business of the House (*and see below*).

<sup>17</sup> *And see* S.O. 1.

<sup>18</sup> The more significant historical references are *May's Parliamentary Practice*, together with Anson, *The Law and Custom of the Constitution*; Report of House of Commons Select Committee on Parliamentary Privilege, HC 34 (1967–68); Hatsell, *Precedents of Proceedings in the House of Commons*. The first and second editions of *House of Representatives Practice* contain additional detail on earlier practice and precedents in the House.

<sup>19</sup> HC 34 (1967–68) vii.

<sup>20</sup> *May*, p. 69.

<sup>21</sup> Cushing, *Legislative Assemblies*, paras 532–3, quoted in *May*, 20th edn (1983), p. 71.

## Distinction between breach of privilege and contempt

'Contempt' and 'breach of privilege' are not synonymous terms although they are often used as such. *May* has this to say in respect of contempt:

Generally speaking, any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any Member or officer of such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results may be treated as contempt even though there is no precedent of the offence. It is therefore impossible to list every act which might be considered to amount to a contempt, the power to punish for such an offence being of its nature discretionary.<sup>22</sup>

In evidence given to the House of Commons Committee of Privileges in 1968, in a case involving the premature publication of committee evidence, the Clerk of the House stated:

The distinction is this, I think, that the privileges of the House are known and established, and one of them is freedom of speech. Now, if Members of a Select Committee feel that they cannot speak freely for fear that somebody will intrude upon their discussions, then this constitutes in the person who commits this offence a breach of known privilege of the House. On the other hand, when the House has passed a resolution, as it did in 1837, and an outside person ignores or flouts that resolution, that constitutes a contempt. So you very often have Committees of Privilege finding that not only a breach of privilege has been committed but at one and the same time it is a contempt of the House for flouting and ignoring its Order. So you can charge a matter on either or both counts.<sup>23</sup>

The distinction is made clearer in the following extract from Halsbury's Laws of England:

The power of both Houses 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 . . . Certain offences which were formerly described as contempts are now commonly designated as breaches of privilege, although that term more properly applies only to an infringement of the collective or individual rights or immunities, of one of the Houses of Parliament.<sup>24</sup>

It has been said that 'All breaches of privilege amount to contempt; contempt does not necessarily amount to a breach of privilege'.<sup>25</sup> In other words a breach of privilege (an infringement of one of the special rights or immunities of a House or a Member) is by its very nature a contempt (an act or omission which obstructs or impedes a House, a Member or an officer, or threatens or has a tendency so to do), but an action can constitute a contempt without breaching any particular right or immunity.

## No new privilege may be created except by legislation

In 1704 the Lords and Commons agreed:

That neither House of Parliament hath any power, by any vote, or declaration, to create to themselves any new privilege, that is not warranted by the known laws and customs of Parliament.<sup>26</sup>

The import of the resolution quoted is that neither House of the British Parliament may itself create any new privilege and, it is submitted, by virtue of section 49 of the Constitution this is also the case with regard to the Houses of the Commonwealth Parliament. The rights and immunities of the Houses, their committees and Members are part of the law of the land, and the law may only be changed by the passage of legislation by the three component parts of the Parliament. Subject to the constraints imposed by the Constitution, it would however be possible for the Commonwealth

<sup>22</sup> *May*, p. 115.

<sup>23</sup> 'Complaint concerning an article in the *Observer* Newspaper of 26 May 1968', *House of Commons Committee of Privileges Second Report*, HC 357 (1967-68) 39-40.

<sup>24</sup> *Halsbury's Laws of England*, 3rd edn, vol. 28, p. 465; see also G. Marshall, 'The House of Commons and its Privileges', in *The House of Commons in the Twentieth Century*, S. A. Walkland (ed), Clarendon Press, Oxford, 1979, pp. 205-9.

<sup>25</sup> HC 34 (1967-68) 171.

<sup>26</sup> CJ (1702-04) 555, 559-63.

Parliament to enact legislation which varied an existing right or immunity or created a new one.

Within the framework set by the Constitution and relevant legislation it is within the competence of each House to expound the law of privilege and apply that law to the circumstances of each case as it arises.<sup>27</sup> To suggest, as has on occasions been done, that the existing privileges of the Parliament have been extended in some particular case, is incorrect.

## ENUMERATION OF PRIVILEGES

The following were listed by *Quick and Garran* as among the original principal powers, privileges and immunities of each House, and of the Members of each House, drawn from the law and custom of the House of Commons as at 1901<sup>28</sup>:

- 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 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;
- the right of each House as a body to freedom of access to the Sovereign for the purpose of presenting and defending its views;
- 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 of 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 House or its committees, and
- immunity of officers of either House, in immediate attendance and service of the House, from arrest for civil causes.

A number of these provisions were modified by the *Parliamentary Privileges Act 1987*, and the detailed provisions are described hereunder.

<sup>27</sup> For further comment see HC 34 (1967–68) 97–9.

<sup>28</sup> See *Quick and Garran*, pp. 501–2.

## FREEDOM OF SPEECH

By the 9th Article of the Bill of Rights 1688 it was declared:

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.<sup>29</sup>

The provisions of Article 9 became part of the law applying to the Commonwealth Parliament by virtue of section 49 of the Constitution.

The privilege has been variously described as one which has always been regarded as most valuable and most essential<sup>30</sup>, as the only privilege of substance enjoyed by Members of Parliament<sup>31</sup>, and as one of the most cherished of all parliamentary privileges, without which Parliaments probably would degenerate into polite but ineffectual debating societies.<sup>32</sup> Unquestionably, freedom of speech is by far the most important privilege of Members.

Members are absolutely privileged from suit or prosecution only in respect of anything they might say in the course of proceedings in Parliament. Members may state whatever they think fit in debate in the Parliament, however offensive or injurious to the character of individuals and provided it is in accord with the ordinary rules and practices of the House. It is, however, incumbent upon Members not to abuse the privilege. The House itself, by its rules of debate and disciplinary powers, has the duty to prevent abuse (*see* chapter on 'Debate', and *see also* pages 709 and 724). As *May* puts it:

... it becomes the duty of each Member to refrain from any course of action prejudicial to the privilege which he enjoys.<sup>33</sup>

Absolute privilege does not attach to words spoken by Members other than when participating in 'proceedings in Parliament' (*and see below*).

### Absolute and qualified privilege

A statement is said to be privileged if the person making it is protected from legal action. Generally, qualified privilege exists where a person is not liable to an action for defamation if certain conditions are fulfilled, for example, if the statement is not made with malicious intention. Absolute privilege exists where no action may lie for a statement, even, for example, if made with malice; it is not limited to action for defamation but extends also to matters which could otherwise be punished as crimes (for example, contempt of court or breach of a secrecy provision).

### Proceedings in Parliament

Article 9 of the Bill of Rights refers to 'debates and proceedings in Parliament'. Section 16 of the *Parliamentary Privileges Act 1987* re-asserts that the provisions of Article 9 of the Bill of Rights apply in relation to the Commonwealth Parliament, but it goes on to provide that for the purposes of the provisions of Article 9, and for the purposes of that section, the term 'proceedings in Parliament' means:

all words spoken and acts done in the course of, or for purposes of or incidental to, the transacting of the business of a House or of a committee, and, without limiting the generality of the foregoing, includes—

- (a) the giving of evidence before a House or a committee, and evidence so given;
- (b) the presentation or submission of a document to a House or a committee;

<sup>29</sup> 1 Will. & Mary, sess. 2, c.2.

<sup>30</sup> Hatsell, vol. I, p. 85.

<sup>31</sup> HC 34 (1967–68) 91.

<sup>32</sup> Campbell, *Parliamentary Privilege in Australia*, p. 28.

<sup>33</sup> *May*, p. 85.

- (c) the preparation of a document for purposes of or incidental to the transacting of any such business; and
- (d) the formulation, making or publication of a document, including a report, by or pursuant to an order of a House or a committee and the document so formulated, made or published.

What constitutes 'proceedings in Parliament' has been the subject of a good deal of consideration in the House of Commons for a number of years but the term has not yet been defined in so far as the British Parliament is concerned.

The Clerk of the House of Commons in a supplementary memorandum to the 1967 Select Committee on Parliamentary Privilege elaborated on the term:

The primary meaning, as a technical parliamentary term, of "proceedings" (which obtained at least as early as the seventeenth century) is some formal action, usually a decision, taken by the House in its collective capacity. This is naturally extended both to the forms of business on which the House takes action and to the whole process, the principal part of which is debate, by which the House reaches a decision.

An individual Member takes part in proceedings usually by speech, but also by various recognised kinds of formal action, such as voting, giving notice of a motion etc., or presenting a petition or a report from a Committee, most of such actions being time-saving substitutes for speaking. Officers of the House take part in its proceedings principally by carrying out its orders, general or particular. Strangers can also take part in the proceedings of the House, e.g. by giving evidence before one of its committees, or by presenting petitions for or against private bills.

While taking part in the proceedings of the House, Members, officers and strangers are protected by the same sanction as that by which freedom of speech is protected, namely, that they cannot be called to account for their actions by any authority other than the House itself.<sup>34</sup>

It is clear that the ambit of the term, and so the extent of absolute privilege, is limited. It is considered that, for instance, conversations or comments among Members, or between Members and other persons, which are not part of a 'proceeding in Parliament' as such would not enjoy absolute privilege.<sup>35</sup> It is also considered that citizens communicating with a Member in normal correspondence would not enjoy absolute privilege in this matter.<sup>36</sup>

On two occasions the Committee of Privileges has considered complaints arising from action, or threatened action, against Members following letters the Members had written to Ministers. In each case it accepted that such correspondence did not form part of 'proceedings in Parliament'.<sup>37</sup> In another case the committee considered action taken against a person who had sworn a statutory declaration and given it to a Member. The Member subsequently used the information in a speech in the House. The committee was required to report on the Member's complaint that the action against his informant would interfere improperly with his ability to perform his duties as a Member. It commented that whether the informant's actions fell within the scope of s.16 of the *Parliamentary Privileges Act 1987* would be determined in the course of court proceedings. An opinion appended to the committee's report dealt with the issue of whether the informant's actions might be protected<sup>38</sup> (and see p. 703).

Although, as stated above, the House of Commons has not, to date, adopted a detailed definition of the term 'proceedings in Parliament', it has on two important occasions considered the meaning and scope of the term.

In the London Electricity Board case in 1957 (more generally known as the *Strauss Case*), the House of Commons Committee of Privileges found that Mr Strauss in writing a letter to a Minister criticising certain alleged practices of the Board, was engaged in a

<sup>34</sup> HC 34 (1967-68) 9.

<sup>35</sup> May, pp. 93-4 (and see *Parliamentary Privileges Act 1987*).

<sup>36</sup> May, p. 133 (and see *Parliamentary Privileges Act 1987*).

<sup>37</sup> PP 118 (1992), PP 78 (1994).

<sup>38</sup> PP 407 (1994).



'proceeding in Parliament'. The committee also found that, in threatening a libel action against the Member, both the Board and its solicitors had acted in breach of the privilege of Parliament.<sup>39</sup> By a narrow margin of 218 votes to 213 votes, the House of Commons rejected a motion agreeing with the committee's report. An amendment declaring that Mr Strauss' letter was not a proceeding in Parliament and that no breach of privilege had been committed was carried on a non-party vote.<sup>40</sup> In an important decision in 1939, the House of Commons agreed that notice in writing of a question to be asked in the House was 'protected by privilege'.<sup>41</sup>

### Privilege attaching to Hansard reports

Hansard reports of the proceedings are absolutely privileged and no action may lie against a Member, the Principal Parliamentary Reporter or the Government Printer, or their officers, in publishing the report.<sup>42</sup> The House has, by resolution, explicitly authorised the publication of the record of debates and proceedings prepared by the Department of the Parliamentary Reporting Staff; this was done so as to remove any doubt as to the status of the Hansard report when published electronically by the Department of the Parliamentary Reporting Staff.<sup>43</sup>

Parliamentary privilege does not protect individual Members publishing their own speeches apart from the rest of a debate. If a Member publishes his or her speech, this printed statement becomes a separate publication<sup>44</sup>, a step removed from actual proceedings in Parliament. Similarly, it is considered that Members are not protected by absolute privilege in respect of the publication of Hansard extracts, or pamphlet reprints, of their parliamentary speeches, unless the extracts or reprints are published under the authority of the House. In respect to an action for defamation, regard would also need to be had to the particular law applying in the State or Territory in which the action is taken or contemplated. Even qualified privilege may not be available unless the publication is for the information of the Member's constituents.<sup>45</sup>

### *Reports of proceedings*

Under section 10 of the *Parliamentary Privileges Act 1987* it is a defence to an action for defamation that the defamatory matter was published by the defendant without any adoption by the defendant of the substance of the matter, and that the defamatory matter was contained in a fair and accurate report of proceedings at a meeting of a House or a committee. This defence does not apply in respect of matter published in contravention of section 13 of the Act, and it does not deprive a person of any defence that would have been available to that person if the section had not been enacted.

## USE OF HANSARD AND OTHER DOCUMENTS IN COURTS OR OTHER TRIBUNALS

Two particular issues arise in this area: first, the restrictions on the actual use of, or reference to, parliamentary records in courts or other tribunals, and secondly, the arrangements for the production of such records.

<sup>39</sup> *House of Commons Committee of Privileges Report*, HC 305 (1956–57) viii.

<sup>40</sup> H.C. Deb. 591 (8.7.58) 245.

<sup>41</sup> *House of Commons Committee of Privileges Report*, HC 101 (1938–39) para. 3.

<sup>42</sup> See *Parliamentary Papers Act 1908*, ss. 3, 4; and see Ch. on 'Papers and documents'.

<sup>43</sup> VP 1993–95/25; H.R. Deb. (5.5.93) 89–90.

<sup>44</sup> And see *May*, p. 87.

<sup>45</sup> Advice from Attorney-General's Department, dated 25 August 1978.

### Restriction on use of or reference to parliamentary records

It has long been held that Article 9 of the Bill of Rights 1688 protects Members, but also other participants in 'proceedings in Parliament', for example, witnesses who give evidence to parliamentary committees. The resolution of the House of Commons of 26 May 1818 stated:

That all witnesses examined before this House, or any committee thereof, are entitled to the protection of this House, in respect of anything that may be said by them in their evidence.

This resolution reflected the attitude of the House of Commons on this aspect, and this attitude is in turn reflected in House of Representatives standing order 362. It had been held that the provisions of Article 9 prevented proceedings from being examined or questioned or used to support a cause of action.<sup>46</sup> Apart from court proceedings in respect of civil<sup>47</sup> and criminal<sup>48</sup> matters, the issue of references to parliamentary records has also arisen in respect of Royal Commissions<sup>49</sup>, and the documents involved have included the Hansard record of proceedings<sup>50</sup>, documents tabled in the House<sup>51</sup>, a committee report<sup>52</sup>, the transcript of committee evidence<sup>53</sup> and documents submitted to parliamentary committees.<sup>54</sup>

Following judgments which had the effect of permitting participants in proceedings in Parliament (in this case witnesses before committees—*see* p. 691) to be examined and cross-examined in court in respect of committee evidence, in 1987 the Parliament enacted legislation to restore and enshrine the traditional interpretation of Article 9, which it believed should be upheld in the interests of the Parliament. Section 16 of the *Parliamentary Privileges Act 1987* provides, *inter alia*:

(3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of—

- (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
- (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
- (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

(4) A court or tribunal shall not—

- (a) require to be produced, or admit into evidence, a document that has been prepared for the purpose of submission, and submitted, to a House or a committee and has been directed by a House or a committee to be treated as evidence taken in camera, or admit evidence relating to such a document; or
- (b) admit evidence concerning any oral evidence taken by a House or a committee in camera or require to be produced or admit into evidence a document recording or reporting any such oral evidence, unless a House or a committee has published, or authorised the publication of, that document or a report of that oral evidence.

In 1988 the application of section 16 was considered by the Federal Court. An application was made to tender an extract from Hansard, but was rejected, being seen as

<sup>46</sup> *E.g. Church of Scientology of California v. Johnson-Smith* [1972] 1 QB 522.

<sup>47</sup> VP 1980–83/908–9; VP 1983–84/956.

<sup>48</sup> *R v. Lionel Keith Murphy, R v. John Murray Foord* (*see* p. 691).

<sup>49</sup> Royal Commission into the Australian Meat Industry (1982), VP 1980–83/949; Royal Commission on Australia's Security and Intelligence Agencies (1983), VP 1983–84/149; Royal Commission into activities of the Nugan Hand Group (1984), VP 1983–84/881.

<sup>50</sup> VP 1980–83/908–9.

<sup>51</sup> VP 1980–83/908–9; VP 1983–84/881.

<sup>52</sup> VP 1985–87/1355.

<sup>53</sup> *R v. Lionel Keith Murphy, R v. John Murray Foord*.

<sup>54</sup> VP 1985–87/1355; VP 1987–89/965–6.

'... by way of or for the purpose of questioning the motive, intention or good faith of the Senator ...' and as '... by way of, or for the purpose of, inviting the drawing of inferences or conclusions from what was said in the Senate ...'.<sup>55</sup> In 1992 the Federal Court held that an answer by a Minister to a question without notice could not be used in court proceedings in support of an argument as to the Minister's disposition on the matter in dispute. This was held to be contrary to paragraphs 16(3)(b) and (c) of the Act.<sup>56</sup> In a 1994 decision the Judicial Committee of the Privy Council gave an interpretation of Article 9 of the Bill of Rights consistent with the articulation of Article 9 in section 16 of the Act.<sup>57</sup>

At the time of publication an appeal had been lodged with the High Court against a Queensland Supreme Court judgement given on 22 November 1996 on the application and validity of subsection 16(3)—*Katter v. Laurance* (unreported).

The Act provides that in relation to proceedings that relate to a question arising under section 57 of the Constitution or the interpretation of an Act, neither the Act nor the Bill of Rights shall be taken to prevent or restrict the admission in evidence of a record of proceedings published by or with the authority of the House or a committee, or the making of statements, submissions or comments based on that record. Similar provisions apply in relation to a prosecution for an offence against the Parliamentary Privileges Act or an Act establishing a committee.

### Arrangements for the production of parliamentary records

In a second resolution of 26 May 1818 the House of Commons resolved:

That no Clerk, or officer of this House, or short-hand writer employed to take minutes of evidence before this House or any committee thereof do give evidence elsewhere in respect of any proceedings or examination had at the bar, or before any committee of this House, without the special leave of the House.

The terms of the resolution limited it to the question of the attendance of officials or officers. However, until 1980 the House of Commons had followed the practice of requiring leave to be granted both for the attendance of officers and for the production of parliamentary records, although it appears that the usual practice was for leave to be granted without any conditions being attached, presumably in the belief that the requirements of the Bill of Rights would always be observed.<sup>58</sup>

Standing order 368 of the House applies the terms of the House of Commons' resolution of 1818. As was previously the case in the House of Commons, in the House the usual practice has been to grant leave for the production of parliamentary records as well as for the attendance of officers, although technically the standing order is limited to the attendance of officers. Previously petitions have been presented from, or on behalf of, parties asking the House to grant the leave sought<sup>59</sup>, although in some cases motions have been moved in the House without a petition having been presented. In such cases it has been usual for a brief explanation to be made.<sup>60</sup>

In deciding to grant leave, the House has not necessarily granted all that has been requested in a petition; for example, one petition, as well as seeking leave for subpoenas to be served for the production of records, for them to be adduced into evidence, and for

<sup>55</sup> *Amman Aviation Pty Limited v. Commonwealth of Australia* (No. G667 of 1987, p. 15).

<sup>56</sup> *Hamsher & ors v. Swift and ors*, (1992) 33 FCR 545–67 at 547, 562–5.

<sup>57</sup> *Prebble v. Television New Zealand Limited* (1994) 3 All ER 407–420 at 414.

<sup>58</sup> HC 102 (1978–79) 9.

<sup>59</sup> VP 1985–87/1207.

<sup>60</sup> VP 1980–83/791; H.R. Deb. (18.3.82) 1134–5; VP 1983–84/881; H.R. Deb. (2.10.84) 1321–2; VP 1990–92/1334; H.R. Deb. (27.2.92) 390–2.

the attendance of appropriate officers, also sought leave to interview and obtain proofs of evidence from officers of the Parliamentary Reporting Staff. The House did not grant leave for the officers to be interviewed.<sup>61</sup> In some cases no action has been taken on petitions.<sup>62</sup>

On 31 October 1980 the House of Commons resolved:

That this House while re-affirming the status of proceedings in Parliament confirmed by Article 9 of the Bill of Rights, gives leave for reference to be made in future Court proceedings to the Official Report of Debate and to the published Reports and evidence of Committees in any case in which, under the practice of the House, it is 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 adoption of similar provisions for the Commonwealth Parliament was recommended by the Joint Select Committee on Parliamentary Privilege in its 1984 report. Although resolutions to give effect to the recommendations of the committee were tabled, the recommendations were not implemented. The House therefore did not decide that the practice of granting leave should be discontinued. It has, however, been held by some authorities that the granting of leave is not required as a matter of law<sup>63</sup> and the Senate has agreed to a resolution to the effect that leave of the Senate is not required.<sup>64</sup> It should also be noted that the adduction into evidence of in camera evidence is expressly prohibited by the Parliamentary Privileges Act.<sup>65</sup>

### **Waiver of privilege by House not possible**

The immunity conferred on participants in proceedings in Parliament, and the laws on the use of or reference to records of, or documents concerning, parliamentary proceedings are part of the law of the Commonwealth<sup>66</sup> and, as such, cannot be waived or suspended by either House acting on its own. The Committee of Privileges of the House has expressed the view that 'as a matter of law there is no such thing as a waiver of Parliamentary Privilege'.<sup>67</sup> In relation to the *Prebble v. Television New Zealand* case the New Zealand House of Representatives maintained that 'article 9, as a rule of statute law, cannot be waived collectively by the House or individually by members (or others)'.<sup>68</sup> The Senate has resolved not to accede to a request in a petition that it 'waive privilege' in relation to a submission made to a committee.<sup>69</sup>

The Defamation Act 1996 (UK) enables a person effectively to waive, in so far as it concerns that person, the immunity preventing 'proceedings in Parliament' from being impeached or questioned in court where the person's conduct in relation to proceedings is an issue in defamation proceedings. This law, which is contrary to the previously applying law, does not change the law in respect of the Commonwealth Parliament.

### **Matters arising when House is not sitting**

On occasions when the House is not sitting and the production of parliamentary records has been desired, the Speaker has granted permission for their production. In

61 VP 1983-84/887, 956 (see also VP 1987-89/965-6).

62 VP 1976-77/563; VP 1977/39.

63 E.g. *Comalco Limited v. Australian Broadcasting Commission*, (1982) 50 ACTR.

64 J 1987-89/525, 536.

65 *Parliamentary Privileges Act 1987*, s.16.

66 Opinion of Hon. T. E. F. Hughes, QC, appended to Committee of Privileges Report, PP 154 (1980) 96-7 (the opinion noted that a House may choose not to enforce its privileges in particular circumstances).

67 'Report relating to the use of or reference to the records of proceedings of the House in Courts', *House of Representatives Committee of Privileges*, PP 154 (1980) 6.

68 *Prebble v. Television New Zealand Limited* (1994) 3 All ER 407-20 at 407.

69 J 1985-87/153-4.

conveying approval, the Speaker has noted that it is given on the understanding that proper regard will be had to Article 9 of the Bill of Rights. All cases to date arose before enactment of the Parliamentary Privileges Act and, in any future case, attention will presumably be drawn to the provisions of that Act. The Leader of the House, the Manager of Opposition Business (or equivalent) and the Attorney-General have been advised of the Speaker's decision when it has been made, and the matter has been reported to the House as soon as practicable. Similar action has also been taken in the Senate.<sup>70</sup>

## Precedents

The more unusual or important cases which have arisen are described in the following pages. It should be noted that, except for the last one, each case pre-dates the enactment of the *Parliamentary Privileges Act 1987*.

In 1943, during an inquiry into the 'Brisbane line', a Royal Commissioner held that he could not direct a Minister to answer questions in regard to a statement he had made in the House.<sup>71</sup>

On 7 May 1963 the House authorised two Hansard reporters to attend in the Supreme Court of the Australian Capital Territory to give evidence in relation to a proceeding in the House (produce shorthand notebooks to prove the accuracy of a newspaper report of a particular proceeding).<sup>72</sup> No petition was presented to the House in this instance.

### *Sankey 'Loans affair' prosecution*

On 21 October 1975, a petition was presented from Mr Danny Sankey praying that the House grant leave to the petitioner and his legal representatives to issue and serve subpoenas for the production of certain official records of the proceedings of the House held on 9 July 1975 and of documents tabled therein and further to issue and serve subpoena for the attendance in court of those persons who took the record of such proceedings. Mr Sankey advised the House in his petition that he wished to institute proceedings against Mr Whitlam, Mr Connor, Dr Cairns and former Senator Murphy and the records sought were intended to be adduced in evidence in the prosecution.<sup>73</sup> On 25 February 1976, a further petition was presented from Mr Sankey seeking leave for the petitioner and his legal representatives to inspect the documents tabled during the proceedings of 9 July 1975, together with the other matters sought in the previous petition.<sup>74</sup>

On 4 June 1976, the House granted leave for the inspection of the tabled documents in question, for a subpoena to be issued and served for the production of the documents and for an appropriate officer to attend at court and produce the documents.<sup>75</sup>

Two further petitions were presented to the House on behalf of Mr Sankey. The first was presented on 9 December 1976<sup>76</sup> and the second on 24 March 1977.<sup>77</sup> No action was taken by the House in respect of either of these petitions.

<sup>70</sup> VP 1980-83/949; VP 1983-84/149; J 1983-84/203.

<sup>71</sup> ALJ Vol. 18, 1944, p. 76.

<sup>72</sup> VP 1962-63/464; and see Ch. on 'Papers and documents'.

<sup>73</sup> VP 1974-75/1002; H.R. Deb. (21.10.75) 2292-3.

<sup>74</sup> VP 1976-77/33.

<sup>75</sup> VP 1976-77/247.

<sup>76</sup> VP 1976-77/563.

<sup>77</sup> VP 1977/39.

It should be noted that the House did not grant leave for the Hansard report to be used in the proceedings nor for the reporters who took the report to appear in the court in connection with the proceedings.

*Order of Mr Justice Begg in the case of Uren v. John Fairfax & Sons Ltd*

In 1979 an order was made by Mr Justice Begg of the Supreme Court of New South Wales in a case in which the Hon. T. Uren, MP had commenced an action for defamation against John Fairfax & Sons Limited, publishers of the *Sydney Morning Herald*. On 11 September 1979, the order having been raised as a matter of privilege, the House referred the following matter to the Committee of Privileges:

The extent to which the House might facilitate the administration of justice with respect to the use of or reference to the records of proceedings of the House in the Courts without derogation from the Privileges of the House, or of its Members.<sup>78</sup>

The judge's order was to the effect that certain interrogatories should be answered and verified by Mr Uren, requiring him to agree that certain speeches in the Parliament shown in photostat copies of Hansard as having been made by him and two other persons were in fact made by him or them. The judge accepted the submission by counsel to the effect that what the defendant was seeking to do did not infringe the privilege of a House of Parliament in relation to proceedings before it, but sought merely to prove as a matter of fact that the plaintiff and others had made certain speeches in the House, not in any way to criticise them nor call them into question in court proceedings, but to prove them as facts upon which the defendants' alleged comments were made in the publication sued upon by the plaintiff. The judge ruled that this use of the fact of what was said in Parliament would not be a breach of the privilege of Parliament.

The Committee of Privileges carefully examined the order and concluded that His Honour was in error. (The judge had expressed views to the effect that the broadcast of proceedings and the publication of those proceedings in Hansard amounted to a waiver of privilege.) The committee expressed concern that, as a consequence of his order, the answers to the interrogatories may have been used by counsel in cross-examination had the case (which was settled out of court) come to trial. Such a course, if allowed, may have been used for questioning the motives of the Member when he made his speech in the House, a gross violation of the privilege enshrined in Article 9 of the Bill of Rights.

In considering the matter, the committee had the benefit of a report of the House of Commons Committee of Privileges which had conducted a similar inquiry and reported to the House of Commons on 7 December 1978. In that report the committee distinguished between the question of the application of Article 9, and the subsidiary procedural question of whether leave was required for the production of, or reference to be made to, the Hansard record. It stated:

The Resolution [of 1818] continues to provide an essential protection for the House in the matters to which it strictly relates, but Your Committee consider that no purpose is served by its extension to the requirement of leave merely for reference to be made to the Official Report. They believe that the provisions of Article 9 of the Bill of Rights, reinforced by the care taken by the courts and tribunals to exclude evidence which might amount to infringement of parliamentary privilege, amply protect the House's privilege of freedom of speech.<sup>79</sup>

In a memorandum submitted to the House of Representatives Committee of Privileges, at its request, the Clerk of the House also drew attention to the practice in Canada whereby records of the House could be admitted without leave having been first obtained. He stated:

<sup>78</sup> VP 1978-80/975.

<sup>79</sup> *House of Commons Committee of Privileges Report*, HC 102 (1978-79) iii.

If the Committee is to draw on the experiences of other Parliaments, particularly the Commons Houses of the United Kingdom and Canada, it may feel disposed to recommend the adoption of a procedure whereby records of the House may be admitted into evidence in court proceedings, without the leave of the House having been first obtained, for the limited purpose only of establishing that a particular statement was made by a particular person at a specified time.<sup>80</sup>

The Committee of Privileges presented its report to the House on 9 September 1980. As well as commenting on the order of Mr Justice Begg, the committee recommended, inter alia, that the petitioning process should be continued, that petitions should be referred to the Committee of Privileges (which should enable any Member or former Member to be heard) and that the committee should then report its views to the House, recommending any conditions on the production of the record(s) it deemed appropriate.<sup>81</sup> These recommendations were not implemented.

### *Royal Commission into Australia's Security and Intelligence Agencies*

In June 1983 during the winter adjournment the Speaker approved a request for the adduction into evidence before a Royal Commission of Inquiry into Australia's Security and Intelligence Agencies of certain Hansard reports, subject to the condition that proper regard be had to the provisions of Article 9. During the course of the Royal Commission's proceedings, when attention was being given to matters involving an expelled diplomat, a lobbyist, and government actions in connection with these matters, a statement of issues requiring resolution was produced by the Royal Commission. Concern was expressed that a breach of parliamentary privilege could arise in connection with two of the issues which could have involved the questioning of statements of Ministers in the House. Although some modifications of the issues in question were made it was considered that there was still a risk to Parliament's interests and counsel representing the Speaker, joined by the Deputy President of the Senate, was given conditional leave to appear before the Royal Commission. Senior counsel addressed the Royal Commission on the application of the law of parliamentary privilege, and during the further stages of the proceedings junior counsel remained and represented the interests of the Speaker and the President, as necessary, in so far as the issue of privilege was concerned. The Speaker's actions were endorsed when he reported them to the House when sittings resumed on 23 August 1983.<sup>82</sup>

### *Cases involving Mr Justice Murphy and Judge Foord*

In 1985 and 1986 issues of parliamentary privilege arose during trials which followed Senate committee inquiries concerning Mr Justice Murphy. Although the matters concerned the Senate in an immediate sense, the principles involved were considered to be of equal importance to the House of Representatives.

In the first trial of Mr Justice Murphy arguments put by counsel representing the President of the Senate in favour of the traditional parliamentary view of the meaning of Article 9, and to the effect that the presiding judge should intervene of his own volition to ensure the provisions were observed, were rejected.

The judge favoured a narrower view of the term 'impeached or questioned', indicating that there needed to be an adverse effect on freedom of speech or debates or proceedings in Parliament for Article 9 to be breached. The judge stressed the importance of cross-examination of witnesses with regard to previous statements, and referred to the competing interests involved. The judge held that 'questioning of

<sup>80</sup> PP 154 (1980) 49.

<sup>81</sup> PP 154 (1980) 6.

<sup>82</sup> VP 1983-84/149; H.R. Deb. (23.8.83) 1-3.

witnesses . . . as to what they said before a committee of the Senate, does not necessarily amount to a breach of privilege as being necessarily contrary to the Bill of Rights'.<sup>83</sup> The cross-examination permitted extended to evidence given in camera and not authorised for publication. In a later trial, *R. v. Foord*, witnesses were also cross-examined on their committee evidence.<sup>84</sup>

In the second trial of Mr Justice Murphy a different view again was taken of the proper interpretation of the provisions of Article 9, although the result was similar. The judge held that what was meant by the declaration in Article 9 was that no court proceedings having legal consequences against a Member, or a witness, were permissible which would have the effect of preventing a Member or witness exercising his or her freedom of speech in Parliament or before a committee or of punishing him or her for having done so. It was held that statements to the committees could, without breach, be the subject of comment, used to draw inferences or conclusions, analysed and made the basis of cross-examination or submissions and comparisons made between such statements and statements by the same person outside Parliament.<sup>85</sup> The trial proceeded in light of these decisions.

Members and Senators were informed of these matters and, in due course, it was concluded that only by legislation could the preferred interpretation of Article 9 of the Bill of Rights be guaranteed, and this was one of the principal objects of the Parliamentary Privileges Bill sponsored by the President of the Senate and the Speaker.<sup>86</sup>

#### *Aboriginal Affairs Committee inquiry*

During the course of an inquiry in the 33rd Parliament into the effects of asbestos mining on the Baryulgil community the House Standing Committee on Aboriginal Affairs received a number of documents from a person formerly employed as manager of the asbestos mine in question and some from the New South Wales Aboriginal Legal Service. The committee published some of the documents and others were retained as exhibits and confidential exhibits. On 15 November 1985, in the 34th Parliament, a petition was presented from a solicitor for the Aboriginal Legal Service seeking leave to take possession of photographs, letters and plans tendered by the Aboriginal Legal Service, to take possession of documents tendered or presented by the former mine manager and seeking leave for persons seeking compensation for injuries and damages resulting from employment in or residence near the mine to refer to the committee's report in court proceedings. It also sought to have an appropriate officer or officers attend in court to produce the committee report and to give evidence in relation to the inquiry that led to the report.

Not having direct knowledge of the documents or matters in question, the House referred to the Standing Committee on Aboriginal Affairs the question of whether the documents should be presented to the House by the committee for the purpose of the House granting leave for a subpoena to be issued and served for the production of the documents in court.

Before the committee reported on the matter a second petition was received seeking leave to serve a subpoena requiring the production of various photographs, letters and documents received from the former mine manager and seeking leave for the documents to be released into the custody of the Supreme Court of New South Wales. The petition

83 Judgment of Cantor J, *R v. Lionel Keith Murphy*, N.S.W. Supreme Court, (1986) 64 ALR 498.

84 Parliamentary Privileges Bill 1987, explanatory memorandum, p. 10.

85 Judgment of Hunt J, *R v. Lionel Keith Murphy*, N.S.W. Supreme Court, (1986) 64 ALR 498.

86 S. Deb. (4.6.86) 3307-8; S. Deb. (7.10.86) 893-5; H.R. Deb. (4.6.86) 4552-3; H.R. Deb. (19.3.87) 1154-6.



related to litigation commenced to determine the rights to possession and ownership of documents.

The committee, having received advice from the Attorney-General, and having given the witnesses involved an opportunity to comment, concluded that there was significant public interest in the documents being available for use in the courts, which it did not want to disrupt, and noted that the witnesses consented to the release of the documents, so the question of protection of the witnesses did not affect any decision. The committee recommended that leave should be granted as requested. The House subsequently granted leave to the petitioners to issue subpoenas for the production of the documents and for the appropriate officer or officers to attend in court and produce the documents and the official report and give evidence concerning the inquiry (provided that such officer or officers would not be required to attend on a day which would prevent the performance of their duties in the Parliament) 'with the intention that the said documents be available for production in all proceedings to which they are relevant'.<sup>87</sup>

### *Road Safety Committee inquiry*

In November 1988 a petition was presented from a firm of solicitors seeking, inter alia, leave for the petitioners to take possession of the transcript of proceedings of a Road Safety Committee inquiry and all documents tendered by parties appearing and giving evidence and, in particular, certain exhibits referred to in an appendix to the report, and for the production and admission into evidence of such documents. The House granted leave in respect of the published records of proceedings and the report of the committee, but not in respect of the confidential exhibits. When the petition was presented the Road Safety Committee had ceased to exist, but the Standing Committee on Transport, Communications and Infrastructure had responsibilities in that area, and so the House referred to that committee the question of whether the confidential exhibits should be presented to the House for the purpose of the House granting the leave sought. In April 1989 the committee reported, having contacted those who had lodged the confidential exhibits. The committee evaluated the arguments for and against the release sought. It noted that the documents had been provided on the basis that they would be treated as confidential. In recommending against release, the committee stated that the House had a strong moral obligation to protect the arrangements made in obtaining information and stated that to authorise release of the documents for use in a court could seriously impair the future effectiveness of the working of parliamentary committees because witnesses could refuse to be forthcoming in what they said or provided, knowing that they could be disadvantaged in court proceedings by the release of evidence. It noted that the word of Parliament could amount to nought and the integrity of the institution could be called into question. The committee advised that the exhibits should not be presented to the House for the purposes sought and that in future the House should ask committees, when making such a decision, to take into consideration the concepts and propositions it had enunciated. In the event the matter was settled and the case did not proceed.<sup>88</sup>

87 VP 1985-87/1040-1. 'Certain documents tendered to the Committee during the Baryulgil Community Inquiry', *House of Representatives Standing Committee on Aboriginal Affairs*, PP 355 (1986); VP 1985-87/1355.

88 VP 1987-89/965-6. 'Release of Tyre Safety Inquiry documents', *Report of the House of Representatives Standing Committee on Transport, Communications and Infrastructure*; VP 1987-89/1095.

## FREEDOM FROM ARREST ETC

Section 14 of the *Parliamentary Privileges Act 1987* provides that a Member of either House shall not be arrested or detained in a civil cause on any day on which the House of which he or she is a Member meets, on any day on which a committee of which he or she is a member meets or on any day within five days before or after such days.

The principal reason for the privilege of freedom from arrest has been well expressed in a passage from Hatsell:

As it is an essential part of the constitution of every court of judicature, and absolutely necessary for the due execution of its powers, that persons resorting to such courts, whether as judges or as parties, should be entitled to certain Privileges to secure them from molestation during their attendance; it is more peculiarly essential to the Court of Parliament, the first and highest court in this kingdom, that the Members, who compose it, should not be prevented by trifling interruptions from their attendance on this important duty, but should, for a certain time, be excused from obeying any other call, not so immediately necessary for the great services of the nation.<sup>89</sup>

Freedom from arrest in civil matters is one of the earliest privileges. The immunity is confined to civil arrest; there is no immunity from arrest for crime.

The imprisonment of a Member of the House of Representatives was the subject of an inquiry by the Committee of Privileges in 1971. On 11 April 1971, Mr T. Uren, MP was committed for 40 days after his failure to pay costs of \$80 awarded against him in respect of an unsuccessful action he had brought against a policeman for alleged assault. He was released after serving only a short period when the balance of the costs was paid by another person.

The particular question for determination by the Committee of Privileges was whether the commitment of Mr Uren was one in a case which was of a civil or criminal character. Clearly, if the commitment was one in a case which was of a civil character, a breach of parliamentary privilege had occurred. On the other hand, if the commitment arose out of a case which was of a criminal character or which was more of a criminal than a civil character, the Member enjoyed no immunity from imprisonment and no breach of parliamentary privilege had occurred.

The committee received conflicting legal advice, but reported to the House on 7 May 1971 (a.m.) that it had found that the commitment to prison of Mr Uren constituted a breach of parliamentary privilege but recommended that:

... having regard to the complexities and circumstances of the case ... the House would best consult its own dignity by taking no action in regard to the breach of Parliamentary Privilege which had occurred.<sup>90</sup>

On 23 August 1971 the House agreed to take note of the report. During the course of the debate the Minister representing the Attorney-General tabled correspondence from the New South Wales Premier and the New South Wales Attorney-General which expressed the strong view that the committee's finding was inconsistent with decisions of New South Wales courts which held that imprisonment for costs is 'criminal in nature'.<sup>91</sup>

## House to be informed of the detention of a Member

In all cases in which Members of either House are arrested on criminal charges, the House must be informed of the cause for which they are detained from their service in Parliament.<sup>92</sup>

<sup>89</sup> Hatsell, vol. 1, pp. 1-2.

<sup>90</sup> 'Commitment to prison of Mr T. Uren, M.P.', *Report of House of Representatives Committee of Privileges*, PP 40 (1971) 6.

<sup>91</sup> VP 1970-72/667; H.R. Deb. (23.8.71) 526-9.

<sup>92</sup> *May*, p. 95.

The committal of a Member for any criminal offence, or in any civil matter, including contempt of court, should be similarly notified to the Speaker by the committing judge or magistrate or some other competent authority. When Mr Uren was committed for 40 days for his failure to pay court costs of \$80 (*see above*), advice of his imprisonment (and subsequent release) was conveyed to the Speaker and reported by him to the House at its next sitting.

On 26 February 1980 the Senate agreed to a resolution relating to the right of the Senate to receive notification of the detention of its Members. A resolution reaffirming the resolution of February 1980 was agreed to by the Senate on 18 March 1987. The resolution was communicated to the Presiding Officers of the Parliaments of the States, the Attorneys-General of the States and the Speaker of the House of Representatives.<sup>93</sup>

In 1984 the Joint Select Committee on Parliamentary Privilege recommended that the court or officer having charge of a detained Member should inform the relevant Presiding Officer but no specific action was taken by the House to have this recommendation implemented.<sup>94</sup>

### Extension of privilege to others

Section 14 of the *Parliamentary Privileges Act 1987* also extends the immunity from arrest in civil causes to officers and witnesses in the following terms:

(2) An officer of a House—

...

(b) shall not be arrested or detained in a civil cause,  
on any day—

(c) on which a House or a committee upon which that officer is required to attend meets; or

(d) which is within 5 days before or 5 days after a day referred to in paragraph (c).

(3) A person who is required to attend before a House or a committee  
on a day—

...

(b) shall not be arrested or detained in a civil cause,  
on that day.

### Exemption from jury service

Based on the House's prior claim to the services of its Members, they are excused from service on juries. This exemption has been incorporated in the *Jury Exemption Act 1965*. Certain officers of the Parliament have traditionally been exempted from jury service in the Australian Capital Territory by regulations<sup>95</sup> made under the Act.

### Exemption from attendance as a witness

Section 14 of the *Parliamentary Privileges Act 1987* provides that Members shall not be required to attend before a court or tribunal on any day on which the House of which the Member is a member meets, on any day on which a committee of which he or she is a member meets or on any day within five days before or after such days. The exemption is also extended to officers of the House required to attend upon the House or a committee and applies on days on which the House or the committee upon which the officer is required to attend meets, or on days within five days before or after such days.

93 See Ch. on 'The Parliament'.

94 Joint Select Committee on Parliamentary Privilege, *Final Report*, October 1984, PP 219 (1984) 72.

95 Jury Exemption Regulations.

Witnesses, that is, 'persons required to attend before a house or a committee on a day', shall not be required to attend before a court or tribunal on that day.

The Parliament claims the right of the service of its Members and officers in priority to a subpoena to attend as a witness in court '... upon the same principle as other personal privileges, viz, the paramount right of Parliament to the attendance and service of its Members'.<sup>96</sup> In the House of Commons it has been held on occasions that the service of a subpoena on a Member to attend as a witness was a breach of privilege.<sup>97</sup> In the House of Representatives, when a Member has received a subpoena requiring his or her attendance in court on a day on which a Member could not be compelled to attend, it has been common for the Speaker to write to the court authorities asking that the Member be excused.

In 1943 during an inquiry into the 'Brisbane Line', a Royal Commissioner stated:

... I have no power, sitting here as a Royal Commissioner, to direct the Minister ... to attend before me and give evidence.<sup>98</sup>

In 1966 the Treasurer was served with a subpoena requiring his attendance before the Supreme Court of Victoria. The Speaker wrote to the court drawing attention to the claims of the House concerning the attendance of Members. The judge ruled in accordance with the Speaker's representations, and excused the Treasurer from attendance.<sup>99</sup>

Subsection 15(2) of the *Evidence Act 1995* provides that a Member of a House of an Australian Parliament is not compellable to give evidence if this would prevent the Member from attending a sitting of his or her House, or a joint sitting, or a meeting of a committee of which he or she is a member.

## PUBLICATION OF TABLED PAPERS TO MEMBERS

Section 11 of the *Parliamentary Privileges Act 1987* provides that no action, civil or criminal, lies against an officer in respect of a publication to a Member of a document that has been laid before a House, but this provision does not deprive a person of any defence that would otherwise be available.

## ACTS CONSTITUTING BREACHES OF PRIVILEGE AND CONTEMPTS

By virtue of section 49 of the Constitution, the House has the ability to treat as a contempt:

... any act or omission which obstructs or impedes ... (it) ... in the performance of its functions, or which obstructs or impedes any Member or officer ... in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results ... even though there is no precedent of the offence.<sup>100</sup>

Whilst the House thus has a degree of flexibility in this area, section 4 of the *Parliamentary Privileges Act 1987* imposes a significant qualification:

<sup>96</sup> *May*, p. 100.

<sup>97</sup> *May*, p. 100.

<sup>98</sup> *ALJ* Vol. 18, 1944, p. 76.

<sup>99</sup> *Di Nardo v. Downer* (1966) *Victorian Reports* 351-2.

<sup>100</sup> *May*, p. 115.

Conduct (including the use of words) does not constitute an offence against a House unless it amounts, or is intended or likely to amount, to an improper interference with the free exercise by a House or committee of its authority or functions, or with the free performance by a member of the member's duties as a member.

This important provision should be taken into account at all stages in the consideration of possible contempts, although its application has not, to date, been established in practice. It is also important to recognise that the Act does not codify or enumerate acts or omissions that may be held to constitute contempts, although on 25 February 1988 the Senate agreed to a resolution in this regard.<sup>101</sup>

Section 6 of the Act provides that words or acts shall not be taken to be an offence against a House by reason only that those words or acts are defamatory or critical of the Parliament, a House, a committee or a Member, thus abolishing a previous category of contempt. This provision does not apply to words spoken or acts done in the presence of a House or a committee. The Act also contains specific provisions dealing with the protection of witnesses (*see* p. 704) and the unauthorised disclosure of evidence (*see* p. 706).

In 1984 the Joint Select Committee on Parliamentary Privilege recommended the adoption, by resolution, of detailed guidelines which, whilst they would not prevent the House from pursuing a matter not covered by their provisions, would indicate matters that may be treated as contempts. Whilst draft guidelines were tabled in the House in 1987<sup>102</sup>, action was not taken to adopt them. The committee also recommended the adoption of a policy of restraint in the exercise of the penal jurisdiction, proposing that each House should exercise its powers in this area only when satisfied that to do so was essential in order to provide reasonable protection for the House, its Members, its committees or its officers from such improper obstruction, or attempt at or threat of obstruction, such as was causing, or likely to cause substantial interference with their respective functions.<sup>103</sup> Although no explicit action was taken by the House to implement this recommendation, successive Speakers, in giving decisions on complaints raised, have referred to the policy of restraint and have indicated support for it.<sup>104</sup>

The following paragraphs are confined mainly to a note of matters highlighted in *May* and a record of those matters on which the House of Representatives has determined acts or conduct constituting breaches of privilege or contempt before enactment of the Parliamentary Privileges Act. The experience of the House, because of its relatively short history, is limited and for guidance as to precedents of other acts found to constitute contempt by the House of Commons, reference is made to the experience of that as recorded in *May*.<sup>105</sup> **In assessing the relevance to future cases of the precedents which do exist in the Commonwealth Parliament and in the House of Commons, regard must be had to the provisions of the Act and, in particular, to section 4, which appears above. Appendix 25 contains a full listing of complaints raised in the House.**

<sup>101</sup> J (1988–89) 520–21, 536.

<sup>102</sup> Proposed resolution incorporated in Hansard at H.R. Deb. (5.5.87) 2632. The Senate adopted a resolution to give effect to the recommendation on 25 February 1988.

<sup>103</sup> PP 219 (1984) 83; H.R. Deb. (5.5.87) 2632–3.

<sup>104</sup> E.g. H.R. Deb. (9.11.83) 2461; H.R. Deb. (29.4.86) 2698; H.R. Deb. (16.9.86) 759. The Senate has adopted resolutions on this matter, J 1987–89/520–1, 536.

<sup>105</sup> *May*, p. 115–134. It is stated at p. 115, 'It is therefore impossible to list every act which **might** be considered to amount to a contempt' (emphasis added).

## Misconduct

### *In the presence of the House or a committee*

*May* states:

Any disorderly, contumacious or disrespectful conduct in the presence of either House or any committee, which may be committed by strangers, parties or witnesses, will constitute a contempt.<sup>106</sup>

The most frequent example of disorderly conduct on the part of strangers is the interruption or disturbance of the proceedings of the House by visitors in the galleries, generally seeking to publicise some political cause. In practice, disorderly conduct of this nature would not normally be pursued as a possible contempt but rather dealt with by other means (*see* Chapter on 'Parliament House and the House of Representatives Chamber').

It should also be noted that section 15 of the Parliamentary Privileges Act provides:

... for the avoidance of doubt, that, subject to the provisions of section 49 of the Constitution and this Act, a law in force in the Australian Capital Territory applies according to its tenor (except as otherwise provided by that or any other law) in relation to:

- (a) any building in the Territory in which a House meets; and
- (b) any part of the precincts as defined by subsection (3) (1) of the Parliamentary Precincts Act 1988.

Section 11 of the *Parliamentary Precincts Act 1988* provides that the *Public Order (Protection of Persons and Property) Act 1971* applies to the precincts as if they were Commonwealth premises within the meaning of that Act.

### *Disobedience to the rules or orders of the House*

Examples of this type of contempt include the refusal of a witness or other person to attend the House or a committee after having been summoned to attend and refusing to withdraw from the House or a committee when directed to do so. 'To prevent, delay, obstruct or interfere with the execution of the orders of either House or its committees is also a contempt'.<sup>107</sup>

*Curtin Case* (1953)<sup>108</sup>: On 17 March 1953, the House resolved that contempt of its ruling and authority had taken place by a Member who, on 13 March, had failed to observe an order for his exclusion from the Parliament building following his suspension from the House for using an unparliamentary expression. Following the resolution the Member made an apology to the House which the House resolved to accept and no further action was taken.

### *Abuse of the right of petition*

*May* states 'Any abuse of the right of petition may be treated as a contempt by either House'.<sup>109</sup> Precedents in this area include:

- frivolously, vexatiously or maliciously submitting a petition containing false, scandalous or groundless allegations against any person, whether a Member of such House or not, or contriving, promoting and prosecuting such a petition;
- inducing persons to sign petitions by false representations.<sup>110</sup>

<sup>106</sup> *May*, p. 115.

<sup>107</sup> *May*, p. 117.

<sup>108</sup> VP 1951-53/609, 611.

<sup>109</sup> *May*, p. 118.

<sup>110</sup> *May*, p. 118.

*Forged or falsified documents*

It is a contempt to present or cause to be presented to either House or to a committee forged, falsified or fabricated documents with intent to deceive.<sup>111</sup>

In 1907, a committee of the House of Representatives reported that signatures to a petition were found to be forgeries and the House 'requested' the Crown law authorities to take action with a view to criminal prosecution. The House was later advised, however, that prosecution for forgery would be unsuccessful.<sup>112</sup> In 1974, a letter published in a newspaper in the name of a Member was found by the Committee of Privileges to be a forgery and therefore appeared to constitute a criminal offence. As the author of the letter was unknown, no legal action could be taken.<sup>113</sup>

*Conspiracy to deceive*

To conspire to deceive either House or committees of either House could be punished as a contempt. The abuse of the right of petition and forging or falsifying documents could be examples of this type of contempt.

*Deliberately misleading the House*

May states:

The Commons may treat the making of a deliberately misleading statement as a contempt. In 1963 the House resolved that in making a personal statement which contained words which he later admitted not to be true, a former Member had been guilty of a grave contempt.<sup>114</sup> (*Profumo's Case*, CJ (1962–63) 246)

The circumstances surrounding the decision of the House of Commons in *Profumo's Case* are of importance because of the guidance provided in cases of purported 'misrepresentation' by Members. Mr Profumo had sought the opportunity of making a personal statement to the House of Commons to **deny** the truth of allegations currently being made against him. Later he was forced to admit that **in making his personal statement of denial to the House**, he had deliberately misled the House. As a consequence of his actions, he resigned from the House which subsequently agreed to a resolution declaring him guilty of a grave contempt.

Whilst claims that Members have deliberately misled the House have been raised as matters of privilege or contempt in the House, the Speaker has not, to date, accepted such a claim.

On 16 September 1986 Speaker Child advised the House that she had appraised a statement to the House on 22 August by a Member, following her reference to remarks critical of her attributed to the Member. The Speaker, having examined the transcripts of the remarks in question, and comparing them to the Member's statement to the House, claimed that he had misled the House and this action, in her opinion, constituted a contempt of the House. The Member then addressed the House on the matter. The Chairman of Committees then moved a motion to the effect, *inter alia*, that the Member's statement to the House on 22 August 'being clearly at odds with his original comments, misled the House, and thus constitutes a contempt of the House . . .' After debate, and the Member having again withdrawn the remarks to which attention had been drawn,

<sup>111</sup> May, p. 118.

<sup>112</sup> VP 1907–08/165, 267.

<sup>113</sup> 'Report relating to a letter fraudulently written in the name of the honourable Member for Casey published in the Sun-News Pictorial on 6 December 1973', *House of Representatives Committee of Privileges*, PP 65 (1974); VP 1974/98.

<sup>114</sup> May, p. 119.

and having again apologised, the motion was withdrawn, by leave<sup>115</sup> (*and see* Chapters on 'The Speaker, Deputy Speakers and Officers' and 'Motions').

### *Corruption in the execution of their office as Members*

Section 73A of the *Crimes Act 1914* provides that a Member who asks for or receives or obtains, or offers or agrees to ask for or receive or obtain any property or benefit of any kind for himself or any other person on an understanding that the exercise by him of his duty or authority as such a Member will, in any manner, be influenced or affected, is guilty of an offence. The penalty is imprisonment for two years.

*May* states:

The acceptance by any Member of either House of a bribe to influence him in his conduct as such Member or any fee, compensation or reward in connection with the promotion of, or opposition to any bill, resolution, matter or thing submitted or intended to be submitted to the House or any committee thereof is a breach of privilege.<sup>116</sup>

Also:

The concern of the House of Commons extends beyond direct pecuniary corruption of Members. The House has emphasised that 'it is the personal responsibility of each Member to have regard to his public position and the good name of Parliament in any work he undertakes'.<sup>117</sup>

### *Advocacy by Members*

*May* records:

On 22 June 1858 the House of Commons resolved, "That it is contrary to the usage and derogatory to the dignity of this House that any of its Members should bring forward, promote or advocate in this House any proceeding or measure in which he may have acted or been concerned for or in consideration of any pecuniary fee or reward".<sup>118</sup>

(*And see* Chapter on 'Members'.)

### **Obstructing Members and officers in the discharge of their duty**

To cause or effect the arrest of a Member in a civil cause during periods when the immunity conferred by the Parliamentary Privileges Act applies could be pursued as a contempt (*see* p. 694). It is also a contempt to molest a Member while attending, coming to, or going from the House. Similarly, it is a contempt to attempt to influence a Member in his or her conduct by threats or to molest any Member on account of his or her conduct in the Parliament.

In 1986 the Committee of Privileges considered a case in which the work of a Member's electorate office had been disrupted as a result of a considerable number of telephone calls received in response to false advertisements in a newspaper. The committee's report stated that the actions in question were to be deprecated; that in all the circumstances it did not believe that further action should be taken; but that harassment of a Member in the performance of his or her work by means of repeated or nuisance or orchestrated telephone calls could be judged a contempt.<sup>119</sup>

The Committee of Privileges has also considered the effect of industrial action which caused the delivery of mail to, and the despatch of mail from Member's electorate offices. It found that the actions had disrupted the work of electorate offices, and

<sup>115</sup> VP 1985-87/1089, 1090, 1101-2.

<sup>116</sup> *May*, p. 119; *and see* Constitution, s. 45.

<sup>117</sup> *May*, p. 120.

<sup>118</sup> *May*, p. 120.

<sup>119</sup> 'Disruption caused to the work of the electorate office of the honourable Member for Wentworth made in response to false advertisements in the *Sydney Morning Herald* of 20 September 1986', *House of Representatives Committee of Privileges*, PP 282 (1986) 5-6.



impeded the ability of constituents to communicate with Members, but that as the actions were not taken with any specific intention to infringe the law concerning the protection of Parliament an adverse finding should not be made.<sup>120</sup>

In 1995 the Committee reported on a complaint following the execution, by officers of the Australian Federal Police, of a search warrant on the electorate office of a Member. The committee concluded that, although the work of the Member's electorate office was undoubtedly disrupted, and that although the actions complained of amounted to interference in the free performance by the Member of his duties as a Member, the interference could not be regarded as improper interference (as required by section 4 of the Act and so no contempt was committed).<sup>121</sup>

The Parliamentary Privileges Act also confers, by section 14, immunity from arrest in civil causes of officers required to attend on a House or a committee for certain periods (see p. 695). The obstruction of officers of the House in the execution of their duty or other people employed by the House, or entrusted with the execution of its orders, or the molestation of those people on account of their having carried out their duties, could be found to be a contempt. To commence proceedings against such officers or other people for their conduct in obedience to the orders of the House could be regarded as a contempt.

### **Attempts by improper means to influence Members in the performance of their duties**

Section 73A of the *Crimes Act 1914* provides that a person who, in order to influence or affect a Member in the exercise of his duty or authority as such a Member, or to induce him to absent himself from the House or any committee of which he is a Member, gives or confers or promises or offers to give or confer any property or benefit of any kind to or on the Member or any other person is guilty of an offence. The penalty is imprisonment for two years.

#### *The offer of a bribe*

As well as being a criminal offence (see p. 700) the acceptance by Members of a bribe to influence them in their duty as Members is a contempt. The offering of a bribe to Members to influence them in their parliamentary conduct is equally a contempt.

#### *Intimidation etc. of Members*

To attempt by any improper means to influence a Member in his or her conduct as a Member is a contempt.<sup>122</sup> So too is any conduct having a tendency to impair a Member's independence in the future performance of his or her duty, subject, since 1987, to the provisions of the Parliamentary Privileges Act.

In a notable case the House of Commons Committee of Privileges in 1947 inquired into a complaint that certain actions of the Executive Committee of the Civil Service Clerical Association were calculated, improperly, to influence a Member (Mr Brown) in the exercise of his parliamentary duties. Mr Brown had for many years been employed as General Secretary of the Association. Upon his election to Parliament, the Association entered into a contractual relationship with Mr Brown that, whilst remaining a Member, he would hold the appointment of Parliamentary General Secretary and would continue

<sup>120</sup> PP (122) 1994

<sup>121</sup> PP 376 (1995).

<sup>122</sup> In the *Chairman of Sydney Stock Exchange Case* (1935) the question of an alleged threat to a Member was not pursued by the House, VP 1934–37/149–50.

to receive a salary and certain other not insignificant advantages, although his contract with the Association entitled him 'to engage in his political activities with complete freedom'. Mr Brown complained that the cumulative effect of a sequence of events over a period of time was such as to bring pressure to bear upon him to alter his conduct as a Member of Parliament and to change the free expression of his views under the threat that, if he did not do so, his position as an official of the Association would be terminated or rendered intolerable. Following an extensive inquiry, the Committee of Privileges found that, in the particular circumstances, the action of the Executive Committee of the Association did not in fact affect Mr Brown in the discharge of his parliamentary duties. However, in its report the committee stated:

Your Committee think that the true nature of the privilege involved in the present case can be stated as follows:

It is a breach of privilege to take or threaten action which is not merely calculated to affect the Member's course of action in Parliament, but is of a kind against which it is absolutely necessary that Members should be protected if they are to discharge their duties as such independently and without fear of punishment or hope of reward.<sup>123</sup>

*'Bankstown Observer' (Browne/Fitzpatrick) Case*

On 8 June 1955 the Committee of Privileges reported to the House that it had found<sup>124</sup>:

- That Messrs Fitzpatrick and Browne were guilty of a serious breach of privilege by publishing articles intended to influence and intimidate a Member (Mr Morgan), in his conduct in the House, and in deliberately attempting to impute corrupt conduct as a Member against him, for the express purpose of discrediting and silencing him. The committee recommended that the House should take appropriate action.
- That there was no evidence of improper conduct by the Member in his capacity as a Member of the House.
- That some of the references to the Parliament and the Committee of Privileges contained in the newspaper articles constituted a contempt of the Parliament. However, the committee considered the House would best consult its own dignity by taking no action in this regard.

The committee's inquiry and report followed a complaint made by a Member (Mr Morgan) on 3 May 1955 that an article published on 28 April 1955 in a weekly newspaper known as the *Bankstown Observer*, circulating in his electorate, had impugned his personal honour as a Member of Parliament and was a direct attack on his integrity and conduct as a Member of the House.<sup>125</sup> On 26 May 1955 the committee presented a special report to the House seeking authority to include in its investigation articles appearing in the same newspaper on 5, 12 and 19 May 1955.<sup>126</sup> The House acceded to the committee's request on 31 May 1955.<sup>127</sup>

The committee's report and findings were considered by the House on 9 June 1955 and a motion moved by the Prime Minister 'That the House agrees with the Committee in its Report' was agreed to without division. On a further motion of the Prime Minister it was resolved that Messrs Browne and Fitzpatrick be notified that at 10 a.m. the

123 *House of Commons Committee of Privileges Report*, HC 118 (1947) xii.

124 H of R 2 (1954-55) 7. For a full account of this case see J. A. Pettifer, 'The Case of the *Bankstown Observer*', *The Table* XXIV, 1955, pp. 83-92.

125 VP 1954-55/184; H.R. Deb. (3.5.55) 352-5.

126 VP 1954-55/225.

127 VP 1954-55/239.

following day the House would hear them at the Bar before proceeding to decide what action it would take in respect of their breaches of privilege.<sup>128</sup>

On being brought to the Bar of the House the following morning<sup>129</sup> Mr Fitzpatrick sought permission for his counsel to act on his behalf. The request was refused by the Speaker and Mr Fitzpatrick apologised to the House for his actions and withdrew. Mr Browne was then brought to the Bar and addressed the House at some length without apologising and withdrew.

Following a suspension of 51 minutes, the House resumed and the Prime Minister moved the following motion:

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.

A similar motion was moved in respect of Mr Browne. The Leader of the Opposition moved, as an amendment, that both motions be amended to read:

That this House is of opinion that the appropriate action to be taken in these cases is the imposition of substantial fines and that the amount of such fines and the procedure of enforcing them be determined by the House forthwith.

Following considerable debate, the amendment was defeated, on division, and the motions of the Prime Minister agreed to, on division.

The action taken by the legal representatives of Messrs Browne and Fitzpatrick to apply to the High Court for writs of habeas corpus and their subsequent petition to the Judicial Committee of the Privy Council for special leave to appeal against the decision of the High Court is referred to earlier (*see* p. 678).

#### *Case involving Hon. G. G. D. Scholes, MP*

In 1990 the Committee of Privileges reported on actions taken by a solicitor in respect of the Hon. G. G. D. Scholes, MP. Mr Scholes had distributed certain information within his electorate, and had subsequently received a letter from a solicitor acting on behalf of a client affected by the information. The letter, *inter alia*, asked that Mr Scholes refrain from making such statements in the future, and stated that if assurances sought were not forthcoming, the solicitor would advise his client to initiate proceedings. Mr Scholes claimed that the threat would inhibit him in carrying out his duties as a Member, but the committee found that the solicitor's actions did not constitute a contempt.<sup>130</sup>

#### *Cases involving letters written by Members*

In the *Nugent Case* (1992) and the *Sciacca Case* (1994) the Committee of Privileges considered complaints that actions or threatened actions to sue Members on account of statements made in letters to Ministers. The substance of the Members' complaints was that they had been subject to improper interference in the performance of their duties as Members. In the case of Mr Nugent, the committee found that the terms of the letter

128 VP 1954-55/267.

129 For proceedings on this day *see* VP 1954-55/269-71; H.R. Deb. (10.6.55) 1625-65.

130 PP 428 (1990).

containing the threat and the circumstances of its receipt had a tendency to impair Mr Nugent's independence in the performance of his duties.<sup>131</sup> The House subsequently resolved that the persons responsible should be required to apologise<sup>132</sup> and they did so.<sup>133</sup> In the case of Mr Sciacca, the Committee found that although Mr Sciacca had felt constrained, there was no evidence of an attempt to interfere improperly in the performance of his duties and a finding of contempt should not be made.<sup>134</sup>

#### *Case involving Mr Katter, MP*

In this case the Committee was required to consider a complaint that action to sue a person who had sworn a statutory declaration and given it to a Member (who had used it in the course of proceedings in the House) amounted to improper interference in the performance of the Member's duties. The committee found that a contempt had not been committed.<sup>135</sup>

### **Offences against witnesses**

Section 12 of the *Parliamentary Privileges Act 1987* provides that a person shall not, by fraud, intimidation, force or threat, by the offer or promise of any inducement or benefit, or by other improper means, influence another person in respect of any evidence given or to be given before a House or a committee, or induce another person to refrain from giving any such evidence. Further, under the Act a person shall not inflict any penalty or injury upon, or deprive of any benefit, another person on account of the giving or proposed giving of any evidence or any evidence given or to be given, before a House or a committee. The penalties, in each case, are \$5 000 for natural persons and \$25 000 for corporations. These provisions do not prevent the imposition of a penalty in respect of an offence against an Act establishing a committee.<sup>136</sup>

Breach of the immunity of persons required to attend before the House or a committee from arrest in civil causes (and from compulsory attendance before a court or a tribunal as a witness) on days when they are required by the House or committee could be regarded as a contempt.<sup>137</sup>

As well as being able to be punished as a statutory offence, intimidation, punishment, harassment of or discrimination against witnesses or prospective witnesses can be punished as a contempt and, technically, there is no prohibition on a person being punished for such a contempt as well as being prosecuted under the Act. *May* states:

Any conduct calculated to deter prospective witnesses from giving evidence before either House or committee is a contempt.<sup>138</sup>

Both Houses will treat the bringing of legal proceedings against any person on account of any evidence which he may have given in the course of any proceedings in the House or before one of its committees as a breach of privilege.<sup>139</sup>

131 PP 118 (1992)

132 VP 1990-92/1487, 1540, 1551.

133 VP 1990-92/1633.

134 PP 78 (1994).

135 PP 407 (1994).

136 *Parliamentary Privileges Act 1987*, 12(3), see also S.O. 362.

137 Section 14 of the *Parliamentary Privileges Act 1987* provides that persons required to attend before a House or a committee, shall not be required to attend before a court or a tribunal, or be arrested or detained in a civil cause, on that day.

138 *May*, p. 131.

139 *May*, p. 132.

*Berthelsen Case (1980)<sup>140</sup> and other cases*

A matter of alleged discrimination against and intimidation of a witness who had given evidence to a parliamentary subcommittee was referred to the Committee of Privileges on 23 April 1980. Although the committee was not satisfied, on the evidence, that a breach of privilege had been proved against any person, it found that the witness had been disadvantaged in his career prospects in the public service. The House, on the recommendation of the committee, and being of the opinion that the report be given full consideration early in the 32nd Parliament, resolved that the Public Service Board be requested to do all within its power to restore the career prospects of the witness and ensure that no further disadvantage was suffered as a result of the case. A paper from the Public Service Board informing the House of action taken in respect of Mr Berthelsen was presented on 24 February 1981.<sup>141</sup>

On two other occasions the Committee of Privileges has considered allegations that witnesses had been discriminated against or penalised on account of their participation in committee inquiries, but in neither case did the committee find that a contempt had been committed.<sup>142</sup> The Senate Committee of Privileges has also reported on a number of complaints of this nature.<sup>143</sup> (*And see* Chapter on 'Parliamentary committees').

## **Acts tending indirectly to obstruct Members in the discharge of their duty**

*Reflections on Members*

Following a recommendation of the Joint Select Committee on Parliamentary Privilege, the Commonwealth Parliament, in 1987 with the enactment of the Parliamentary Privileges Act, 'abolished' the previous category of contempt constituted by reflections on Parliament, a House or a Member. Section 6 of the Act provides:

Words or acts shall not be taken to be an offence against a House by reason only that those words or acts are defamatory or critical of the Parliament, a House, a committee or a member,

However, this provision does not apply to words spoken or acts done in the presence of a House or a committee. This qualification would enable a House or a committee to take action if, for instance, a member of the public made insulting or offensive remarks during a sitting or meeting. Under the Act, words or acts, if, for instance, they constituted intimidation, could be pursued; the section is confined to preventing the punishment of defamatory or critical remarks 'by reason only that they are defamatory or critical'.

Prior to the enactment of the *Parliamentary Privileges Act 1987*, allegations of breach of privilege or contempt in this area had been raised on a number of occasions. It was, however, always an important factor that, to constitute a contempt, a libel upon a Member had to concern the character or conduct of the Member **in that capacity**.

<sup>140</sup> 'Report relating to the alleged discrimination and intimidation of Mr David E. Berthelsen in his public service employment because of evidence given by him in a Subcommittee of the Joint Committee on Foreign Affairs and Defence', *House of Representatives Committee of Privileges*, PP 158 (1980); VP 1978–80/1372, 1375, 1417, 1422, 1672–3.

<sup>141</sup> VP 1981–83/80.

<sup>142</sup> PP 455 (1991); PP 136 (1994).

<sup>143</sup> E.g. PP 461 (1989); PP 258 (1991); PP 235 (1992); PP 85 (1993).

*Premature publication or disclosure of committee proceedings, evidence and reports*<sup>144</sup>

Standing order 340 of the House of Representatives, which is derived from a resolution of the House of Commons of 1837, provides that:

The evidence taken by any select committee of the House and documents presented to and proceedings and reports of such committee, which have not been reported to the House, shall not, unless authorised by the House, be disclosed or published by any Member of such committee, or by any other persons.

More specific provisions have been included in the *Parliamentary Privileges Act 1987*. Section 13 of the Act provides that:

A person shall not, without the authority of a House or a committee, publish or disclose—

- (a) a document that has been prepared for the purpose of submission, and submitted, to a House or a committee and has been directed by a House or a committee to be treated as evidence taken in camera; or
- (b) any oral evidence taken by a House or a committee in camera, or a report of any such oral evidence,

unless a House or a committee has published, or authorised the publication of, that document or that oral evidence.

Penalties under the section are \$5 000 in the case of a natural person and \$25 000 in the case of a corporation.

Most evidence taken by parliamentary committees is taken in public and publication of the evidence is expressly authorised. The provisions of the standing orders (in respect of publication of committee proceedings) have traditionally not been enforced when this occurs. However, the publication or disclosure of evidence taken in camera, of private deliberations and of draft reports of a committee before their presentation to the House, have been pursued as matters of contempt (*and see* Chapter on 'Parliamentary committees').

A Member wishing to raise a complaint in this area must raise it in the House at the first appropriate opportunity. The Member is not required to go into the detail of the matter, but must identify the committee and the nature of the concern. If it has not already done so, the committee in question must then consider the matter—in particular it must consider whether the matter has caused or is likely to cause substantial interference with its work, with the committee system or with the functioning of the House. The committee must also take whatever steps it can to ascertain the source(s) of the disclosure(s). The committee must inform the House of the results of its consideration and, if it finds that substantial interference has occurred, it must explain why it has reached that conclusion.<sup>145</sup> The issue is then considered by the Speaker, who determines whether or not to allow precedence to a motion on the matter. Should a committee conclude that substantial interference has not occurred the House should be informed accordingly.<sup>146</sup>

The following cases in this area have been reported on by the Committee of Privileges:

<sup>144</sup> See also Ch. on 'Parliamentary committees'.

<sup>145</sup> These requirements were first applied in 1990, but were set out more comprehensively in a statement by Speaker McLeay in 1992—H.R. Deb. (17.9.90) 1989–90; H.R. Deb. (7.5.92) 2661–2; VP 1990–92/187; 1489; for precedents *see*, for example, H.R. Deb. (18.9.90), 2087–8; H.R. Deb. (27.10.93) 2654.

<sup>146</sup> H.R. Deb. (7.5.92) 2661–2. For precedents *see*, for example H.R. Deb. (23.11.93) 3401–2; H.R. Deb. (5.5.94) 367. A detailed statement has been made on such an occasion—H.R. Deb. (29.6.94) 2292–3.

'*Sun*' Case (1973)<sup>147</sup>: The *Sun* newspaper having published matter relating to the contents of a draft report of the Joint Committee on Prices, the House agreed with the finding of the Committee of Privileges that a breach of privilege had occurred and that the editor and journalist were guilty of a contempt of the House.

'*Daily Telegraph*' Case (1971)<sup>148</sup>: In this case the Committee of Privileges expressed concern at an apparent premature disclosure of part of its proceedings. The committee found the action of the person or persons (unknown) to be a breach of standing orders and a breach of a well established privilege in that proceedings of the committee were disclosed prior to the presentation of its report to the House.

*Telecommunications Interception Case* (1986-87)<sup>149</sup>: In 1986, a number of newspapers having published material purporting to reveal private deliberations and prospective recommendations of the Joint Select Committee on Telecommunications Interception, the Committee of Privileges, in a majority report, stated that, although unable to identify the source or sources of the disclosure, if such persons had acted deliberately, they were each guilty of a serious contempt. It further stated that, if they could have been identified, the House would have been well-advised to take exemplary action. The committee noted that the publication had caused no impediment to the former committee, but found that the actions of three named journalists constituted contempts (as well as the actions of those responsible for the later publication of the reports), and sought the guidance of the House on the matter of penalties, but no action was taken by the House.

*Migration Regulations Committee Case* (1990)<sup>150</sup>: This case concerned a newspaper article which revealed details of a confidential submission to the committee. The Committee of Privileges became aware that it was possible that the submission may have been disclosed by persons other than those associated with the committee inquiry (persons who may not have been aware of the prohibition on disclosure) and it concluded that it was unlikely that further investigations would enable a more satisfactory conclusion to be reached.

*Public Accounts Committee Case* (1993-94)<sup>151</sup>: In this case the Committee of Privileges considered the matter of media reports revealing details of a draft report and private deliberation of the Joint Committee of Public Accounts. The Committee of Privileges found that confidential information had been disclosed without authorisation and stated that if the person or persons responsible had acted deliberately he or she (or they) were guilty of a serious breach. The committee could not identify the source or sources, and so it made no recommendation as to penalty.

### *Other indignities offered to the House*

*May* states:

Other acts besides words spoken or writings published reflecting upon either House or its proceedings which, though they do not tend directly to obstruct or impede either House in the performance of its functions, yet have a tendency to produce this result indirectly by bringing such House into odium, contempt or ridicule or by lowering its authority may constitute contempts.<sup>152</sup>

147 PP 217 (1973); VP 1973-74/518.

148 PP 242 (1971).

149 'Matter of printed references to the proceedings and prospective recommendations of the Joint Select Committee on Telecommunications Interception in the *Sun News-Pictorial* and the *Courier Mail* on 17 November 1986, and similar references in other newspapers', *House of Representatives Committee of Privileges*, PP 135 (1987).

150 PP 429 (1990). This report was accompanied by a dissenting report.

151 PP 77 (1994).

152 *May*, pp. 124-5.

An instance of this type of contempt is disorderly conduct within the precincts of either House while such House is sitting or during committee proceedings although, as indicated earlier in this chapter, such conduct is usually dealt with by other means. In the assessment of any complaint in this area, regard would need to be had to the provisions of section 4 of the Parliamentary Privileges Act.

*May* also cites in this category of contempt:

Serving or executing civil or criminal process within the precincts of either House while the House is sitting without obtaining the leave of the House.<sup>153</sup>

Parliament House is not considered to be an appropriate place in which to serve such documents and, for example, service, or attempted service, on a Member on a sitting day, or on a day on which a Member was to participate in a committee meeting, could be regarded as a contempt.

On 6 October 1922 a complaint was made in the House of Representatives that a summons had been served upon a Member, Mr Blakeley, in the precincts of the House while the House was sitting.<sup>154</sup> The Attorney-General undertook to look into the matter. On 11 October 1922 he gave the opinion that it was not desirable to proceed further in the case but that 'those entrusted with the service of process of the Court should take steps to have summonses served in the ordinary way, as it is not a desirable practice that service should, under any circumstances, be made within the precincts of this House while the House is sitting'.

### Other matters which have arisen

On 20 December 1912 the House agreed, without debate, to the following motion, moved pursuant to notice:

That, in the opinion of this House, immediate action should be taken to protect Members of this Parliament from the aspersions and misrepresentations of the newspaper press by making an order that, when any article or paragraph appears in a newspaper reflecting upon the good conduct or integrity of a Member which, in the opinion of the said Member, is calculated to prejudice him in the eyes of the community, and the Member affected, by personal explanation or otherwise, declares that the statements so made in regard to himself are erroneous, misleading, and injurious, and the House, in good faith accepts such statement, no representative or representatives of the newspaper implicated be allowed within the precincts of Parliament House unless, or until, the explanation or contradiction made by the aggrieved Member be given in the aforesaid newspaper prominence equal to that given to the offending article or paragraph.<sup>155</sup>

On 24 October 1919 the Speaker drew to the attention of the House a matter concerning the Economies Royal Commission 'as it affected the privileges of Parliament'. The Royal Commission proposed to investigate expenditure in connection with parliamentary services and the Speaker said that as it had no authority from the Parliament to interfere in any way with the various services of Parliament, it was his duty to call attention to the proposed serious encroachment on the rights and privileges of Parliament by a tribunal to inquire into matters over which the legislature had absolute and sole control. The Government gave an assurance that no privileges of the Parliament would be in any way infringed by the operation of the Royal Commission.<sup>156</sup>

In the *Chairman of the Sydney Stock Exchange Case* (1935) the House resolved on 28 March 1935 that a letter written by the Chairman, allegedly making a threat and reflecting on the motives and actions of a Member, did not amount to a breach of

<sup>153</sup> *May*, p. 125.

<sup>154</sup> VP 1922/190, 201; H.R. Deb. (6.10.22) 3337-8; H.R. Deb. (11.10.22) 3555.

<sup>155</sup> VP 1912/305.

<sup>156</sup> VP 1917-19/587; see also Ch. on 'Parliament House and the House of Representatives Chamber'.



privilege but was, in effect, an exercise of the right of an individual to defend himself. The House considered, however, that the Chairman was in error in addressing a letter to the Speaker instead of direct to the Member concerned.<sup>157</sup>

In 1989 the Committee of Privileges reported on a reference concerning an allegation made in the House by one Member against another. While it did not find that a contempt had been committed, it concluded that having regard to the experience of the Member who had made the allegation he had offended against the rules of the House. It recommended that he be required to apologise and withdraw.<sup>158</sup> The House agreed to a motion calling on the Member to withdraw and apologise, but he declined to do so and was subsequently suspended by the House for two sitting days.<sup>159</sup>

In a 1994 report the committee stated, in respect of concerns about a Member's action in repeating in the House serious allegations about a citizen:

... Some have questioned the judgment exhibited by Mr ... in his use of the privilege of freedom of speech to divulge as he did, and to rely so heavily on, the hearsay allegations ... In the final analysis, however, it is for the Member to resolve whether or not it is in the public interest to raise a matter in the House, and his or her action will be judged accordingly.<sup>160</sup>

## PENAL JURISDICTION OF THE HOUSE

### Power and source

By section 49 of the Constitution the House of Representatives acquired the powers, privileges and immunities of the House of Commons as at 1 January 1901, until the Parliament otherwise declared. In the absence of such a declaration of those powers, privileges and immunities until 1987, with the enactment of the Parliamentary Privileges Act, they remained those of the House of Commons as at 1 January 1901.

The High Court judgment in the case of *Browne and Fitzpatrick* (see p. 702) left no doubt that the House of Representatives possessed all of the powers, privileges and immunities of the Commons, and the Parliamentary Privileges Act provides that, except to the extent that the Act expressly provides otherwise, the powers, privileges and immunities of each House, and the committees and Members of each House, as in force under section 49 before the commencement of the Act, continue.

*May* states that:

The power of both Houses to punish Members and non-Members for disorderly and disrespectful acts has much in common with the authority inherent in the superior courts 'to prevent or punish conduct which tends to obstruct, prejudice or abuse them' while in the exercise of their responsibilities. By this means the two Houses are enabled to safeguard and enforce their necessary authority without the compromise or delay to which recourse to the ordinary courts would give rise. The act or omission which attracts the penal jurisdiction of either House may be committed in the face of the House or of a committee, within the Palace of Westminster or outside it. Nor is it necessary that there should have been a breach of one of the privileges enjoyed, collectively or individually, by either House: anything done or omitted which may fall within the definition of contempt even if there is no precedent, may be punished.<sup>161</sup>

The principal means by which the Houses may enforce the observance of their privileges and immunities and may punish people found guilty of not doing so, are by commitment to prison (see p. 710), by the imposition of a fine or by (public) reprimand

<sup>157</sup> VP 1934-37/149-50.

<sup>158</sup> PP 498 (1989) (the report was accompanied by two dissenting reports).

<sup>159</sup> VP 1987-89/1695-8.

<sup>160</sup> PP 407 (1994) 5. These observations have been endorsed by Speakers Martin and Halverson, H.R. Deb. (27.9.95) 1810, H.R. Deb. (28.6.96) 3181.

<sup>161</sup> *May*, p. 103

or admonishment (*see* p. 712). The power of the Houses to punish by means of imposing a fine on people found guilty of a breach of privilege or of contempt was problematical, but the issue was resolved by the provisions of section 7 of the *Parliamentary Privileges Act* (*see* p. 711). Other means by which the House could take action against offenders is the requirement for an apology (publicly, if appropriate) or in the case of media representatives, their exclusion from the precincts (*see* p. 713).

In a case in which an offence may be adjudged a breach of privilege or a contempt but also an offence at law, or in which penalties available to the House are considered inadequate, or for some other reason, the House may choose not to exercise its power of punishment. Alternatively, it is a recognised right of the House to request government law officers to prosecute the offender and it could also be possible to initiate a private prosecution. There is no case of the House directing or requesting the law officers to prosecute, *per se*.<sup>162</sup> Section 10 of the *Parliamentary Precincts Act 1988* provides that the functions of the Director of Public Prosecutions in respect of offences committed in the precincts shall be performed in accordance with general arrangements agreed between the Presiding Officers and the Director of Public Prosecutions.

In 1907 a committee of the House reported that signatures to a petition were found to be forgeries and the House 'requested' the Crown law authorities to take action with a view to criminal prosecution. The House was later advised, however, that prosecution for forgery would be unsuccessful.<sup>163</sup> In 1974 a letter published in a newspaper in the name of a Member was found by the Committee of Privileges to be a forgery and therefore appeared to constitute a criminal offence. As the author of the letter was unknown no legal action could be taken.<sup>164</sup>

Although the House may consider that a breach of privilege or a contempt has been committed it may take no further action<sup>165</sup> or it may decide, having regard to the circumstances of the case, to 'consult its own dignity' by taking no punitive action<sup>166</sup> (*and see Brown/Fitzpatrick Case*, p. 702).

Another course of action adopted by the House of Representatives in respect of enforcing its privileges was by resolution requesting that remedial action be taken by the Public Service Board to restore the career prospects of a public service witness who was found by the Committee of Privileges to have been disadvantaged as a result of his involvement with a parliamentary subcommittee.<sup>167</sup>

## Commitment

Section 7 of the *Parliamentary Privileges Act 1987* provides that the House may impose a penalty of imprisonment for a period not exceeding six months for an offence against it. Such a penalty is not affected by prorogation or dissolution. Before the enactment of this provision, the House, under section 49 of the Constitution, possessed the same power in this area as the House of Commons in 1901; the Commons was considered to be without the power to imprison for a period beyond the session, although

162 It is of interest to note that in 1922 the Attorney-General, having promised to do so, examined and advised the House concerning the service of a summons on a Member in the precincts of Parliament House, VP 1922/190, 201.

163 VP 1907-08/165, 267.

164 '*Sun News Pictorial Case* (1973), PP 65 (1974); VP 1974/98.

165 '*South Australian Worker Case* (1931), VP 1929-31/613; '*Sunday Sun Case* (1933), VP 1932-34/755.

166 *See 'Sun Case* (1951), VP 1951-53/171; '*Daily Telegraph Case* (1971), VP 1970-72/901-2. For other examples *see Uren Case* (1971), PP 40(1971), VP 1970-72/667; '*Sunday Observer Case* (1978) 'actions of editor not worthy of occupying the time of the House', PP 120 (1978), VP 1978-80/147-8.

167 *Berthelsen Case* (1980), PP 158 (1980), VP 1978-80/1672-3.

apart from this constraint there were no other limits in terms of the length of committal.<sup>168</sup>

On the only occasion when the House of Representatives has exercised its power of commitment (see p. 702), Messrs Browne and Fitzpatrick, in 1955, were committed for three months. No prorogation or dissolution of the Parliament intervened during the period of their imprisonment and they served the full period of their commitment.

## Form of warrant

Section 9 of the *Parliamentary Privileges Act 1987* states:

Where a House imposes on a person a penalty of imprisonment for an offence against that House, the resolution of the House imposing the penalty and the warrant committing the person to custody shall set out particulars of the matters determined by the House to constitute that offence.

In the House of Commons warrants for commitment issued by the Speaker on the order of the House have sometimes been expressed in general terms to the effect that the person is committed for a 'high contempt' or a breach of privilege. On other occasions, particular facts constituting the contempt have been stated. If the form of the warrant is general, it has been held that it is not competent for the courts to inquire further into the matter. If the particular facts have been stated on the warrant, the courts have taken divergent views as to their duty of inquiry.

The High Court decision in the *Browne/Fitzpatrick Case* (1955) stated:

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. This statement of law appears to be in accordance with cases by which it was finally established, namely, the *Case of the Sheriff of Middlesex*<sup>169</sup> (and see p. 678).

Because particulars of the matters determined to constitute the offence must, by virtue of section 9 of the *Parliamentary Privileges Act*, be set out in the resolution imposing the penalty and the warrant committing the person, the effect of the case law that has been established is therefore that a court may review a decision to impose a penalty of imprisonment to determine whether the conduct or action in question was capable of constituting an offence.<sup>170</sup>

Subsection 7(4) of the Act enables the House to delegate to the Speaker the authority to have a person released from prison when the House is not sitting. Such authority could, for example, be used if a person was committed following a refusal to give information to a committee but then, after being committed, agreed to provide the information sought.

## Power to fine

The House, under section 7 of the *Parliamentary Privileges Act 1987*, may impose a fine not exceeding \$5 000 in the case of a natural person, and not exceeding \$25 000 in the case of a corporation. Subsection 7(6) provides that such fines are debts due to the Commonwealth and may be recovered on behalf of the Commonwealth in a court of competent jurisdiction by any person appointed by the House for that purpose. A fine and imprisonment may not be imposed for the same offence.

<sup>168</sup> May, pp. 109.

<sup>169</sup> *R. v. Richards; ex parte Fitzpatrick and Browne* (1955) 92 CLR 162.

<sup>170</sup> *Parliamentary Privileges Bill 1987*—explanatory memorandum.

For many years there had been substantial doubt as to whether the Houses had the power to impose fines, the issue turning, because of the provisions of section 49 of the Constitution, on whether the House of Commons had such power in 1901.

The House of Commons has not imposed fines on persons found guilty of breach of privilege or contempt since 1666. The House of Lords has claimed to be a court of record and, as such, to have power to impose fines. The 10th edition of *May*, published in 1893, states:

Whether the House of Commons be, in law, a court of record, it would be difficult to determine, for this claim, once firmly maintained, has latterly been virtually abandoned, although never distinctly renounced.<sup>171</sup>

During consideration of the motion to commit Messrs Browne and Fitzpatrick, Leader of the Opposition Evatt expressed the view that, although the House of Commons had not exercised the power to fine over a great period, that did not prove it had gone.<sup>172</sup> Prime Minister Menzies was of the view that the power of the House to impose a fine was extremely doubtful. In 1971 the Senate Committee of Privileges asserted that the Senate had the power to fine; in 1978 the House Committee of Privileges expressed the view that the power was extremely doubtful<sup>173</sup>; and in 1984 the Joint Select Committee on Parliamentary Privilege thought that the better view was that the power did not exist.<sup>174</sup> The matter was finally resolved by the insertion of a provision conferring the power to fine in the *Parliamentary Privileges Act 1987*.

## Reprimand or admonishment

Another acknowledged form of penalty available to the Houses is that of public reprimand or admonishment at the Bar of the House or Senate by the Speaker or President, as the case may be. Any reprimand or admonishment is in the name and with the authority of the House concerned. The House has not used the procedure of requiring the attendance of a privilege offender at the Bar of the House to receive a reprimand by the Speaker.

In the *BMC Case* (1965) (also known as the case of 'the *Canberra Times* and others'), the Committee of Privileges found that an advertisement<sup>175</sup> which appeared in the *Canberra Times* and other newspapers on 18 August 1965, represented a breach of privilege. The committee also found that the ultimate responsibility for publication of the advertisement lay with ten named individuals, and that the publication was done without malice towards the House or any Member, or intent to libel any Member, and appeared through negligence and lack of appreciation of what was involved.<sup>176</sup>

The committee made no recommendation to the House as to what action it might take in respect of the offenders. A number of apologies by those involved were received or printed prior to the presentation of the committee's report to the House.<sup>177</sup>

On 23 September 1965, on the motion of the Prime Minister, the House agreed that the advertisement involved a breach of privilege, that it was defamatory of the Leader of the Opposition and, while it accepted that it was published without malice and apologies had been made, the House recorded its 'censure of the advertisement and its reprimand

171 *May*, 10th edn (1893), p. 89.

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

173 PP 120 (1978) 3-4.

174 PP 219 (1984) 96.

175 The advertisement contained a reproduction of a photograph of the Leader of the Opposition addressing the House and was used for the purpose of advertising products of the British Motor Corporation (Aust) Pty Ltd.

176 PP 210 (1964-66) 7.

177 PP 210 (1964-66) 18-19.

to those concerned in its publication'. The House further resolved that 'those newspapers who published the advertisement should publish this resolution in full', which resolution was transmitted to the named offenders.<sup>178</sup>

In 1971 two people found guilty of a breach of privilege were called to the Bar of the Senate and were reprimanded by the Deputy President. The background to this case was that on 4 May 1971 articles published in the *Sunday Australian* and the *Sunday Review* newspapers, and allegedly containing certain findings and recommendations of a Senate select committee which had not been reported to the Senate, were referred to the Senate Committee of Privileges.<sup>179</sup>

The committee reported to the Senate that the publication constituted a breach of the privileges of the Senate and that the editor and publisher of each of the newspapers were the people responsible and culpable in the breach of privilege. The committee recommended:

That, having regard to the nature of the breaches of privilege in this case, and the circumstances in which they occurred, Mr J. R. Walsh and Mr H. B. Rothwell be required to attend before the Senate, on their own behalf and on behalf of their publishers, to be reprimanded by the Presiding Officer.<sup>180</sup>

On 13 May, the Senate adopted the committee's report and resolved that the two editors attend the Senate at 2.15 p.m. the next day.<sup>181</sup> They duly attended and the Deputy President administered the reprimand in the following terms:

Mr Walsh and Mr Rothwell, the decision of the Senate is that you, on your own behalf and on behalf of your publishers, be severely reprimanded for the publication of contents of a draft report of the Senate Select Committee on Drug Trafficking and Drug Abuse in Australia, prior to its presentation to the Senate. I therefore, on behalf of the Senate, severely reprimand you as guilty of a breach of privilege.<sup>182</sup>

Mr Walsh and Mr Rothwell then withdrew.

### Exclusion of media representatives from precincts

In respect of persons working in or using the facilities of the parliamentary press gallery, a person's pass may be withdrawn, thereby depriving the person or the person's organisation of access to the Parliament building. Control of access to such facilities is under the authority of the Presiding Officers (*and see* Chapter on 'The Speaker, Deputy Speakers and Officers').

In 1912 a notice of motion proposing the exclusion of representatives of the *Age* newspaper from the press gallery for statements concerning a Member was withdrawn following an apology.<sup>183</sup> In June 1942 the President as 'custodian of the rights and privileges of the Senate' demanded an apology from certain newspaper representatives for the publication of an article reflecting on the Senate. When no apology was forthcoming, action was taken to exclude the persons from the precincts of the Senate, after which similar action was taken by the Speaker in respect of the precincts of the House.<sup>184</sup>

<sup>178</sup> VP 1964-66/386.

<sup>179</sup> J 1970-72/555.

<sup>180</sup> 'Report upon articles in the *Sunday Australian* and the *Sunday Review* of 2 May 1971', *Senate Committee of Privileges*, PP 163 (1971) 3.

<sup>181</sup> J 1970-72/606.

<sup>182</sup> J 1970-72/612.

<sup>183</sup> VP 1912/91.

<sup>184</sup> S. Deb. (2.6.42) 1806, 1818-19; S. Deb. (3.6.42) 1897; H. R. Deb. (3-4.6.42) 2187. Press passes may be withdrawn for other reasons *see* Ch. on 'Parliament House and the House of Representatives Chamber'.

## Apology

Before the current provisions concerning defamatory contempts were enacted, there were precedents in the House of Representatives for the publication of a suitable apology from offenders in a class of cases involving reflections on the House or its Members by speech, action or writing being considered an acceptable action. While not inflicting punishment, in its strict sense, the House considered this course sufficient vindication of its authority.<sup>185</sup>

On a number of occasions under the previous provisions comments published in newspapers, or other publications, have been regarded by the House as reflections on itself and its Members and those responsible have been adjudged guilty of contempt.<sup>186</sup> An apology may also be considered appropriate in relation to other categories of contempt.

In the '*Sun*' Case (1933) an apology, in the form of a withdrawal made in a letter to the Prime Minister, was received and accepted by the House **before** it had decided on what action it would take against the offenders.<sup>187</sup> Similarly, in the '*Sunday Observer*' Case (1978) the editor-in-chief and the editor were found guilty of contempt by the Committee of Privileges. In view of the publication by the editor-in-chief of an apology, the House agreed with the recommendations of the committee that no further action be taken.<sup>188</sup>

In the '*Sun*' Case (1973) the Committee of Privileges, having found the editor and journalist guilty of contempt, recommended the publication of an apology. This proposed action was not undertaken by the House in view of the editor's death.<sup>189</sup>

A Member has apologised for remarks made by him reflecting on the Chairman of Committees and which were published in a newspaper, in view of which a motion that he be suspended from the service of the House was withdrawn.<sup>190</sup> When a Member reflected on the Speaker outside the House, a motion was moved that the comments constituted a breach of the privileges of the House. The motion was withdrawn by leave when the Member again withdrew the remarks and apologised.<sup>191</sup>

In 1992 the Committee of Privileges reported that the terms of a letter threatening legal action against a Member (following a letter the Member had written to a Minister) and the circumstances of its receipt had had a tendency to impair the Member's performance of his duties. Although the committee did not make a finding that a contempt had been committed, the House resolved that the persons responsible should be required to apologise, and they did so, a letter of apology being received and reported by the Speaker.<sup>192</sup>

185 On 17 March 1953 the House resolved 'that contempt of its ruling and authority' had taken place by a Member who remained in the precincts when he had earlier been excluded from the building (*Curtin Case*). The Member having apologised, the House resolved to accept the apology and no further action was taken, VP 1951-53/609, 611.

186 '*Australian*' Case (1971); PP 182(1971); VP 1970-72/818.

187 VP 1932-34/791-2. For further comment see Frank C. Green, *Servant of the House*, Heinemann, Melbourne, 1969, pp. 152-3.

188 PP 120 (1978) 3; VP 1978-80/147-8.

189 'Report relating to an article published in the *Sun*, 18 September 1973', *House of Representatives Committee of Privileges*, PP 217 (1973) 5; VP 1973-74/518.

190 VP 1945-46/63; see also H.R. Deb. (9.3.29) 856-65.

191 VP 1985-87/1089, 1090, 1101-2.

192 PP 118 (1992); VP 1990-92/1487, 1540, 1551, 1633.

## PUNISHMENT OF MEMBERS

In respect of Members whom the House determines have committed contempts, the House's power to punish includes commitment or reprimand but has a further dimension, namely, suspension for a period from the service of the House.

Action taken by the House to discipline its Members for offensive actions or words in the House<sup>193</sup> is based on the concept of privilege, but the offences are dealt with as matters of order (offences and penalties under the standing orders) rather than as matters of privilege or contempt.<sup>194</sup>

### Suspension

In the *McGrath Case* (1913) a Member was suspended from the service of the House for a statement made outside the House which reflected on the Speaker. The Member was suspended for the remainder of the session but in the next Parliament the House resolved to expunge the resolution of suspension from the 'journals of the House'.<sup>195</sup>

In the *Tuckey Case* (1987) a Member was suspended for seven sitting days, including the day of suspension, following remarks critical of the Speaker made outside the House.<sup>196</sup>

### Former power of expulsion

The only occasion the House has exercised the power of expulsion was in the *Mahon Case* (1920) when a Member was expelled for 'seditious and disloyal utterances' made outside the House making him, in the judgment of the House, 'guilty of conduct unfitting him to remain a Member'.<sup>197</sup>

Since the enactment of the *Parliamentary Privileges Act 1987* neither House has had the power to expel a Member from its membership.<sup>198</sup>

## MANNER OF DEALING WITH PRIVILEGE AND CONTEMPT MATTERS

### Raising of matter and determination of *prima facie* case

Any Member may rise in the House at any time to speak upon a matter of privilege suddenly arising.<sup>199</sup> A matter at any time arising suspends the consideration and decision of every other question until disposed of, unless the debate on any motion moved in relation to the matter raised is adjourned.<sup>200</sup> This precedence to privilege motions (that is, debate on a motion) over other business is dependent on two important conditions:

193 VP 1913/151-3; VP 1914-17/181; see also VP 1929-31/413; VP 1945-46/63.

194 Notwithstanding the right of Members to freedom of speech the report of the Committee of Privileges relating to remarks made in the House (H.R. Deb. (24.5.55) 1000) by a Member (together with other matters) found that the remarks of the Member were not a matter of privilege but one of order. The committee stated that all words in the House are privileged, but the House is able to place restraint on conduct of Members including their offensive accusations against other Members, '*Argus Case* (1955) (report not printed). See also VP 1983-84/475-6; 490-2 re censure of a Member and see Ch. on 'Motions'.

195 See Ch. on 'Control and conduct of debate'; see also VP 1914-17/567.

196 VP 1985-87/1467-8.

197 VP 1920-21/423, 425, 431-3; and see Ch. on 'Members'.

198 *Parliamentary Privileges Act 1987*, s. 8.

199 S.O. 95.

200 S.O. 96.

- that the Speaker is of the opinion that a *prima facie* case of breach of privilege has been made out<sup>201</sup>, and
- that the matter has been raised at the earliest opportunity.<sup>202</sup>

A Member in raising and stating the matter of privilege or contempt may speak on the matter to the extent he or she considers necessary unless the Speaker intervenes. But if the matter is to be debated, the Member must be **prepared** to move a motion (without notice) either:

- declaring that a contempt or breach of privilege has been committed, or
- referring the matter to the Committee of Privileges.<sup>203</sup>

It is the practice of the House that no seconder is required for either of these motions.

When a matter is raised by a Member, the Speaker may give an opinion immediately as to whether a *prima facie* case of breach of privilege exists<sup>204</sup> or state that he or she will consider the matter and give an opinion later. This may be later in the same sitting<sup>205</sup> or at a subsequent sitting.<sup>206</sup> Establishing a *prima facie* case is, in a technical sense, only for the purpose of giving precedence to a motion in relation to the matter, but the practice usually provides the House with some guidance as to the nature and acceptability or substance of the complaint. Although the Speaker may be of the opinion that a *prima facie* case has not been made out, this does not prevent a Member from lodging a notice of motion in relation to the matter, but such a motion is not entitled to any precedence. Although the Speaker may find that a *prima facie* case has been made out, or that precedence may be given to a motion in respect of a complaint, this does not compel the Member who raised the complaint, or any other Member, to move a motion on the matter. For instance, it may be considered inappropriate or inconsistent with the dignity of the House either to give further consideration to a matter or to refer the matter to the Committee of Privileges for inquiry.<sup>207</sup> The Speaker may not necessarily use the term 'prima facie' in giving his or her opinion on a matter, but simply indicate whether or not precedence will be accorded to a motion. This decision indicates whether or not the requirements of the standing orders for precedence to be given have been met. In addition, since 1990 particular provisions have applied in respect of complaints concerning unauthorised disclosure of information concerning committees (*see* p. 706).

Although it is irregular for debate to ensue on the matter raised until a motion has been moved<sup>208</sup>, for the purposes of clarification Members have sometimes been allowed to speak by leave or indulgence to a matter raised, before the Speaker's opinion has been given and without a motion having been moved.<sup>209</sup> In determining that a *prima facie* case exists, the Speaker typically refers to the matter briefly, but does not give reasons as it is for the House to decide, in practice after examination by the Committee of Privileges, whether a contempt or breach of privilege has been committed. An opinion by the Speaker that a *prima facie* case has been made out does not imply a conclusion that a breach of privilege or a contempt has occurred, or even that the matter should

201 S.O. 96.

202 S.O. 96; VP 1978–80/1168.

203 S.O. 95.

204 VP 1978–80/1035.

205 VP 1978–80/1372, 1375.

206 VP 1976–77/123, 129.

207 VP 1980–83/449; H.R. Deb. (8.9.81) 976; VP 1985–87/319; H.R. Deb. (23.5.85) 3080–1; VP 1985–87/649; H.R. Deb. (29.11.85) 3981; VP 1985–87/650; H.R. Deb. (29.11.85) 3982.

208 *See* S.O.s 95 and 96. As difficulties had arisen in the past (H.R. Deb. (11.11.13) 2987, 2993) the requirement for a motion was adopted in the 1950 standing orders and clarified in the 1963 amendments, H of R 1 (1962–63) 25.

209 VP 1980–81/26. Members have also spoken after the Chair's opinion has been given, VP 1978–80/990.



necessarily be investigated.<sup>210</sup> It is the House which determines whether or not a contempt or breach has been committed. This fact has been expressed by the Clerk of the House of Commons in the following succinct statement:

Although any Member may complain of breach of privilege, the issue cannot be decided either by the Speaker or by the Committee of Privileges. The House alone is competent to pronounce on the matter; and the House has to decide, by resolution, that a breach of privilege has been committed. The Committee of Privileges can express a view, but the House does not always accept the advice of the Committee and indeed has occasionally come to a decision without referring the issue to its Committee.<sup>211</sup>

The Speaker may give reasons or make comments if, in his or her opinion, a *prima facie* case does not exist.<sup>212</sup> In respect of a matter raised on 19 March 1969 the Speaker would not accept a motion as a *prima facie* case had not been made out.

An opinion by the Speaker on a complaint raised under the provisions of standing order 95 is not a ruling and so a dissent motion, as provided for in standing order 100, is not in order.<sup>213</sup>

Two separate matters have been raised by a Member at the same time.<sup>214</sup> It has been held that a Member may not raise a matter on behalf of another Member.<sup>215</sup> In the past the Speaker, normally by way of a statement, has raised matters coming within his or her knowledge for the consideration and action of the House as it deems necessary.<sup>216</sup> It has also been held that a matter should not be raised by way of a question to the Chair.<sup>217</sup> A personal explanation should not be made under the guise of a matter of privilege.<sup>218</sup> A matter of order or a matter coming within the standing orders or practice should not be raised as a matter of privilege.<sup>219</sup> Likewise, if a question of privilege is raised, it must be in connection with something affecting the House or its Members in their capacity as such.<sup>220</sup>

A matter may be raised at any time. It is common for matters to be raised immediately after Prayers as this is often the earliest available opportunity<sup>221</sup>, although it is sometimes more convenient for a matter to be raised at an appropriate opportunity later in the proceedings.<sup>222</sup> Business before the House has been interrupted to raise matters.<sup>223</sup> An exception to this rule is that a matter of privilege cannot be raised during the course of a division.<sup>224</sup>

If a Member complains to the House of a statement in a newspaper, book or other publication as a breach of privilege, the Member is required to produce a copy of the

210 VP 1980-83/449; H.R. Deb. (8.9.81) 976; VP 1985-87/319; H.R. Deb. (23.5.85) 3080-1; VP 1985-87/649; H.R. Deb. (29.11.85) 3981.

211 HC 34(1967-68) 4.

212 VP 1976-77/129; VP 1978-80/76, 471.

213 Submission of Mr L. A. Abraham to House of Commons Select Committee in 1967 refers, HC 34 (1967) 108. There is, however, an example of a motion of dissent having been moved and debated on such a matter, VP 1985-87/203.

214 VP 1976-77/123.

215 H.R. Deb. (25.5.55) 1060.

216 VP 1917-19/177-8, 587; VP 1951-53/131, 609.

217 H.R. Deb. (22.10.48) 2039.

218 See H.R. Deb. (27.9.04) 4916-17.

219 H.R. Deb. (20.5.14) 1131.

220 H.R. Deb. (16.3.17) 11699.

221 VP 1978-80/469, 529.

222 VP 1993-94/909, 1072.

223 VP 1978-80/714, 1100.

224 The Chair has refused to proceed with a matter of privilege raised between the moving of the closure motion and the putting of the question until after this question and the further question were resolved by the House, H.R. Deb. (8.6.78) 3245-6.

publication in question and be prepared to give, if required by the House, the name of the printer or publisher.<sup>225</sup>

### *Matter arising in committee proceedings*

If a question of privilege arises in connection with proceedings of a select or standing committee the committee reports the matter to the House, by special report if necessary.<sup>226</sup>

### *Matter arising when the House is not sitting*

During a period when the House is not sitting and is not expected to meet for a further period of at least two weeks, a Member may bring to the attention of the Speaker a matter of privilege which has arisen since the House last met and which he or she proposes should be referred to the Committee of Privileges. If satisfied that a prima facie case of breach of privilege has been made out and the matter is one upon which urgent action should be taken, the Speaker must refer it forthwith to the Committee of Privileges. Any referral by the Speaker in accordance with these provisions must be reported to the House by the Speaker at its next sitting whereupon the Member who raised the matter must move forthwith, without notice, that such referral be endorsed by the House and, if this motion is negatived, the Committee of Privileges may take no further action in respect of the matter.<sup>227</sup>

### *Recommended changes*

In 1979 the Standing Orders Committee examined the question of raising and dealing with matters of privilege which had been a cause of increasing concern because of the frequency with which some Members had obtained precedence over other business under the guise of raising a matter of privilege.<sup>228</sup> The Speaker, in giving his decision on a matter claimed to be a breach of privilege on 8 November 1979, suggested that the House might wish to consider the method by which complaints of breach of privilege were raised in the House of Representatives (under standing orders 95, 96 and 97), and indicated that the new procedures adopted by the House of Commons might be considered by the Standing Orders Committee (essentially requiring matters to be raised, in the first instance, in writing with the Speaker).<sup>229</sup> On 6 February 1978 the House of Commons had passed a resolution approving new procedures on the recommendation of its Committee of Privileges, which had reviewed the report of the 1967 Select Committee on Parliamentary Privilege.<sup>230</sup>

The Standing Orders Committee considered the new House of Commons privilege procedure<sup>231</sup> and recommended that standing orders 95, 96 and 97 be omitted and a standing order along the lines of the Commons procedure be substituted.<sup>232</sup> This recommendation was not acted upon. In 1984 the Joint Select Committee on Parliamentary Privilege recommended the adoption of new procedures along

225 S.O. 97; VP 1978-80/27.

226 For the application of privilege in relation to select and standing committees see also Ch. on 'Parliamentary committees'.

227 S.O. 97A; VP 1993-95/2303-4.

228 'Matters relating to presentation of petitions and method of raising matters of privilege', *House of Representatives Standing Orders Committee Report*, PP 345 (1979).

229 H.R. Deb. (8.11.79) 2819-20.

230 *House of Commons Committee of Privileges, 3rd Report*, HC 417 (1976-77); H.C. Deb. 54 (6.2.78) 1198.

231 A more detailed account of the revised House of Commons procedure in respect of raising matters of privilege is at p. 5 of the report; and see George Thomas, 'Parliamentary privilege at Westminster', *The Parliamentarian*, LXI, 4, October 1980, pp. 212-14 for a review of the revised procedure.

232 PP 345 (1979).

substantially similar lines. A draft proposal to give effect to the 1984 recommendations was presented to the House on 5 May 1987, but no further action was taken.

## Committee of Privileges

In order to assist the House in its examination of issues of privilege the House appoints a Committee of Privileges at the commencement of each Parliament. The committee was first established, by standing order, on 7 March 1944.<sup>233</sup>

The provision in standing order 96 for the Speaker's opinion as to whether a *prima facie* case has been made out in order to justify precedence over other business was incorporated into the procedure of the House when the standing orders were adopted on 21 March 1950.<sup>234</sup>

### Membership

The Committee consists of the Leader of the House or his or her nominee, the Deputy Leader of the Opposition or his or her nominee and nine other Members.<sup>235</sup> The chair of the committee is normally a backbench Member of considerable parliamentary experience. During the 28th Parliament (1973–1974) the chair was also a Minister (Mr Enderby) and the Prime Minister (Mr Whitlam) was a member of the committee. The committee usually has a number of lawyers among its members. A member may be discharged from the committee and another appointed in his or her place for the consideration of particular inquiries.<sup>236</sup> This may occur if a member of the committee has raised the matter being inquired into in the House<sup>237</sup>, or if a member is absent or will be absent for a significant part of the inquiry, or for some other reason such as a member having had some prior involvement in respect of a particular issue. A member on being elected Speaker (for example, Speaker Sir John McLeay) withdraws from the committee and another Member is appointed to fill the vacancy.<sup>238</sup> In other cases members have not participated in inquiries (for example, because they were also members of a committee involved in the inquiry), but they have not been replaced. In respect of certain inquiries the committee has resolved that any statements to the press were to be made by the chairman after being authorised by the committee.<sup>239</sup>

### Authority and jurisdiction

The committee's purpose is to inquire into and report on complaints of alleged breaches of privilege or contempt, or occasionally, on other matters referred to it by the House.<sup>240</sup> On the basis that privilege questions are matters for each House alone, the committee has no power to confer with the Senate Committee of Privileges, although it has been recommended that the two committees should be empowered to confer.<sup>241</sup> In 1982, however, the House and the Senate resolved to appoint a joint select committee to review and report whether any changes were desirable, *inter alia*, in respect of 'the law

<sup>233</sup> S.O. 26; VP 1943–44/80.

<sup>234</sup> VP 1950–51/36.

<sup>235</sup> S.O. 26.

<sup>236</sup> VP 1973–74/432.

<sup>237</sup> VP 1978–80/35.

<sup>238</sup> VP 1956–57/341, 377.

<sup>239</sup> See 'Daily Telegraph' Case (1971), PP 242 (1971) 8.

<sup>240</sup> The only reference given to the committee of a general nature, that is, not arising directly from a complaint, has been the inquiry into the use of House documents in the courts, VP 1978–80/975. An earlier reference to the committee relating to a petition seeking leave to use House documents in a court case was rescinded following advice that the case had been settled, VP 1978–80/972, 975. For discussion of the committee's findings see p. 690 and Ch. on 'Papers and documents'.

<sup>241</sup> PP 219 (1984) 127; and see J 1987–89/525, 536.

and practice of parliamentary privilege as they affect the Senate and the House of Representatives, and the Members and the committees of each House... and substantial changes, described elsewhere in this chapter, followed this inquiry.<sup>242</sup>

The House of Representatives Committee of Privileges has, on four occasions, inquired into complaints of breach of privilege arising from inquiries conducted by joint committees. In 1973 it inquired into the unauthorised publication of the contents of a draft report of the Joint Committee on Prices<sup>243</sup>; in 1980 the committee gave careful consideration to the question of its jurisdiction before determining that it had the power to inquire into matters arising from an inquiry conducted by a subcommittee of the Joint Committee on Foreign Affairs and Defence<sup>244</sup>; in 1987 it inquired into the unauthorised publication of information concerning the Joint Select Committee on Telecommunications Interception, and in 1994 it inquired into a matter concerning the Joint Committee of Public Accounts.<sup>245</sup>

The committee may not only investigate the specific matter referred but also the facts relevant to it.<sup>246</sup> The committee has also reported on matters arising during, or as a consequence of, its inquiry, such as refusal of witnesses to provide information without first seeking a separate reference from the House.<sup>247</sup>

In the *Browne/Fitzpatrick Case* (1955) the committee, in a special report to the House, sought and received authority to investigate articles in editions of the *Bankstown Observer* in addition to the edition referred to it for investigation and report.<sup>248</sup>

In the *Censorship of Members' Correspondence Case* (1944), the committee regarded itself as having no jurisdiction or authority to report on a number of matters raised during the course of the inquiry.<sup>249</sup> The committee inquiring into the '*Century*' Case (1954), acting in accordance with the practice of the House of Commons of inquiring into facts surrounding and reasonably connected with the matter of the particular complaint, commented on aspects of the production of Hansard existing at the time.<sup>250</sup> In 1955 two separate but related matters referred by the House were considered together by the committee and one report made.<sup>251</sup>

### *Procedures*

The practice of the committee is to write to persons from whom it may wish to receive evidence, providing relevant information, such as the terms of the matter referred to the committee, extracts from Hansard, any documents tabled in connection with the matter and information on the committee. Normally persons are invited to make a written submission.<sup>252</sup> Having considered written submissions received, the committee may then invite persons to appear before it. It has the power to compel

242 VP 1980-83/805-6; J 1980-83/884.

243 '*Sun*' Case (1973), PP 217 (1973).

244 *Berthelsen Case*, PP 158 (1980) 3.

245 PP 135 (1987).

246 May, p. 660, states that for the House of Commons Committee of Privileges 'The scope of any inquiry comprises all matters relevant to the complaint'.

247 PP 135 (1987) 12-13.

248 VP 1954-55/225, 239.

249 H of R 1 (1943-44) 3.

250 VP 1954-55/81, 94 (report not printed).

251 '*Argus*' Case (1955), VP 1954-55/245 (report not printed).

252 PP 456 (1991) (minutes), but see also PP 78 (1994) (minutes).

persons to attend before it.<sup>253</sup> Where relevant, written submissions from one party may be published to another party.<sup>254</sup>

It is usual for the Clerk of the House to prepare a memorandum for the assistance of the committee. The Clerk is acknowledged 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 in respect of its inquiries. The Clerk on other occasions has been permitted to attend meetings as an observer. In respect of certain inquiries the Speaker and law officers of the Crown have given evidence to, or conferred informally with, the committee. In respect of its inquiry into the use of House documents in the courts in 1980, a leading Queen's Counsel was appointed as a specialist adviser to the committee.

Since 1987 the practice of the committee has been to permit witnesses to be accompanied by an adviser when giving evidence. Normally witnesses have chosen to be accompanied by lawyers<sup>255</sup>, but on other occasions persons such as a Member's assistant<sup>256</sup> or another Member have accompanied witnesses.<sup>257</sup> Witnesses are permitted to consult freely with their advisers when giving evidence, but advisers are not permitted to make submissions themselves or to question other witnesses. In 1955 (*Browne/Fitzpatrick Case*) the committee heard counsel on his right to appear on behalf of a witness and on the committee's authority to administer an oath. The committee did not agree to the request to appear, and witnesses were examined on oath.<sup>258</sup>

Historically, it has been the norm for the committee to take evidence in camera. The question of taking evidence in public had been raised over the years by Members of the committee, but it was not until 1987, during its inquiry into matters concerning the Joint Select Committee on Telecommunications Interception, that the committee took evidence in public.<sup>259</sup> Prior to the 1987 decision, a copy of the transcript of evidence had sometimes been published in full.<sup>260</sup> In the *Browne/Fitzpatrick Case* the committee published extracts of the evidence in its report. The minutes of proceedings of the committee are always tabled with its report.

Witnesses, including Members, are normally examined on oath or asked to make an affirmation. Before 1987, witnesses before the committee had not been permitted to be present when other witnesses were giving evidence. The right to cross-examine witnesses has never been permitted. In the '*Daily Telegraph*' Case (1971), an 'accused' witness was expressly refused permission to be present when other witnesses were giving evidence.<sup>261</sup> The practice of the committee since 1987 has been, even where evidence is taken in camera, to publish that evidence to another party who may be invited or required to appear before the committee.<sup>262</sup>

The committee is not bound by the rules of evidence applying in courts, although the practice of the committee is to avoid receiving hearsay evidence, and to advise witnesses that it wishes to obtain information from witnesses about matters within their direct or personal knowledge. Witnesses are also advised that they can ask the committee to take

253 S.O. 26.

254 PP 456 (1991) (minutes).

255 PP 78 (1994) (minutes).

256 PP 77 (1994) (minutes).

257 PP 498 (1989) (minutes).

258 H of R 2 (1954-55) 9-10.

259 PP 135 (1987) 6.

260 '*Daily Telegraph*' Case (1971), PP 242(1971) 9, 39; '*Daily Mirror*' Case (1981), PP 202 (1981).

261 PP 242 (1971) 9.

262 PP 78 (1994) (minutes).

evidence in camera at any stage if they wish to, and the request is then considered. Witnesses are given the opportunity to make an opening statement if they wish before questioning commences and, at the conclusion of questioning, are given a further opportunity to make additional comments.<sup>263</sup>

During the course of two inquiries into matters concerning joint committees the committee has advised the House by special report or statement that it wished to be able to take evidence from Senators, and it proposed that the House should communicate with the Senate by message asking it to grant leave for Senators to appear. This advice has been acted upon, and Senators have been given leave to appear if they thought fit.<sup>264</sup>

It is traditionally observed that, in the consideration and determination of privilege matters, members of the committee do not act along party lines. In reaching a decision as to whether a breach of privilege or contempt had been committed in the *Daily Telegraph Case*, two earlier decisions of the committee were recommitted due to the votes being taken when certain members of the committee were absent.<sup>265</sup>

A report of the committee usually makes a finding as to whether or not a breach of privilege or a contempt of the House has been committed and usually recommends to the House what action, if any, should be taken in each case. However, the final decision lies with the House.

### Proceedings following report

On presentation of the committee's report to the House by the chairman, it is now the regular practice that the report be ordered to be printed.<sup>266</sup> The House may then order that it be taken into consideration at the next sitting<sup>267</sup> or on a specified day.<sup>268</sup> 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<sup>269</sup>, 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 usually given by the House.<sup>270</sup>

If consideration is made an order of the day for a future day, the order of the day takes precedence over other notices and orders of the day.<sup>271</sup> A motion or motions may be moved declaratory of the House's view on the committee's report and recommendations and in respect of the House's proposed action, which motion is debated and decided at that time.<sup>272</sup> If the committee finds that no breach of privilege or contempt has been committed, the House may take no action in respect of the report after it has been tabled.<sup>273</sup>

263 E.g. *Telecommunications Interception Case* (1986-87), Transcript of evidence, pp. 175-9.

264 'Special report dated 26 November 1986, relating to the matter referred to the committee on 18 November 1986, *House of Representatives Committee of Privileges*; VP 1985-87/1361, 1365, 1430; J 1985-87/1576; VP 1993-95/596, 649; PP 77 (1994).

265 PP 242 (1971) 13-14, 19-20.

266 VP 1978-80/1613. The report cannot be debated on this motion.

267 VP 1974/84.

268 VP 1978-80/1613.

269 For comment on this general view with respect to privilege questions see H.R. Deb. (29.5.08) 11701-2; H.R. Deb. (27.3.35) 326.

270 See H.R. Deb. (11.9.80) 1178-84.

271 NP 186 (17.9.80) 11681; VP 1978-80/1672-3; unless the order of the day is postponed, VP 1964-66/377.

272 VP 1978-80/147-8.

273 VP 1973-74/562; 'Report relating to a letter allegedly written by the Secretary, Department of Aboriginal Affairs', *House of Representatives Committee of Privileges*, PP 236 (1973) 4; VP 1985-87/1272.

The House does not necessarily follow the committee's findings and recommendations in declaring itself in relation to the matter or any penalty that may be decided.<sup>274</sup> Any motion proposed is subject to amendment.<sup>275</sup> It has been recommended that seven days' notice should be required of any motion to impose a fine or commit a person for contempt or breach of privilege, although the recommendation has not been implemented.<sup>276</sup>

In respect of the reports on two inquiries conducted by the Committee of Privileges in 1980 (the *Use of House Records Case* and the *Berthelsen Case*), which were tabled towards the end of the 31st Parliament, the House resolved, at its second last sitting, that it was of the opinion that the reports should be considered early in the next Parliament. The general issues were dealt with in the 1984 report of the Joint Select Committee on Parliamentary Privilege.

## PROPOSALS FOR CHANGES IN THE LAW AND PRACTICE RELATING TO PRIVILEGE AND CONTEMPT

The question of codifying the law of privilege, both in limited areas and in an all embracing form, has been raised from time to time. It was consistently claimed that the chief complaint against the traditional arrangements was their uncertainty, that there was an arbitrariness in the judgments of the Committee of Privileges, that journalists worked in a situation where they could not predict the consequences of their actions, and that they were often inhibited in their inquiries and their comments as a consequence.

There was some justification for these complaints. Whilst the privileges, or more correctly the rights and immunities, of the House and its Members were limited and generally understood or able to be ascertained, it was in the area of contempt that difficulties were sometimes experienced. More detail on the earlier consideration of these issues is given at pages 730–1 of the second edition.

In 1982, and following recommendations by the House of Representatives Committee of Privileges, a joint select committee was appointed to review and report whether any changes were desirable in respect of the law and practice of parliamentary privilege as they affect the Senate and the House, and the Members and committees of each House, the procedures by which complaints should be raised, investigated and determined and the penalties that may be imposed.<sup>277</sup> The committee recommended in a report in October 1984, *inter alia*, that:

- the exercise of Parliament's penal jurisdiction should be retained in Parliament;
- a policy of restraint in the exercise of the penal jurisdiction should be adopted:  
 ... each 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;
- no substantive changes should be made to the law of contempt, but detailed guidelines should be adopted by resolution, which action, whilst not depriving the

274 VP 1970–72/901–2; VP 1990–92/1487, 1540, 1551, 1633, PP 118 (1992).

275 VP 1954–55/270.

276 PP 219 (1984) 115, *but see* J 1987–89/524, 536.

277 VP 1980–83/804–6; J 1980–83/884.

House of the ability to deal with new or unprecedented problems, would indicate clearly actions which may be pursued as contempts; and

- a mechanism be established which could be used by members of the public concerned that they have been subject to unfair or groundless attack in Parliament, and a complementary resolution adopted on the importance of the responsible exercise of the privileges of Parliament.

The committee recommended many other changes in respect of matters such as the definition of proceedings in Parliament, the updating of some of the traditional immunities, the delineation of the precincts and concerning references to parliamentary proceedings and documents before courts and other tribunals.<sup>278</sup> Most of the changes made by the *Parliamentary Privileges Act 1987* were recommended by the committee, and the relevant details are noted in this chapter. Draft proposals to give effect to recommendations of the committee which did not require legislation were presented; these recommendations were not adopted by the House, although successive Speakers have had regard to the recommendations (particularly those concerning the sparing exercise of the penal jurisdiction) and the procedures of the Committee of Privileges have been altered in light of the recommendations (*and see* earlier comments). On 25 February 1988 the Senate agreed to 11 resolutions on various aspects of the subject.<sup>279</sup>

## LIMITATIONS AND SAFEGUARDS IN THE USE OF PRIVILEGE

An important duty rests with each Member and the House as a whole to refrain from any course of action prejudicial to the privilege of freedom of speech or prejudicial to continued respect for its other rights and immunities. This duty can be expressed in the following ways:

- First, in the need for a Member to avoid arrangements of any kind prejudicial to limiting his independence as a Member. This duty is expressed in the resolution of the House of Commons on 15 July 1947 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.<sup>280</sup>

- Secondly, the existence of Members' privileges imposes a responsibility on Members not to abuse them, for example, by raising trivial matters as matters of privilege or contempt. Speaker Snedden stated in 1979:

The privileges of the House are precious rights which must be preserved. The collateral obligation to this privilege of freedom of speech in the Parliament and the essential complementary privileges of the House will be challenged unless all members exercise the most stringent responsibility in relation to them. I reiterate what I said this morning, that when matters of privilege are raised I will consider them but if I come to the conclusion that there is clearly no basis whatever for the claim of privilege then I will have to report to the House that I believe that the member has misused its forms.<sup>281</sup>

278 PP 219 (1984).

279 J 1988–89/517–25, 534–6.

280 This resolution arose out of *W. J. Brown's Case* in which the subject of the complaint was alleged improper pressure on a Member by a trade union, HC 118 (1946–47); *and see* G. Marshall, in *The House of Commons in the Twentieth Century*, S. A. Walkland (ed), Clarendon Press, Oxford, 1979, pp. 223–5 for comment.

281 H.R. Deb. (8.11.79) 2819–20.



- Thirdly, and analogous to the previous point, is the obligation on Members not to use the privilege of freedom of speech to be unfairly critical of the character or conduct of individuals in debate.<sup>282</sup> This view, however, requires some qualification and an added perspective was given by Speaker Snedden in the following statement:

In regard to freedom of speech, I think it is important for us to understand that there are occasions on which a Member in this House, exercising the freedom of absolute privilege of what he says in this House, can and does attack persons who apparently are defenceless. This privilege in the past has been used outrageously by individual Members. But the point made by Speaker Thomas I think is true; that is, there is a fundamental sense of justice in a House and if a Member is acting badly the House will recognise it and treat him accordingly. The public will also recognise it and rob him of his credibility. So I feel that we do not need to invent any rules whereby a Speaker or anybody else should make the judgment as to whether a Member should be allowed to proceed with his privileged attack on an individual. It would not be within the capacity of a Speaker to make the right judgment because he would not have the facts. He would not know. Therefore the person raising the matter must bear the consequences himself. But I would not like to see that privilege limited or diminished in any way. All of us can think of not one, but many examples where, if it had not been for the freedom of speech and the attack on an individual in Parliament crime would have gone undetected and unpunished. Some people who were being seriously disadvantaged by rapacious people would not have been protected had it not been for the freedom and absolute privilege that this Chamber has to raise matters and to ventilate them so that inquisitorial efforts could be taken by other people and so that the matter could be circulated with the qualified privilege of the media.<sup>283</sup>

The Joint Select Committee on Parliamentary Privilege recommended the adoption of resolutions stressing the need to exercise the privileges of Parliament in a responsible manner. In a 1994 report the Committee of Privileges, having noted that the judgment exhibited by a Member in raising certain allegations in the House had been questioned, stated:

... In the final analysis, however, it is for the Member to resolve whether or not it is in the public interest to raise a matter in the House, and his or her actions will be judged accordingly.<sup>284</sup>

This view is consistent with the views expressed by Members of the House of Commons Committee of Privileges and with a statement of British practice which noted, *inter alia*, that while Members may be called to account and punished by the House on account of remarks made, the last precedent for this occurred in 1882 and there was no modern practice of limiting the content of speeches (apart from the normal rules of debate).<sup>285</sup> (*And see p. 709.*)

The Joint Select Committee on Parliamentary Privilege also proposed the establishment, on a trial basis, of a mechanism by which persons who believed they had been subject to unfair or groundless attacks in Parliament could lodge complaints. A Senate resolution of 25 February 1988 established such a mechanism and the proposal has been supported by the House's Standing Committee on Procedure.<sup>286</sup>

282 See Chs on 'Motions' and 'Control and conduct of debate' for rules imposed by the House on the control of speech in the House.

283 *Report of 5th Conference of Commonwealth Speakers and Presiding Officers*, Govt Pr., Canberra, 1978, pp. 70–1; for Speaker Thomas' comment see p. 62.

284 PP 407 (1994) 5.

285 C. J. Boulton, 'The limits of free speech', *The Parliamentarian*, LXIII, No. 1, Jan. 1982, pp. 24–7.

286 J 1988–89/517–25, 534–6. PP 168 (1991) 7–8.

- Fourthly, the House should exercise or invoke its powers in respect of matters of contempt and privilege sparingly.<sup>287</sup> As noted, the Joint Select Committee on Parliamentary Privilege recommended the formal adoption by the House of a policy of restraint in these matters, such as was adopted by the House of Commons in 1978. Although this recommendation has not been formally adopted by the House, Speakers have had regard to the policy and have indicated support for it.<sup>288</sup>
- Fifthly, the House should be careful to ensure that, in exercising its power to punish for contempt, its punitive action is appropriate to the offence committed (*see* comment on previous point).

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287 From the establishment of the Committee of Privileges in 1944 to December 1996, 37 matters have been referred to the committee; of these matters 18 were found to contain some kind of breach of privilege or contempt; and of these in only five cases did the House impose or insist on any significant punitive measure; namely, in one case imprisonment, in another case a form of reprimand and in the other three the demand of a suitable apology; *and see* Appendix 25.

288 H.R. Deb. (9.11.83) 2461; H.R. Deb. (29.4.86) 2698; H.R. Deb. (16.9.86) 759. *and see* J 1987–89/520, 536.