REVIEW OF PROCEDURES OF THE HOUSE OF REPRESENTATIVES RELATING TO THE CONSIDERATION OF PRIVILEGE MATTERS AND PROCEDURAL FAIRNESS

TO: **House of Representatives Standing Committee of Privileges**

FROM: **Professors Geoffrey Lindell and Gerard Carney**

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Introduction

1. We have been asked by the House of Representatives Committee of Privileges:

> to undertake a review of the procedures relating to the consideration of privilege matters in the House of Representatives having regard to issues of natural justice and procedural fairness and make any suggestions for changes to existing procedures.

2. In accordance with these terms of reference, this review focuses on the extent to which the procedures of the House and of its Committee of Privileges ("Privileges Committee") in relation to the raising and determination of allegations of contempt of parliament are consistent with the principles of procedural fairness (previously referred to as the rules of natural justice). This review does not consider a number of issues which the Secretary of the Privileges Committee has confirmed lie outside our terms of reference: (i) the position of witnesses who may appear before other House of Representatives Committees and also other persons whose reputations may be adversely affected by the proceedings or evidence given to those Committees; (ii) the right of reply procedure; (iii) the scope and availability of Executive Privilege; and (iv) the interpretation[1] of s 16 of the *Parliamentary Privileges Act* 1987 (Cth). We should also indicate that we have been greatly assisted in carrying out this review by the wide ranging assistance and information that was provided to us particularly as regards a survey of the experience of comparable overseas jurisdictions and also the differences that exist between the practices followed by the House of Representatives and Senate Privileges Committees.

3. It seems clear that the rules of procedural fairness apply to the determination of allegations of contempt only to the extent which either House of the Parliament decides is appropriate. We have interpreted our terms of reference as requiring an assessment of whether the present procedures of the House and of the Privileges Committee comply with the rules of procedural fairness as they are currently applied by the courts in relation to administrative bodies and tribunals. Our assessment has been made on the basis that the House and its Privileges Committee are not bound in law to comply with those requirements.

4. While undertaking our review, we formed the opinion that it was not possible for the House or its Privileges Committee to accord procedural fairness to those accused

[1] Section 16 defines "proceedings of parliament" for the purposes of the freedom of speech in Art 9 of the *Bill of Rights* 1688.

of serious contempt at the level which contemporary standards of justice require. Accordingly, our preliminary suggestion is for the Commonwealth Parliament to enact legislation which transfers the penal jurisdiction of both Houses to the High Court. For that reason, this review is divided as follows:

> Part I recommends that the penal jurisdiction of the House should be transferred to the High Court provided the House retains the sole power to initiate judicial proceedings for contempt.
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> Part II recommends that the House adopt by resolution a range of guidelines for the Privileges Committee which provide a high level of procedural fairness when investigating and determining allegations of contempt – whether or not our suggestion in Part I, to transfer the penal jurisdiction to the High Court, is adopted. Specific suggestions are made to give effect to this appropriately high standard of procedural fairness.
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> Part III recommends that the House adopt, by resolution, a procedure for dealing with reports from the Privileges Committee on matters of contempt which provides for an appropriate level of procedural fairness within the House itself.
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> Part IV provides in summary form a list of our suggestions arising from this review.

Nature of contempt proceedings

5. This review focuses on the proceedings of the Privileges Committee and of the House in relation to allegations of contempt of parliament.

6. Circumstances where allegations of contempt of parliament are made usually fall within one of two situations: the first ("situation (1)"), where an allegation is made against a specific person or body (ie "the accused") on the basis that their alleged conduct constitutes contempt of parliament; or the second ("situation (2)"), where the identity of the person or body responsible for the alleged contempt is unknown.

7. In situation (1) where a specific "charge" of contempt can be brought against named persons or bodies, the nature of the contempt proceedings is primarily adversarial. Those "charged" are required to defend themselves if they are to avoid being found guilty of contempt and thereby liable to the penal jurisdiction of the House. In situation (2), where further investigation is necessary to identify those responsible for the alleged contempt, the proceedings are initially inquisitorial. However, as the investigation progresses, those proceedings may assume more of an adversarial nature as the identity of those alleged to be responsible for contempt is revealed. In such cases, the inquisitorial role evolves into an adversarial role (within situation (1)) where those revealed by the parliamentary investigation then become the subject of a "charge" of contempt and liable to the penal jurisdiction of the House. The extent to which the Privileges Committee should act to protect the interests of persons who are charged with contempt or come under suspicion of committing contempt in those situations is considered below in Part II Section A.

8. There is a third situation which can arise out of situations (1) and (2); that is, where in the course of the Privilege Committee investigations in each of those situations, adverse or disparaging remarks are made about a third person who may or may not be present at the time ("the third party situation"). The extent to which the Privileges Committee should act to protect the interests of that third person is considered separately below in Part II Section B.

9. In respect of situations (1) and (2), no other institution of government has such a breadth of power over an individual or body. No other institution of government has the power to investigate an allegation as well as effectively charge those alleged to be responsible, try the charge, and impose a penal sanction. A royal commission of inquiry merely investigates and recommends that charges be laid. Where charges are laid, a court of law then tries those charges and imposes judgment. Not only does no other institution of government possess such a potent combination of investigative and disciplinary powers, but their exercise by the House and its Privileges Committee are beyond judicial review except to a limited degree.[2]

10. The unique nature of the proceedings of the Privileges Committee in respect of contempt of parliament – varying between inquisitorial and adversarial - was recognised by the 1984 *Final Report of the Joint Select Committee on Parliamentary Privilege* (the 1984 Joint Committee Report):

> [T]he workings of the Privileges Committees combine the traditional inquisitorial functions of parliamentary committees with duties that are of a judicial or quasi judicial character. There is an inherent tension between these two functions.[3]

11. This state of affairs leads us to consider first, whether some part of contempt proceedings should be transferred to another institution of state, such as the courts, before considering what protections are necessary to ensure that parliamentary contempt proceedings are fair. Part I of this review deals with the first of these fundamental issues, while Part II deals with the second. A failure to carefully consider both of these issues may impact adversely on the institution of Parliament itself, as well as on the rights of those investigated and charged with contempt.

Part I Transfer of penal jurisdiction to the courts

12. A critical preliminary issue for the House in any review of the level of procedural fairness required for dealing with allegations of contempt of parliament is the extent to which the House should retain its all-encompassing jurisdiction to deal with such matters. There is, in our view, an overwhelming case for transferring at least the penal jurisdiction of the House (and of the Senate) to the courts.

13. By "penal jurisdiction", we mean the power of the House to impose a fine or imprisonment on any person found guilty of contempt of parliament. The House has the power to impose either of these forms of punishment pursuant to s 7 of the *Parliamentary Privileges Act* 1987 (Cth). Section 7(1) empowers each House to impose a period of imprisonment not exceeding 6 months, while s 7(5) empowers

[2] See below at paras 16.9-16.11.

[3] Final Report of the Joint Select Committee on Parliamentary Privilege (October 1984), PP No 219/1984 at [7.65].

each House to impose a fine not exceeding $5,000 on a natural person, and a fine not exceeding $25,000 on a corporation. Section 7(7) ensures that only one of these forms of punishment can be imposed in respect of an offence.

14. In our view, no House of Parliament should continue to be vested with the power to impose punishment for contempt of parliament. The fairest approach is for each House to continue to have an investigative role, but serious cases of alleged contempt, which may warrant punishment, should be referred to a court for prosecution on the initiation of the House concerned.

15. We acknowledge that this transfer of jurisdiction to the courts has been previously debated and that despite a recommendation to that effect being made as far back as 1908, no transfer has taken place.[4] However, more recent developments in public law require the issue to be reconsidered. Underlying these developments is an enhanced understanding of the rule of law – in the first sense described by Professor Dicey: "no man is punishable or can be lawfully made to suffer in body or goods except for a distinct breach of law established in the ordinary legal manner before the ordinary courts of the land."[5] This aspect of the rule of law has had a profound impact on the development of Australian public law, especially during the latter half of the twentieth century. What is proposed here can be seen as a natural step in the evolution of the rule of law.

Grounds for transfer of penal jurisdiction

16. Our suggestion here, to transfer the penal jurisdiction of each House to the courts, is based upon several substantive grounds:

(i) The penal jurisdiction of a House has long outlived its historical justification.

16.1 The penal jurisdiction of the UK House of Commons arose by the early 17th century in response to a mistrust of the courts whose judges lacked independence from the Crown. This jurisdiction was retained by the House despite the conferral of security of tenure on English judges by Art III of the *Act of Settlement* in 1701. As Professor Enid Campbell[6] has argued, the guarantee of judicial independence under Ch III of the Commonwealth Constitution completely removes the basis for any comparable mistrust at the federal level. Moreover, House of Commons concern about potential interference from the other chamber in Westminster, namely, the House of Lords through its judicial role, has never applied in Australia.

[4] See eg Commonwealth Parliament, *Progress Report from the Joint Select Committee on Privilege – In Cases Of; together with Minutes of Evidence (to date) and Appendices* (29 May 1908), espec at 674-675; cf Final Report of the Joint Select Committee on Parliamentary Privilege (October 1984), PP No 219/1984, espec at paras 7.7 – 7.11.

[5] A V Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th ed, Macmillan Education London 1959 (1987 reprint) at 188, see also 202.

[6] Enid Campbell, *Parliamentary Privilege* (The Federation Press Sydney 2003), Ch 12 189-207.

(ii) A House is unable to provide an impartial and independent tribunal.

16.2 A House is unable to provide the appropriately high level of procedural fairness required when exercising its penal jurisdiction. While much can be done to improve the level of procedural fairness afforded by a House (see Parts II and III below), there remain areas of concern which cannot be resolved satisfactorily. The most profound deficiency is the lack of an impartial and independent tribunal.

16.3 Presently, the whole procedure is determined by the House: the raising of an allegation of contempt can only be made by a member; the House determines whether it is referred to the Privileges Committee for investigation; the House decides whether to accept the findings of that Committee; and finally, the House decides what and if any punishment is to be imposed. This procedure was severely criticised in 1908 by a Commonwealth Joint Select Committee on Privilege:

> The ancient procedure for punishment of contempts of Parliament is generally admitted to be cumbersome, ineffective, and not consonant with modern ideas and requirements in the administration of justice. It is hardly consistent with the dignity and functions of a legislative body which has been assailed by newspapers or individuals to engage within the Chamber in conflict with the alleged offenders, and to perform the duties of prosecutor, judge, and gaoler.[7]

16.4 That Committee's Report, based upon evidence provided by such distinguished jurists as Mr Robert Garran and Professors Harrison Moore and Pitt-Cobbett, recommended nearly a century ago the transfer of the penal jurisdiction of the Commonwealth Houses to the High Court with each House retaining the exclusive power to authorise the initiation of a prosecution. Professor Pitt-Cobbett went as far as to suggest that the powers and privileges exercised by the House of Commons, from which the present powers and privileges exercised by both Houses of the Australian Parliament are derived, were "in themselves wholly anomalous" and that:

> A political assembly has never been, and never will be, capable of exercising judicial functions with that calmness and impartiality which are essential to their proper discharge… Trail by an *interested* tribunal must always be foreign to British ideas of justice. [8]

16.5 Not only is the current procedure in clear breach of the common law rule against bias, it also appears to violate Australia's international obligations under Art 14 of the *International Covenant on Civil and Political Rights* which requires all crimes to be prosecuted before an impartial and independent tribunal.

16.6 A comparable violation under Art 6 of *The European Convention on Human Rights* was found by the European Court of Human Rights to have been committed by the House of Representatives in Malta: *Demicola v Malta*.[9] In that case, two members of the House alleged that the editor of a magazine had committed a contempt of the House. Those members then participated in the parliamentary proceedings. Australia could be found to violate the comparable right in Art 14 of the *International Covenant on Civil and Political Rights* of those charged with a criminal offence to be "entitled

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[7] Commonwealth Parliament, *Progress Report from the Joint Select Committee on Privilege-Procedure In Cases Of; together with Minutes of Evidence (to date) and Appendices* (29 May 1908), at 674. The Committee was chaired by Sir John Quick

[8] Ibid at 691.

[9] (1992) 14 EHRR 47 at [41] and [42].

to a fair and public hearing by a competent, independent and impartial tribunal established by law." Of all the institutions of state, a House of Parliament is the least capable of being seen as an impartial body. For this reason alone, the penal jurisdiction of the House should be transferred to the courts.

16.7 Further, the House is unable to provide other important aspects of procedural fairness, in particular, an appropriate forum by which a person accused of contempt can be effectively heard, personally or through counsel, on the issue of penalty. This was recognised by the First Report of the UK Parliament Joint Committee on Parliamentary Privilege (1999) ("1999 UK Joint Committee Report") in finding that it was impracticable for both UK Houses to provide non-members with the appropriate level of procedural fairness in dealing with allegations of serious forms of contempt. Accordingly, the Joint Committee recommended the transfer of the jurisdiction of contempt of the UK Parliament in relation to non-members to the UK courts:

> We do not think it practicable for Parliament to provide, and be seen to provide, the procedural safeguards appropriate today when penalising persons who are not members of Parliament. A debate by the whole House, for instance, on whether to impose a fine on a non-member, and if so how much, is far removed from current perceptions of the proper way to administer justice. Despite the weighty arguments of principle and the break with tradition involved, we have been constrained to conclude that for practical reasons punishment of non-members for contempt should, in general, now be transferred to the courts [306].

16.8 The Report recommended, however, in relation to non-members, the retention of residual jurisdiction in the House to deal with misconduct occurring within the House, or where a reprimand is appropriate, or in exceptional cases.[10] We endorse the retention of this jurisdiction in the former two circumstances which involve neither imprisonment or imposition of a fine. But we reject the inclusion of "exceptional cases", since this potentially undermines the very purpose of the transfer of jurisdiction. Paradoxically, this was not of concern to the UK Joint Committee which noted that they had "no specific instances in mind, but the existence of this residual jurisdiction will serve as a reminder of the constitutional principle that Parliament itself has a penal jurisdiction over non-members." (para 314)

(iii) Inadequate judicial review

16.9 Until the enactment of the *Parliamentary Privileges Act* 1987 (Cth), judicial review was only possible if the warrant for arrest issued by the House cited the grounds of contempt, and then only to check that those grounds were capable of constituting contempt of parliament.[11] A House would avoid judicial review simply by omitting from the warrant the grounds upon which contempt was found, as occurred in the *Fitzpatrick and Browne Case.*[12] This is no longer possible since s 9 of the *Parliamentary Privileges Act* 1987 (Cth) requires the grounds of contempt to be included in both the resolution of the House and the warrant. However, s 9 is deficient in not requiring the grounds of contempt to be cited when a fine is imposed.

16.10 Due to a more profound understanding of the rule of law and a stricter adherence to it, there is a heightened public expectation of the right to judicial review

[10] First Report of the UK Joint Committee on Parliamentary Privilege, at [312-314].
[11] *Sheriff of Middlesex* (1840) 11 Ad & E 273, 113 ER 419.
[12] *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157.

of the exercise of power by all institutions of government. Judicial review now extends to the exercise of statutory power by the Executive at the highest level, that is, the actions of ministers of state and of vice-regal representatives.[13] While the High Court has yet to rule on the issue, there is judicial support for the view that judicial review also extends to the exercise of the prerogative and common law powers of the Crown.[14] The exercise of certain of those powers may remain non-justiciable in so far as they involve political questions which lack manageable legal standards or any enforceable limit.[15]

16.11 It is true that our suggestion here, to transfer the penal jurisdiction of the Houses to the courts, goes further than subjecting the exercise of their penal jurisdiction to greater judicial review. This is necessary because the penal jurisdiction of the Houses departs from the normal assumption mentioned earlier that loss of personal liberty should not occur except where a person has been found guilty by a court of law for breaching the law of the land. The extension of judicial review to the highest level of the Executive branch demonstrates the impact of the rule of law now at the highest political level. It is incongruous that Parliament currently prescribes complex and sophisticated review procedures for virtually all government institutions, and yet retains its penal jurisdiction with the potential to inflict imprisonment on individuals which is subject to minimal judicial review.

(iv) Stultifies Parliament's protection

16.12 A transfer of the penal jurisdiction of the House to the courts is likely to enhance the protection of the House and of its committees, and thereby reinforce their authority. The Privileges Committee can investigate an alleged contempt without feeling constrained by its all encompassing jurisdiction, and the consequent criticism which that presently attracts. This may explain, to some extent, the fact that the House has only once imposed a punitive penalty for contempt: a term of three months imprisonment in the *Fitzpatrick and Browne Case*. The Senate has never imposed imprisonment. No fine has so far been imposed by either House since this power was conferred by s 7 of the *Parliamentary Privileges Act* 1987 (Cth).[16] Both forms of penalty have, however, been imposed at the State level.[17] The confinement of contempt to conduct which improperly interferes with the functioning of the House, its committees and members, and the abolition of libels on parliament as contempt (except when committed during parliamentary proceedings) by s 6 of the

[13] See eg *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170 (H Ct); *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 (HL).
[14] In the UK: *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL); Full Federal Court in *Minister for the Arts, Heritage and Environment v Peko-Wallsend Ltd* (1987) 75 ALR 218; see also *Victoria v Master Builders' Association of Victoria* [1995] 2 VR 121 (CA) and other Australian decisions in fn 372 of Aronson at p 141.
[15] M Aronson, B Dyer, M Groves, *Judicial Review of Administrative Action*, 3rd ed Lawbook Co 2004 at 95 and 140-146.
[16] For the House of Representatives, see I C Harris (ed), *House of Representatives Practice*, 5th ed 2005 at 754 n 281. For the Senate, see H Evans (ed), *Odgers' Australian Senate Practice*, 11th ed 2004 at 64-65.
[17] In 1995, the WA Legislative Assembly imprisoned Mr Brian Easton for one week for refusing to apologise for misleading the House; see Goodwin, Stewart and Thomas, "Imprisonment for Contempt of the Western Australian Parliament" (1995) 25 UWA LR 187.

Parliamentary Privileges Act 1987 (Cth), has also reduced potential unfairness and restraint on freedom of speech.

Response to 1984 Joint Committee Report

17. A range of arguments against transferring the penal jurisdiction of the House to the courts were relied upon by the 1984 Joint Committee Report in recommending against such a reform.[18] We are of the opinion that these arguments do not, on balance, outweigh the factors discussed above which support a transfer of jurisdiction to the courts. Each of those arguments is responded to in turn here:

(i) "[Its jurisdiction] exists as the ultimate guarantee of Parliament's independence and its free and effective working" (para 7.7).

17.1 This argument suggests that the courts pose a potential threat to Parliament if they were to have the power to judge and punish contempts of parliament. This concern can be partially ameliorated by confining to a House the initiation of contempt prosecutions, and further, by confining such prosecutions to serious cases of contempt which may warrant the imposition of a punitive penalty. As noted below, Parliament has already conferred concurrent jurisdiction on the courts by enacting a range of offences under the *Criminal Code Act* 1995 (Cth) which constitute contempt of parliament. Moreover, the lack on the part of the Houses of the New South Wales Parliament of a penal jurisdiction does not appear to have hampered the functioning of those Houses.[19] Nor in the ACT where its Legislative Assembly is denied any power to fine or imprison for contempt.[20] It can also be said that the Executive branch poses a much more serious threat to the effective functioning of Parliament than the courts.

(ii) Courts lack an "acquired understanding of parliamentary life" (para 7.8).

17.2 This is hardly a problem when dealing with serious cases of contempt which warrant imprisonment or fine. Courts alone are qualified to try such cases which place the liberty of the individual at risk. Courts are also adept at acquiring an understanding of all walks of life in the exercise of their vast criminal and civil jurisdiction.

(iii) Courts lack flexibility in being unable to take into account "the potent force of public opinion and the political consequences for Parliament and the principal Parliamentary actors if they act harshly, capriciously or arbitrarily when dealing with a complaint of contempt", and hence, courts may impose harsher penalties (para 7.9).

17.3 This may be so, but the courts under our proposal would only deal with serious cases of alleged contempt and only at the initiation of the House.

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[18] See paras 7.7 – 7.11; Enid Campbell, *Parliamentary Privilege* (The Federation Press Sydney 2003 at 192-3.

[19] For instance the NSW Legislative Council succeeded in obtaining access to Executive documents from one of its members, Mr Egan: see *Egan v Willis* (1998) 195 CLR 424 and *Egan v Chadwick* (1999) 46 NSWLR 563.

[20] Section 24(4) *Australian Capital Territory (Self-Government) Act* 1988 (Cth).

(iv) Even if contempt prosecutions can only be initiated by a House, there remains potential for clashes between the courts and Parliament over what constitutes "contempt" (para 7.11).

17.4 The potential for clashes exists whenever courts interpret parliamentary enactments. Parliament can resolve these clashes by expressing its legislative intent more clearly. In any event, no clashes have so have arisen, despite the conferral of concurrent jurisdiction on the courts under the *Criminal Code* and any potential for clashes has been already been accepted in creating the opportunity for judicial review under s 9 of the *Parliamentary Privileges Act* 1987.

(v) Transfer of the jurisdiction to the courts would expose them to "the odium that Parliament sometimes attracts when it exercises jurisdiction" (para 7.11).

17.5 Courts are equally and increasingly used to public criticism.

(vi) Professor Enid Campbell added to this list the argument that the courts themselves retain a comparable jurisdiction to punish contempt of court.[21]

17.6 Yet the decision of a court is usually subject to appeal to a higher court.

Concurrent jurisdiction

18. There has, of course, already been a partial transfer of concurrent penal jurisdiction by the Commonwealth Parliament to the courts under both the *Parliamentary Privileges Act* 1987 (Cth) and the *Criminal Code Act* 1995 (Cth).

19. Under the *Parliamentary Privileges Act* 1987 (Cth), s 12 prescribes offences which protect witnesses before a House or committee from being threatened and 13 renders it an offence to publish or disclose evidence given to a parliamentary committee without the authority of the House or the committee. While s 12(3) does not preclude action by the House in respect of an offence against the House, no similar provision appears in s 13. Nonetheless, *House of Representatives Practice* is of the view that the position is the same under s 13.[22]

20. Under the *Criminal Code Act* 1995 (Cth), there are several offences each of which also constitute a contempt of parliament. These offences relate to a "Commonwealth public official" which is defined in s 4 to include a member of either House of the Commonwealth Parliament. Hence, offences in the Schedule, which also constitute contempts of parliament, include: dishonestly influencing a member in the exercise of his or her official duties (s 135.1); unwarranted demands of and by a member (ss 139.1 and 139.2); bribery of a member (s 141.1); abuse of public office (s 141.2); causing harm to a member (s 147.1); and obstruction of a member (s 149).

21. Similar State and Territory offences are prescribed in relation to members of State and Territory legislatures.[23] A recent instance of a prosecution occurred in the

[21] Enid Campbell, *Parliamentary Privilege* (The Federation Press Sydney 2003) at 193.
[22] I C Harris (ed), *House of Representatives Practice*, 5th ed 2005 at 737.
[23] *Criminal Code* (Qld) ss 55-61; *Criminal Code* (WA) ss 55-61; *Criminal Code* (NT) ss 57-62 .

Northern Territory where those who disrupted a sitting of the Legislative Assembly were found guilty by a magistrate of an offence under s 61(1) of the *Criminal Code* (NT) of intentionally disturbing the Legislative Assembly whilst in session.[24] On the other hand, concern was raised in the Queensland Parliament over the possibility that a minister might be prosecuted under the Queensland *Criminal Code* for misleading a parliamentary committee, rather than be dealt with by the House. The lack of control on the part of the House led to the repeal in 2006 of certain offences under the *Criminal Code* which made it an offence to disturb the Legislative Assembly (s 56), to give false evidence before Parliament (s 57), and to refuse to appear as a witness before Parliament (s 58).[25]

22. Our suggestion is that the House always retain control over any prosecution in the courts by limiting the initiation of that prosecution to the presiding officer of the House, acting on the instructions of the House. It is clear that there can exist concurrent jurisdiction over contempt of parliament without the Houses being hampered in the exercise of their legislative function.

23. As will be seen below, our suggestion envisages that a court would be given jurisdiction to hear and try alleged contempts of parliament once the House authorised the presiding officer of the House to initiate a prosecution for serious contempt in the courts. Given the dignity of the Parliament and the high place it occupies in the Australian constitutional system we feel it is appropriate that the trial of alleged breaches of parliamentary privilege should be conducted by a single justice of the High Court subject to the normal rights of appeal which would lie to the High Court in the exercise of its appellate jurisdiction, that is, with the grant of special leave as in criminal cases.

24. We would add, that if the House were unwilling to accept our suggestion in its entirety, it could follow the model provided in at least two State jurisdictions under which the Houses of Parliament retain a *concurrent* power to try contempts of parliament either: (a) only in certain cases;[26] or (b) only in those cases where the only penalty that can be imposed is a fine and not imprisonment (except for non-payment of a fine).[27]

Suggested procedure

25. We recommend that consideration be given to the following procedure:

> (i) The House determines whether an allegation of contempt of parliament warrants investigation by its Privileges Committee.
>
> (ii) The Privileges Committee conducts an investigation in accordance with the guidelines suggested below in Part II to ensure a high level of procedural fairness

[24] *Highway v Tudor-Stack* [2006] NTCA 4.
[25] See the report of the Qld Scrutiny of Legislation Committee, *Alert Digest* No 06 of 2006 at pp 1-5.
[26] *Parliamentary Privilege Act* 1858 (Tas) ss 3, 11
[27] *Parliamentary Privileges Act* 1891 (WA) ss 8, 14, 15,

(iii) The Privileges Committee reports to the House with its findings and its recommendations on what, if any, penalty is appropriate.

(iv) The House should then determine, in accordance with the guidelines suggested below in Part III, how far it is prepared to act on the recommendations of the Privileges Committee.

(v) If the Committee considers a term of imprisonment or fine is warranted, it should recommend that the House authorise the presiding officer of the House to initiate a prosecution for serious contempt in the High Court. The presiding officer rather than the Attorney-General is the appropriate person to initiate the prosecution on behalf of the House. A more modern understanding of the separation of powers makes it inappropriate for a member of the Executive to be engaged to act on behalf of the House.

Part II Procedural fairness: Privileges Committee

Current procedure

26. Unlike the Senate, the House of Representatives has not adopted any resolutions prescribing the procedures of the Privileges Committee, in particular those designed for the protection of witnesses. Among the eleven resolutions, concerned with a range of parliamentary privilege issues, passed by the Senate on 25 February 1988, resolutions 1 and 2 prescribe procedures for the protection of witnesses.[28] Resolution 1 prescribes procedures to be observed by all Senate committees, while Resolution 2 prescribes additional protections for witnesses appearing before the Senate Privileges Committee.

27. The House of Representatives has not followed the Senate example of prescribing by resolution specific protections for witnesses appearing before the House or its committees. Instead, the House of Representatives Committee of Privileges has compiled and adopted for its proceedings similar procedures to those prescribed by Senate Resolution 2.[29] These procedures are not as comprehensive and differ in several significant respects from those prescribed by Senate Resolution 2. Further, the House of Representatives Committee on Procedure has recommended that the House adopt by resolution a list of procedures to protect witnesses appearing before House committees. This list substantially follows the terms of Senate Resolution 1.[30] Although the House has not adopted these procedures, we are informed that the House committees generally follow them. No guidance is given where the respective procedures of the Privileges and Procedure Committees are not entirely consistent. But we assume that the former is intended to override the latter. The same position

[28] These resolutions are found in: Harry Evans (ed), *Odgers' Australian Senate Practice*, 11th ed Department of the Senate Canberra, at 593ff.

[29] *Parliamentary privilege: the operation of the committee, some historical notes and Guidelines for Members* – House of Representatives Committee of Privileges, Nov 2002 Appendix A at p 3-4 ("House Privileges Committee Report").

[30] House of Representatives Standing Committee on Procedure, *Its your House: Community involvement in the procedures and practices of the House of Representatives and its committees*, 1999, Recommendation 25 para 6.87(a) at 64 and Appendix C at 93 – 95 ("House Procedure Committee Report").

applies under Senate Resolution 2 which makes it clear that its procedures prevail over any inconsistency with the procedures of Senate Resolution 1.

28. In this part of our review, we strongly suggest that the House prescribe by resolution a range of protections which confer a high level of procedural fairness in contempt matters before the House and its Privileges Committee. There seems little point in providing such protection unless this is prescribed by resolution of the House. Moreover, the rights, which witnesses are entitled to, need to be clear, comprehensive and publicly accessible. As noted earlier, the levels of procedural fairness suggested here should be accorded whether or not the House transfers some, or all, of its penal jurisdiction to the courts as recommended in Part I above. We would add that we would strongly support the need for the House to have whatever procedures and protections apply to the determination of contempt matters enshrined in resolutions even if our suggestions in favour on enhancing the present protections are not accepted in whole or in part.

High level of procedural fairness

29. In determining the level of procedural fairness appropriate for the determination of contempt of parliament, regard must be had to the nature of those proceedings, their participants, and the impact those proceedings have on the rights and reputation of those accused of, and those under investigation for, contempt. The issue is similarly one of degree when determining the appropriate level of procedural fairness for administrative decision-making. The classic judicial statement on this was given by Tucker LJ in *Russell v Duke of Norfolk*:

> The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth.[31]

30. It also needs to be borne in mind that the rules of procedural fairness as developed by the courts have had an inherently dynamic character which means that requirements recognised now may not have been recognised in earlier times.

31. Most significant in the context of parliamentary proceedings for contempt is the range of penalties members and non-members are liable for: from a reprimand to a fine or imprisonment. Additionally for a member, there is, of course, suspension from the House.[32] The width of this range of penalties might suggest a tension between the need for a high level of procedural fairness in respect of the drastic penalties of fine and imprisonment, and a lower level for a mere reprimand. The relatively few occasions when any penalty is imposed in practice could add to this tension. However, the need for a high level of procedural fairness is clearly warranted when one has regard to two other factors. The first is the fact that the members of the House undertake all the functions associated with contempt of parliament, that is, the initiation of a complaint, its investigation and findings (usually through the Privileges Committee), and the imposition of penalties. The second factor is the *potential* for the imposition of severe penalties by a House which are not likely to be subject to judicial

[31] [1949] 1 All ER 109 at 118.

[32] Expulsion from the Commonwealth Parliament is no longer possible: s 8 *Parliamentary Privileges Act* 1987 (Cth).

review. These factors demand that a high level of procedural fairness be accorded to those accused of contempt of parliament. This was recognised by the 1984 Joint Committee Report:

> [It is] a very serious matter for anyone whose conduct attracts the attention of one of the Houses and is brought before its Privileges Committee. Accordingly, the onus is on the Houses to accord to him *the fairest of hearings*, and the *most complete opportunity to defend* himself. [7.51] (emphasis added)

32. The Report also observed that this need for a high level of procedural fairness was reinforced by the fact that there was little opportunity for an individual to seek a full review of the matter before the House as a whole (para 7.52). This aspect is considered further below in Part III.

33. A high level of procedural fairness is also supported by the 1999 UK Joint Committee Report which observed: "While fairness is fundamental to any disciplinary procedure, the more serious the consequences, the more extensive must be the safeguards if the procedure is to be fair." So for "specially serious cases", it considered that "it is essential that committees of both Houses should follow procedures providing safeguards at least as rigorous as those applied in the courts and professional disciplinary bodies." (para 281) As noted earlier, the 1999 UK Joint Committee Report concluded that, as it was impracticable to provide non-members with the appropriate level of procedural fairness in dealing with allegations of serious forms of contempt, the jurisdiction of contempt of parliament in relation to non-members should be transferred to the courts.

Content of procedural fairness

34. This part of our review identifies those aspects of the present procedure of the House Privileges Committee, so far as that procedure can be determined, which fail to accord an appropriately high level of procedural fairness in dealing with allegations of contempt which have been referred to the Committee by the House. The high level recommended here reflects the serious nature of contempt proceedings and the range of penalties which may be imposed, in particular, the punitive penalties of fine and imprisonment. Even if the penal jurisdiction of the House is transferred to the courts, as recommended in Part I of this review, a high level of procedural fairness should still be adopted for all determinations of alleged contempt.

35. Part III of this review addresses the procedures of the House when the Committee has reported back to the House at the conclusion of its investigation - whether or not the penal jurisdiction is transferred to the courts as we have suggested. No suggestions have been made in relation to the procedure for the raising of a matter of contempt by a member in the House.[33] That procedure raises no concerns in relation to procedural fairness.

36. Our suggestions draw substantially upon those contained in Recommendation 21 of the 1984 Joint Committee Report (para 7.66) which recommended, as noted earlier, the highest level of procedural fairness in the proceedings of a Privileges Committee (para 7.51), in view of the serious impact those proceedings may have on those being

[33] I C Harris (ed), *House of Representatives Practice*, 5th ed 2005 at 743ff.

investigated. This approach is consistent with the position of administrative tribunals and administrators, all of which are subject to a common law obligation to act fairly in the exercise of their powers, in so far as they are likely to affect an individual's "rights, interests or legitimate expectations". That expression encompasses "such things as status, business and personal reputation, liberty, confidentiality, livelihood and financial interests."[34] The classic statement of this obligation was provided by Mason J in *Kioa v West*:

> The law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.[35]

37. In following Recommendation 21 of the 1984 Joint Committee Report, our suggestions also draw upon the 1988 Senate Resolutions which in many respects follow Recommendation 21. However, our suggestions go further than the 1988 Senate Resolutions, which, in our view, fail in certain respects to provide a sufficiently high level of procedural fairness.

38. According to Odgers, the Senate deliberately declined to follow what it called "the criminal trial model" recommended by the 1984 Joint Committee Report, because "in a privileges committee inquiry, it is not always clear what is the charge or who is the accused." [36] Instead, Odgers claims that the Senate adopted a "commission of inquiry model" which "gives to all persons appearing before the Privileges Committee greater rights than are possessed by persons appearing in court proceedings".[37]

39. Neither of these explanations, in our view, is satisfactory for rejecting the criminal trial model. Apart from the fact that commissions of inquiry do not make findings of guilt, their investigations do not usually accord greater rights to witnesses appearing before them than in criminal proceedings. Indeed, witnesses before commissions of inquiry are often more vulnerable (as regards their reputation; not their liberty) since those inquiries tend to engage in fishing expeditions for relevant evidence in circumstances where those called to give evidence are unsure precisely which matters they may be called upon to testify.

40. It is true, as Odgers asserts, that in certain privilege committee inquiries there is uncertainty over who is responsible for an alleged breach of privilege or contempt. For instance, this is often the case where there is an unauthorised disclosure of committee evidence or draft findings. Hence, in the course of the committee's investigation, a person may become the focus of specific allegations which were unknown at the outset of the committee's inquiry. With the gradual revelation of those allegations, it is necessary for the committee to accord that person, whether or not they have appeared already as a witness, a greater level of procedural fairness equivalent to that which they ought to be given had the committee's inquiry been instigated for the purpose of investigating specific allegations against them as "the

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[34] M Aronson, B Dyer and M Groves, *Judicial Review of Administrative Action*, (Sydney: Lawbook Co, 3rd ed 2004) at 389.
[35] (1985) 159 CLR 550 at 584.
[36] H Evans (ed), *Odgers' Australian Senate Practice*, 11th ed 2004 at 73.
[37] Ibid.

accused". This follows from the evolution of the proceedings from being primarily inquisitorial to adversarial.

41. Despite Odgers' assertion that the commission of inquiry model gives "greater rights" to persons appearing before a Privileges Committee than in court proceedings, the 1988 Senate Resolutions 1 and 2 actually fall short of the appropriate level of procedural fairness, which this review recommends for a parliamentary contempt inquiry, in a number of significant respects. Certain rights are either not recognised at all, or not sufficiently recognised. Those rights not recognised include the rights to: a transcript of all the evidence; to be present throughout the hearing; to seek the subpoena of witnesses; and to address the committee on all the evidence and later on the issue of penalty if appropriate. Those rights insufficiently recognised include the right to have a reasonable period of time to prepare one's case, the right of an accused's counsel to cross-examine witnesses, as well as the rights to full legal representation, to the privilege against self-incrimination, and to seek the refund of legal expenses.

42. Nonetheless, the 1988 Senate Resolutions 1 and 2, along with Recommendation 21 of the 1984 Joint Committee Report, provide a firm foundation upon which the House should adopt, by resolution, a comprehensive procedure for the determination of contempt cases which accords an appropriately high level of procedural fairness to all witnesses appearing before its Privileges Committee. In the course of identifying specific procedural fairness requirements which need to be covered by that procedure, we note where these are already provided for in the 1988 Senate Resolutions and where they are not. Unless otherwise specifically mentioned, we suggest that the House expressly adopt by resolution the same procedures adopted by Senate Resolutions 1 and 2.

43. As noted earlier at para 7, contempt proceedings usually begin in either an adversarial manner with specific allegations of contempt made against certain persons or bodies (situation (1)), or else they begin in an inquisitorial manner in order to ascertain who is responsible for alleged contempts (situation (2)). Proceedings of the latter kind may become adversarial as those alleged to be responsible for contempt are identified from possible suspects. This chameleon character impacts on the procedures of the Privileges Committee as a higher level of procedural fairness is necessitated when its proceedings are or become adversarial compared to when they are merely inquisitorial. There is also a third category of case where in the course of the Privilege Committee investigations in situations (1) and (2), adverse or disparaging remarks are made about a third person who may or may not be present at the time ("the third party situation"). Separate consideration needs to be given as to the extent to which the Privileges Committee should act to protect the interests of those third persons.

44. Accordingly our specific suggestions on what needs to be provided by the Privileges Committee in terms of procedural fairness are divided in this Part into:

> **Section A** which considers the protection of accused and suspected persons within situations (1) and (2); and
>
> **Section B** which considers the protection of third parties.

45. Specific suggestions on what needs to be provided in terms of procedural fairness by the House itself upon receipt of the report of the Privileges Committee are covered separately in Part III below.

46. Please note that all our suggestions which are summarised in Part IV, refer only to the basic principles upon which the House should draft its procedural guidelines. In the event the House wishes to adopt specific guidelines, we are available to assist in that drafting process.

A. Procedural fairness: protection of accused and suspected persons

47. This section considers the specific requirements of procedural fairness which ought to be in place to protect those who appear before the Privileges Committee as an accused (situation (1)) and as a suspect (situation (2). Henceforth, references to an "accused" in situation (1) are intended to refer to:

(i) any person who is the subject of investigation for alleged contempt by the Privileges Committee at the outset of its investigation, that is a person effectively "charged" with specific contempt; and
(ii) any person who *becomes* the subject of specific allegations of contempt during the course of a Committee's investigation.

48. Our suggestions here also refer, when appropriate, to situation (2), that is, where a person is only suspected by the Privileges Committee to be implicated in a contempt so that no specific charge has yet been formulated against that person.

1. All Committee hearings should be held in public subject to a discretion to hear evidence in private in appropriate cases. [Recommendation 21, 7.66(a); 7.54 and 7.58[38]]

49. We understand that the practice of the House until 1987 was for its committees to take evidence in private. This appears to have changed in recent times.[39] However, the need for public accountability and transparency requires the House to adopt public hearings as a standard practice for its Privileges Committee when investigating and determining allegations of contempt of parliament. This is particularly necessary when the Committee's proceedings are adversarial, in order for justice to be seen to be done.[40]

50. The 1984 Joint Committee Report strongly recommended public hearings to reinforce the "most exacting standards of fairness" (para 7.54). However, that Report reluctantly recognised the need for the Committee to maintain a discretion to hear evidence in private where, for example, this was necessary to prevent the disclosure of secret or confidential information in the national interest or to protect individuals (para 7.58).

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[38] All references in square brackets to each of our suggestions are references to the corresponding recommendation and discussion in the 1984 Joint Committee Report.
[39] I C Harris (ed), *House of Representatives Practice*, 5th ed 2005 at 749.
[40] M Aronson, B Dyer, M Groves, *Judicial Review of Administrative Action*, 3rd ed Lawbook Co 2004 at 529.

51. Senate Resolution 2(7) gives effect to the 1984 Joint Committee Report recommendations by requiring public hearings - except when private proceedings are warranted on the application of the witness or at the Committee's own initiative:

> Hearing of evidence by the committee shall be conducted in public session, except where:
>
> (a) the committee accedes to a request by a witness that the evidence of that witness be heard in private session;
> (b) the committee determines that the interests of a witness would best be protected by hearing evidence in private session; or
> (c) the committee considers that circumstances are otherwise such as to warrant the hearing of evidence in private session.

52. These provisions appear to confine those circumstances when the Senate Privileges Committee hearing can be held in camera. The Committee is not obliged to hold in camera proceedings except when it determines that this is required. If the Committee has reason to believe that an answer may incriminate the accused or suspect, the witness is only obliged to answer that question in a private session (para 4 of the House procedural guidelines, following Senate Resolution 2(5)).

53. The position appears to differ for all other Senate committees under Senate Resolution 1(10) which requires a private session to be held where the committee rejects a witness's objection to answering a question, "unless the committee determines that it is essential to the committee's inquiry that the question be answered in public session". Resolution 1(11)[41] requires the committee to give consideration to a private session where it has reason to believe that evidence is about to be given which may reflect adversely on a person.[42] Further procedural rights are conferred on witnesses before all Senate committees, in that they are required by Resolution 1 to notify each witness, before giving evidence, of their right to apply at any stage for a private session (para 7) and if this occurs, the witness is to be further notified in advance whether or not the committee intends to publish that evidence in whole or in part to the Senate *and* that the Senate has the power to order this in any event (para 8).

54. We do not consider that the rules of procedural fairness necessarily require the House to adopt these requirements in Senate Resolution 1 (7), (8), (10) and (11) for situations (1) and (2). Their equivalents are found in the House Procedure Committee Report paras (6), (7), (9) and (10). It is sufficient for the House to adopt a resolution along the lines of Senate Resolution 2(7) as quoted above. The other resolutions may be appropriate for general committee inquiries, but they undermine the transparency required in contempt cases. But even Senate Resolution 2(7) could be simplified to read as follows:

> Hearing of evidence by the committee shall be conducted in public session, except where the committee determines, on its own initiative or at the request of a witness, that the interests of the witness or the public interest warrant the hearing of evidence in private session.

[41] Cf House Procedure Committee Report para 10 differs from Senate Resolution 1(11) by merely requiring the evidence to "reflect" on the person.

[42] The application of the Senate Resolutions to the third party situation is discussed below at paras 115 – 116, 131 – 132.

55. We do not suggest that the House follow the New Zealand approach which is to distinguish between evidence given in private and that given in secret. While public hearings are the norm there, provision is made for select committees to hear evidence in private which is later published to the House, and to classify evidence as secret which can only be published with the approval of the House (see SO 219, 220 and 238(2)).

2. A transcript of all evidence presented to the Committee should be published as soon as possible, subject to a discretion to withhold evidence taken in private. The transcript should also be presented to the House with the Committee's report. [Recommendation 21, 7.66(b); 7.63]

56. While all evidence given to the Privileges Committee is transcribed (unlike in New Zealand[43]) the House presently has no requirement to make publicly available the whole transcript. This follows from the lack of any general requirement to hold the Committee's hearings in public. The current procedural guidelines merely refer to the right of any person to have the "particulars of any evidence" given against them (para (1)). For public accountability and transparency, the entire transcript of the public hearings should be made available as soon as possible. This is particularly important to enable the House and the Australian people to assess the merits of the Committee's report. It also facilitates the right of any persons, referred to in the evidence, to respond.

57. At times, it is necessary for extracts of the transcript to be brought to the attention of witnesses. Senate Resolution 1(3) and House Procedure Committee Report para (3) recognise this in relation to those who may be adversely affected by certain evidence so as to facilitate their response.[44] Senate Resolution 1(17) and House Procedure Committee Report para (15) require witnesses to be afforded a reasonable opportunity to correct the transcript of their evidence.

58. It may also be necessary in exceptional cases for sections of the transcript to remain confidential or even be expunged. Senate Resolution 1(12)[45] permits a Senate committee to expunge adverse evidence from the transcript where it is not satisfied that it is relevant to the committee's inquiry. [46]

3. Committee members should be disqualified for apparent bias

59. Along with the right to a hearing, the other fundamental tenet of procedural fairness is the right to have decisions made by an impartial body which has not prejudged, nor appears to have prejudged, the issues. Hence, both actual and apparent bias may invalidate the decision made. The test of a "reasonable apprehension of bias" was described by the High Court in these terms:

[43] NZ SO 232(1).
[44] The application of the Senate Resolutions to the third party situation is discussed below at paras 117 – 120, 129.
[45] No equivalent in the House Procedure Committee Report.
[46] The application of the Senate Resolutions to the third party situation is discussed below at paras 115 – 116, 131 – 132.

> Those requirements of natural justice are not infringed by a mere lack of nicety but only when it is firmly established that a suspicion may reasonably be engendered in the minds of those who come before the tribunal or in the minds of the public that the tribunal or a member or members of it may not bring to the resolution of the questions arising before the tribunal fair and unprejudiced minds.[47]

60. It is essential that this rule against bias be complied with so far as possible in Privilege Committee proceedings, given the seriousness of those proceedings and the potential impact they may have on those being investigated. This rule lies at the foundation of the right to a fair hearing, to which all of our other suggestions in this Part give effect.

61. Obviously, complete impartiality is not possible where members of the House adjudge an allegation of contempt against their own House. For that reason, we have suggested the transfer of the penal jurisdiction of the House to the courts. But whether or not this occurs, it is intolerable to allow a member, who instigated the allegation of contempt or who is directly implicated in the allegation, to remain on the Privileges Committee when investigating that allegation. Such blatant violations of the bias rule ought to be clearly prohibited by a resolution of the House.

62. The lack of reference to bias in the Senate resolutions, especially in relation to the hearing of allegations of contempt, is somewhat surprising. The practice of the Senate is to require each member to assess whether or not they should disqualify himself or herself from the committee.[48] This practice was confirmed by the Clerk of the Senate in an advice to the Senate Committee of Privileges in 2002[49], relying on the absence of concerns over bias in any comparable legislature, in particular, the United Kingdom Parliament and the United States Congress, and having regard to the political nature of legislative bodies.

63. With respect, neither of these grounds is persuasive. The New Zealand Parliament recognises the rule against bias - albeit in a limited way, by providing for a complaint of bias to be brought by another member of parliament or by an imminent witness against a member of the committee where that member has "made an allegation of crime or expressed a concluded view on any conduct or activity of a criminal nature" by an identifiable person (SO 233-234). The chairperson of the committee determines the issue, subject to a final appeal to the Speaker. More significantly, the Senate practice appears to violate the right under Art 14 of the ICCPR to an independent and impartial trial. Reference[50] has already been made to the decision of the European Court of Human Rights in *Demicoli v Malta*[51] where the Maltese House of Representatives was found to have violated Art 6 of *The European Convention on Human Rights* in permitting its complainant members to participate in the contempt proceedings. Article 6 is comparable to Art 14 of the ICCPR.

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[47] R v *Commonwealth Conciliation and Arbitration Commission; Ex parte the Angliss Group* (1969) 122 CLR 546 at 553-4.

[48] See eg *Report on Committee's Work since Passage of Privilege Resolutions of 25 February 1988*, Senate Committee of Privileges 35th Report December 1991 at paras 42-46.

[49] *Advices to the Senate Committee of Privileges from the Clerk of the Senate and Senior Counsel* (August 2002) Advice No 2, pp 10-15.

[50] See para 16.6.

[51] [1991] 1 EHRR 47.

64. While parliamentary proceedings are inherently political, those of Privilege Committees are usually not partisan. Given the seriousness of contempt proceedings, it is insufficient to leave to each member of the Committee, subject to disqualification by the House, the determination whether to disqualify themselves. Blatant cases of apparent bias ought to be recognised, namely, when a member of the Committee initiated the complaint of contempt or is implicated in its alleged occurance. The member in such circumstances ought to be automatically disqualified from sitting on the Committee.

4. Any person who is the subject of proposed investigation by the Committee must be notified in advance of the specific nature of the allegations made against them, preferably formulated as a specific charge, or if this is not possible, of the general nature of the issues being investigated, in order to allow them to respond. [Recommendation 21, 7.66(c); 7.56]

65. This suggestion gives effect to the fundamental tenet of procedural fairness that a person must be notified of allegations or adverse evidence made against them so that they can respond to those allegations or adverse evidence.[52] This suggestion contemplates both situations (1) and (2):

> (1) where the Committee accuses a person of contempt of parliament (situation (1)). Notice must then be given of the specific charges of contempt alleged; and
>
> (2) where the Committee has not accused a person of contempt, but wishes to investigate who may be responsible for a contempt (situation (2)). Proposed witnesses must be advised in advance of the general issues being investigated and any relevant evidence adverse or prejudicial to them of which the Committee is aware.

66. The current procedure of the Privileges Committee appears designed to cover both these situations:

> A person shall, as soon as practicable, be informed, in writing, of the nature of any allegations, known to the committee and relevant to the committee's inquiry, against the person, *or evidence which reflects adversely on the person*, and of the particulars of any evidence which has been given in respect of the person. (emphasis added)[53]

67. This provision is identical to Senate Resolution 2(1) except for the insertion of the italicised words. Their insertion appears to have been intended to cover situation (2), that is, where in the course of the hearing, the committee discovers another person warranting investigation. Such a person then needs to be given particulars of the adverse evidence (preferably by an extract of the transcript) to enable them to respond. Senate Resolution 1(13) already covers this situation:

> Where evidence is given which reflects adversely on a person…, the committee shall provide reasonable opportunity for that person to have access to that evidence and to respond to that evidence by written submission and appearance before the committee.

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[52] M Aronson, B Dyer, M Groves, *Judicial Review of Administrative Action*, 3rd ed Lawbook Co 2004 at 499.

[53] House Privileges Committee Report para (1).

The House Procedure Committee Report (para 11) differs from this provision by merely requiring the evidence to "reflect upon a person", and by giving the committee a discretion as to whether to allow that person an opportunity to respond. Whether this improves on Senate Resolution 1(13) is unclear. But neither provision is required for the Privileges Committee since para 1 of its procedures (cited above) is sufficient.

68. If, however, a point is reached during the course of its investigation in situation (2) when the Committee believes a witness may be responsible for a contempt of parliament, the Committee should formulate a specific charge of contempt and formally give notice of that charge to the witness in advance of their further investigation. The proceedings against that witness are thereafter conducted as a situation (1) in an adversarial manner with the highest level of procedural fairness accorded.

69. Where allegations or adverse evidence are made in the course of an investigation which the Committee decides not to investigate further (eg not relevant to the inquiry), suggestions are made in Part III below as to how the Committee should deal with that third party situation.

70. A sensitive issue in inquisitorial proceedings is the extent to which advance notice should be given of the details of the evidence held against those who are intended to be examined. The established principle is that details of the evidence are not required to be given in advance or even at the commencement of an investigative hearing where this would undermine the efficacy of that investigation. In *National Companies and Securities Commission v News Corporation Ltd*, Mason, Wilson and Dawson JJ observed:

> It is of the very nature of an investigation that the investigator proceeds to gather relevant information from as wide a range of sources as possible without the suspect looking over his shoulder all the time to see how the inquiry is going. For an investigator to disclose his hand prematurely will not only alert the suspect to the progress of the investigation but may well close off other sources of inquiry.[54]

71. For this reason, this suggestion (4) merely requires advance notice of the specific allegations to be answered or of the general nature of the issues if such allegations have yet to be formulated. We believe this reflects the general thrust of para 7.56 of the 1984 Joint Committee Report which refers to notice being given of "the substance of the matters to be put against them", "the case they have to meet" and adequately defined "issues".

72. However, para 1 of the current House procedure quoted above goes beyond this position by requiring *particulars* of any adverse evidence to be given. This requirement is necessary where the accused is not present during the giving of that adverse evidence. It is not, however, strictly necessary before or at the commencement of the Committee's proceedings.

73. We do not endorse the restrictive approach adopted in New Zealand where a select committee is only obliged to give notice of allegations made in evidence

[54] (1984) 156 CLR 296 at 323-324. See also Gibbs CJ at 314-316.

against a person during the course of its hearings if those allegations "may seriously damage the reputation" of that person (SO 238; see also SO 235(2)). Correspondingly, the right to respond in writing and/or by appearing before a select committee is limited to such allegations (SO 239). We consider that notice of any allegations which may damage the reputation of a person ought to trigger the right to respond. We do not consider that the opportunity to respond should be limited because "[t]he nature of Parliament is such that people often say hurtful things about other people".[55]

74. One feature of the New Zealand procedure worth considering here is the restriction on select committees not to investigate allegations of criminal activity by identifiable individuals nor to make findings of same unless this has been authorised by the House (SO 200).

5. Persons charged with specific allegations against them, must be given a reasonable time to prepare their response [Recommendation 21, 7.66(d); 7.57]

75. A fundamental corollary of the previous principle of procedural fairness is the need to have a reasonable time in which to prepare a response to a charge of allegations of contempt. A reasonable period depends on the complexity and seriousness of the allegations. Longer periods are required where there is a need to consult with experts, such as lawyers and accountants, and where witnesses need to be arranged.

76. Senate Resolution 2(2) is too ambiguous in merely providing for "all reasonable opportunity" to respond to allegations. It is necessary to spell out in more detail what this entails in terms of, for instance, adequate details of adverse allegations, a copy of the transcript, right to legal representation, as well as a reasonable period to prepare one's case.

77. Procedural fairness also requires a reasonable time to prepare one's testimony as a witness before the Committee. The House Procedure Committee Report (para 3) merely requires a witness appearing before a House committee to be given "notice of a meeting at which he or she is to appear". Senate Resolution 1(3) improves on this by requiring witnesses appearing before any Senate Committee to be given "reasonable notice of a meeting". We suggest that specific provision be made for witnesses appearing before a Privileges Committee to be afforded a *reasonable period of notice* for which to prepare their evidence.

6. Right of the accused to be present throughout whole proceedings, save for deliberative sessions and subject to a discretion to exclude when proceedings held in private [Recommendation 21, 7.66(e), 7.59 and 7.60]

78. The right of the person charged to be present throughout the hearing was a central feature of the recommendations of the 1984 Joint Committee Report because it

[55] *Natural Justice Before Select Committees*, Office of the Clerk of the House of Representatives (New Zealand) 2005 p 15.

facilitated the right to be informed of all the evidence against them, their right to cross-examine witnesses, and the right to respond to all allegations made (para 7.59). We believe these rights must be afforded a person charged in order to provide the highest level of procedural fairness. None of these rights is provided for in the current procedure of the House.

79. Further, witnesses who are being investigated for contempt by the Committee but not yet charged (ie situation (2)), are usually entitled to be present when other witnesses are making allegations against or reflecting adversely on them. This right is recognised by Senate Resolution 2(3):

> Where oral evidence is given containing any allegation against, or reflecting adversely on, a person, the committee shall ensure as far as possible that that person is present during the hearing of that evidence, and shall afford all reasonable opportunity for that person, by counsel or personally, to examine witnesses in relation to that evidence.

80. It is desirable, however, that a person charged with contempt be expressly accorded the right to be present throughout the proceedings except for the deliberative sessions. This avoids the obvious practical difficulties in giving effect to the piece-meal effect of the Senate Resolution.

81. The 1984 Joint Committee Report acknowledged, however, that circumstances might arise where it would be desirable for the person charged to be excluded. No example was given, but such circumstances might arise where the evidence relates to national security. Where the person charged is excluded from the private proceedings, a transcript of relevant allegations should still be provided. (para 7.60)

7. Right to adduce evidence [Recommendation 21, 7.66(f), 7.61]

82. The House procedural guidelines (para 2) follow Senate Resolution 2(2) in conferring upon any person "all reasonable opportunity to respond to [any] allegations and evidence by:

(a) making written submissions to the committee;
(b) giving evidence before the committee; and
(c) having other relevant evidence placed before the committee."[56]

83. The Senate Resolution, however, includes a further sub-paragraph: "(d) having witnesses examined before the committee." Why this paragraph was not adopted is unclear. It may have been considered that it was covered by subparagraph (c). But sub-paragraph (d) appears to extend beyond that to confer a right on the accused to examine witnesses. This right is recommended in our next suggestion (8). In any event, sub-para (c) is not sufficiently clear to ensure the right of the accused to call witnesses. Such a right should be adopted to ensure that the accused is able to respond to the allegations fully. In certain cases, this can only be done if witnesses are able to corroborate the accused's case.

84. The other situation to consider is where adverse allegations are made against a witness or another person by the accused or another witness, which the Committee

[56] This provision obviates the House Procedure Committee Report para 11.

intends to investigate further.[57] In that case, which is situation (2), notice of the adverse allegations will need to be given to the person concerned and they will need to be given an opportunity to respond. Depending on the seriousness of the adverse allegations, that person may need to be accorded all the rights of procedural fairness which the accused is entitled to, including the right to adduce evidence from other witnesses. This is obviously required if the accused is alleging that that person is the person responsible for the contempt with which the accused has been charged.

85. As for the order in which witnesses appear before the Committee, the practice appears to be that this is determined by the Chair of the Privileges Committee.[58] This reflects the inquisitorial role of the Committee in examining witnesses appearing before it. Where, however, the Committee's proceedings assume a more adversarial nature, such as where a person is charged with contempt and is legally represented, the Chair should endeavour to accommodate the order of witnesses requested by the accused's counsel. Aronson observes that in inquisitorial proceedings the decision maker determines the order of witnesses and conducts their examination, whereas in adversarial proceedings, the parties do this.[59]

86. Specific guidelines are needed here if only to require the Chair of the Committee to clarify, even before the commencement of the Committee's hearing, who is to determine the order of witnesses and the opportunity for cross-examination. Aronson warns of the need for "a conscious, coherent and consistent procedural strategy" to avoid difficulties in this area. [60]

87. Circumstances may arise where the accused wishes to call a witness who refuses to co-operate. In such a case, the Committee would have the power to summon that witness.

Objections to answering questions

88. Witnesses appearing before the Privileges Committee as an accused or as a suspect are not entitled to refuse to answer any question put by the Committee or by counsel assisting the Committee. Even where they object to answering a question on the ground that it is irrelevant, outside the terms of reference of the Committee, is self-incriminatory, or violates an obligation of confidentiality, the Committee is entitled to insist on an answer to that question. Fairness requires the Committee, however, to give appropriate consideration to such objections before insisting on an answer.

89. If the Committee has reason to believe that an answer may incriminate the accused or suspect, the witness is only obliged to answer that question in a private session (para 4 of the House procedural guidelines, following Senate Resolution 2(5)). This appears to be a fair rule for the Committee's inquisitorial proceedings within

[57] Where the Committee decides not to pursue the allegations or adverse evidence [third party situation], the person concerned still needs to be accorded some measure of procedural fairness: see below at paras 131 – 132.
[58] We are advised that this is done in consultation with the Committee Secretariat.
[59] M Aronson, B Dyer, M Groves, *Judicial Review of Administrative Action*, 3rd ed Lawbook Co 2004 at 536 and 543.
[60] Ibid at 544.

situation (2) but it is questionable in relation to the hearing of a specific charge of contempt within situation (1).

90. Senate Resolution 1(10) requires any Senate committee to consider an objection by a witness to answering any question. If the committee does not uphold the objection immediately, it is to decide the point in private session and if the objection is overruled, the witness must give the evidence in private session unless the committee is of the view that it is essential that it be given in public session. The House Procedure Committee Report para 9 provides similarly except that the committee is not required to consider the objection in private session. Again this appears to be a fair rule for the Committee's inquisitorial proceedings within situation (2) but it is questionable in relation to the hearing of a specific charge of contempt within situation (1). [61]

Rules of evidence

91. It should be noted that although the Committee is not required to comply with the rules of evidence, fairness requires that greater regard be given to the risks entailed in any departure from those rules, the more adversarial the Committee's proceedings become. For instance, less weight should be accorded to hearsay evidence. Useful guidance in relation to the rules of evidence for commissions of inquiry given, by Lord Diplock in *Mahon v Air New Zealand*[62] (*Mt Erubus* case), applies similarly to parliamentary inquiries:

> The first rule is that the person making a finding in the exercise of [an investigative] jurisdiction must base his decision upon evidence that has some probative value … The second rule is that he must listen fairly to any relevant evidence conflicting with the finding and any rational argument against the finding that a person represented at the inquiry, whose interests (including in that term career or reputation) may be adversely affected by it, may wish to place before him or would have so wished if he had been aware of the risk of the finding being made.
>
> The technical rules of evidence applicable to civil or criminal litigation form no part of the rules of natural justice. What is required by the first rule is that the decision to make the finding must be based upon some material that tends logically to show the existence of facts consistent with the finding and that the reasoning supportive of the finding, if it be disclosed, is not logically self-contradictory.

8. Right of accused and other witnesses to cross examine witnesses [Recommendation 21, 7.66(g), 7.61]

92. The House procedure does not confer a right of cross examination on witnesses. *House of Representatives Practice*[63] asserts that cross examination of witnesses has

[61] The application of the Senate Resolutions to the third party situation is discussed below at paras 115 – 116, 131 – 132.
[62] [1984] AC 808 at 820-821.
[63] I C Harris (ed), *House of Representatives Practice*, 5th ed 2005 at 749. In the joint paper prepared by the then Attorney – General, Senator I Greenwood and the then Solicitor-General, Mr R J Ellicott QC, the view was expressed that the cross examination of witnesses in contempt proceedings provides one occasion where cross examination should be allowed since the accused was in effect on trial even though the Law Officers did not generally favour such a right being accorded before parliamentary committees*: Parliamentary Committees: Powers over and Protection Afforded to Witnesses,* Commonwealth *Parliamentary Paper* No 168 (1972), sub-para 237(f) at 85 ('Law Officers Paper').

never been permitted. Presumably, this refers to cross examination by counsel representing a witness, leaving members of the Committee and its counsel assisting free to do so. This denial of cross examination stems in part from the current practice of the House which precludes the legal representatives of witnesses from addressing the committee.

93. The 1984 Joint Committee Report supported the right of cross examination of witnesses by the accused, especially to resolve disputed questions of fact, since this is likely to be more effective when done by the accused or their counsel, rather than by counsel assisting the Committee (para 7.61). Allegations of contempt often involve difficult issues of fact, such as where there is an allegation of intimidation of a member or a parliamentary witness, or in the most prevalent form of contempt, the unauthorised disclosure of committee deliberations or draft reports. The rules of procedural fairness support an opportunity to cross examine - "the greatest engine for the discovery of truth"[64] - where there is conflicting evidence and to check the credibility of witnesses.

94. While the accused before the Privileges Committee should usually be entitled to cross examine other witnesses in so far as their evidence is adverse to the accused in situation (1), a comparable right to cross examine may need to be accorded those witnesses in situation (2) where their interests are adversely affected by the course of examination. However, to ensure that the principal inquiry is not sidetracked, the adverse effect on those witnesses would need to be viewed by the Committee as significant before according them that right. It seems unnecessary for the House to follow Senate Resolution 2(3) which recognises the right of any person the subject of adverse evidence to have "all reasonable opportunity for the person, by counsel or personally, to examine witnesses in relation to that evidence". The rules of procedural fairness recognise that one party might be allowed to cross examine a witness, but to deny this to other parties.[65] Therefore, it may be appropriate to allow counsel representing an accused to cross examine, but not to allow other witnesses or their counsel the same opportunity. [66]

95. The right to cross examine witnesses is linked with the right for an accused to be represented by a lawyer. The Committee should be capable of ensuring that the right to cross examine is not abused. For instance, cross examination on matters which are improper would be excluded. The 1984 Joint Committee Report referred to "matters of a scandalous, improper, peripheral or prejudicial nature" (para 7.66(g)).

9. Right to accused address the Committee upon conclusion of all evidence, and the right of any person to respond to any draft adverse findings.

96. The accused should have the right to address the Committee upon the conclusion of all the evidence. This ensures the opportunity for the accused to respond to all

[64] M Aronson, B Dyer, M Groves, *Judicial Review of Administrative Action*, 3rd ed Lawbook Co 2004 quoting *Wigmore on Evidence* at fn 576 at 543.
[65] M Aronson, B Dyer, M Groves, *Judicial Review of Administrative Action*, 3rd ed Lawbook Co 2004 at 543.
[66] The application of the Senate Resolutions to the third party situation is discussed below at paras 117 – 129

adverse evidence and to summarise their case.[67] A further opportunity to address the Committee should be given where the Committee has formulated *proposed* findings adverse to the accused. This latter right should also be accorded to any other person who is the subject of proposed adverse findings by the Committee. Only this right is presently recognised by the House procedure (para 6), following Senate Resolution 2(10):

> As soon as practicable after the committee has determined findings to be included in the committee's report to the House, and prior to the presentation of the report, a person adversely affected by those findings shall be acquainted with the findings and be given a reasonable opportunity to respond by written submission or appearance before the committee.

97. However, Senate Resolution 2(10) expressly adds the additional obligation of the Committee to "take such submissions into account before making its report to the Senate." Similar provision should be included in the House procedural guidelines.

98. The 1984 Joint Committee Report (Recommendation 21, 7.66(h)) does not clearly distinguish between these two distinct points in time, that is, at the conclusion of the hearing of evidence, and subsequently when the Committee has formulated its draft adverse findings. Nor does it address the nature of an "adverse finding". Findings may be given which lie along a spectrum extending from mere criticism of a government department to serious allegations of criminal or corrupt activity. In New Zealand, the right to respond to a draft adverse finding is limited to those which may seriously damage the reputation of a person (SO 247(1)). This is, in our view, too restrictive in the context of contempt proceedings, since any criticism by a Privileges Committee is likely to have a sufficiently adverse impact on one's reputation to warrant the right to respond.

10. Right of accused to address the Committee in relation to penalty.

99. A further right to address the Committee should be accorded an accused in relation to any proposed recommendation to the House on the penalty which ought to be imposed. Such an opportunity will impact on whether there should be a right to address the House itself on the penalty – an issue considered below. Despite recognising that an extremely limited opportunity to defend oneself from the Bar of the House required "fortitude" (para 7.52), it is surprising that the 1984 Joint Committee Report failed to make any recommendations to ensure that submissions could be made on any proposed penalty which the Committee was considering to recommend to the House. Nor is there any provision for making such submissions in any of the 1988 Senate Resolutions.

100. The minimum requirement of procedural fairness is that any person, who is potentially liable to a penalty, must be given an opportunity to address the Committee or the House on the penalty issue. This is often overlooked in disciplinary proceedings.[68] Such an opportunity might be given at the conclusion of the Committee's hearing into contempt, or after its tentative findings have been delivered

[67] *Annetts v McCann* (1990) 170 CLR 596, Mason CJ, Deane and McHugh JJ at 601.
[68] M Aronson, B Dyer, M Groves, *Judicial Review of Administrative Action*, 3rd ed Lawbook Co 2004 548-549.

to the accused for final comment. The latter time is preferable as the submissions on penalty can be more specifically directed to the proposed findings. This is also likely to be fairer for unrepresented accused who may have difficulty in addressing, at the earlier time, both the substantive issues and any possible penalty.[69] For that reason, a separate hearing of the Committee on the penalty may be required. This would be far preferable compared with only allowing an opportunity to be heard on the penalty when the matter comes before the House.

101. If there has been no opportunity to address the Committee on the issue of penalty, the accused would need to have an opportunity to address the House. This is considered below in Part III.[70]

11. Right of accused to full legal representation [Recommendation 21, 7.66(i), 7.62]

102. The hearing of any contempt charge brought by the House against an individual or other body is, in itself, such a serious matter for their reputation as to warrant the engagement of legal counsel. Yet, the right of an accused to be represented by legal counsel is not presently recognised by the practice of either House of the Commonwealth Parliament.

103. The current practice of the House of Representatives, like that of the Canadian House of Commons, permits the engagement of a lawyer merely as an adviser to a witness appearing before the Committee.[71] Para 3 does not contemplate the adviser *representing* the witness:

> A person appearing before the committee may be accompanied by an adviser, and shall be given all reasonable opportunity to consult the adviser during that appearance.

104. This provision resembles Senate Resolution 2(4), which refers instead to the right to be accompanied by "counsel".[72] However, the role of counsel is recognised in Senate Resolution 2(3) to include the cross examination of witnesses whose evidence reflects adversely on the accused. Obviously, a clear statement of the entitlement to full legal representation for an accused is required for both Houses.

105. The 1984 Joint Committee Report concluded that the accused should be entitled to be legally represented throughout the Privileges Committee hearing. It rejected the view that this would lead to "endless complexity, technicality, and to great protraction in hearing times" (para 7.62). Committees would be able to ensure this did not occur – their members were not "shrinking violets". The Report recognised the advantages to the Committee's deliberations from the involvement of lawyers, such as the extraction

[69] Ibid.
[70] See paras 134.4-134.6.
[71] In New Zealand, witnesses can be accompanied by counsel with whom the witness may consult. Counsel is permitted to make submissions only on the committee's procedure. Counsel can object to an irrelevant question or his witness answering the question, and can ask for further witnesses to give evidence if his or her client's reputation may be seriously damaged by the committee's proceedings: SO 229 of the NZ House of Representatives.
[72] Senate Resolution 1(14) and the House Procedure Committee Report para 12 merely contemplate the right of a witness *to apply* to the committee to be able to be accompanied by counsel.

of the truth through skilful examination of witnesses and their capacity to formulate the matters most pertinent for the Committee's deliberation.

106. We would equally emphasise the importance of both these roles from the perspective of according procedural fairness to the accused. This is supported by the well established principle of administrative law whereby a statutory right to be heard in person is interpreted, in the absence of a contrary intention, as permitting a right to be legally represented.[73] All the fairness grounds, which support a right to legal representation in administrative proceedings, exist here in the context of contempt proceedings: the accused is unlikely to be capable of representing oneself; the proceedings involve issues of parliamentary law and/or issues of credibility; the accused is subject to potentially serious penalties; the adversarial nature of the proceedings prevent the Committee itself from adequately assisting the accused; and the need to avoid a significant imbalance between the Committee and the accused. The factors which are relied on to justify a denial of legal representation in administrative proceedings are usually absent in contempt proceedings before the Committee: the need for a quick decision, and the need to preserve the informal and non-legalistic character of the proceedings.[74]

107. The 1984 Joint Committee Report recognised that a complainant member should not usually need to be represented, but if this were required, the Committee would permit it. The Report also recognised that committees should always be sufficiently resourced to engage their own counsel assisting. The power of the Senate Privileges Committee to so engage is conferred by Senate Resolution 2(8).

108. There remains to consider the position of a witness within situation (2) who is not accused of contempt but is under investigation. The current practice of the House outlined above is merely to have the right to have "an adviser" whom the witness is entitled to consult. This appears sufficient until such time as the Committee decides to bring a charge of contempt against that witness, in which case a right to full legal representation would arise as per this suggestion 11.

12. Provision made for Committee to authorise payment of legal representation and other expenses [Recommendation 21, 7.66(l), 7.64]

109. The 1984 Joint Committee Report recommended that a Privileges Committee be authorised to recommend to the Presiding Officer of its House the reimbursement to an accused of their legal expenses from parliamentary funds when the interests of justice warranted this (para 7.64). This would obviously be the case where that person has been exonerated of any contempt.

110. The current House procedure only contemplates the reimbursement of "reasonable travel costs of witnesses appearing before the committee" (para (7)). Senate Resolution 2(11) departs from the 1984 Joint Committee Report recommendation in providing for reimbursement of the costs of representation of witnesses in cases of "substantial hardship":

[73] M Aronson, B Dyer, M Groves, *Judicial Review of Administrative Action*, 3rd ed Lawbook Co 2004 at 532 citing *R v Board of Appeal; Ex parte Kay* (1916) 22 CLR 183.
[74] Ibid at 534-5.

> The committee may recommend to the President the reimbursement of costs of representation of witnesses before the committee. Where the President is satisfied that a person would suffer substantial hardship due to liability to pay the costs of representation of the person before the committee, the President may make reimbursement of all or part of such costs as the President considers reasonable.

111. The preferable approach, in our view, is to provide reimbursement to an accused of the legal expenses and other costs (eg for travel and accommodation) arising from the Committee's proceedings when the Committee considers this justified in the interests of justice or in cases of substantial financial hardship.[75] Similar reimbursement should also be accorded to witnesses appearing before the Committee.

Section B Procedural fairness: protection of third parties

112. In this part of the Review we deal with the 'third party' situation, namely:

(i) the position of persons who may or may not be witnesses (referred to as 'third parties',

(ii) in relation to privilege proceedings brought against other persons accused of contempt or involving other persons who may come under suspicion of contempt.

113. The position of third parties raises problems common to witnesses and other persons affected by the proceedings of all parliamentary committees. Although those committees lie beyond our brief, it is necessary to deal with third parties who are affected by the proceedings of the Privileges Committee which we have not already considered.

114. At the outset, it is necessary to stress that the position of third parties is necessarily different to the position enjoyed by the accused and persons suspected of breaching parliamentary privilege which we have already dealt with in Section A of this Part. They do not face, at least at that particular stage, the possibility of incurring penal consequences which flow from the proceedings of the Privileges Committee. In other words, they do not face the possibility of being imprisoned or of having to pay a fine as a result of those particular proceedings. At most the potential damage that can result to them relates to their reputations and intrusions into their privacy. Accordingly, the standard of procedural fairness to be followed in order to protect their legitimate interests can be expected to be necessarily lower than that afforded to the accused or person under suspicion already dealt within Section A.

[75] This approach is supported by Recommendation 22 of the 1967 UK Report adopted in para 17 of the Third UK Privileges Committee Report 1976-77.

Public hearings, publication of evidence and objections to answering questions

115. We think that the appropriate standard of procedural fairness would be satisfied, by affording witnesses who are third parties the following rights recognised by the resolutions of the Senate: [76]

(i) the right to apply to have sensitive evidence heard in private; [77]

(ii) the right to apply to have applications to have sensitive evidence expunged from any record of proceedings; [78] and

(iii) the right to raise objections to the answering of questions eg on the ground of self incrimination or that the questions go beyond the Committee's terms of reference. [79]

116. The rights of witnesses under the relevant resolutions have already been discussed above even though the focus of that discussion was on witnesses who are not third parties and no further discussion is necessary here in relation to these matters. [80]

Rights of legal representation, adducing evidence and cross examination of other witnesses

117. Our main concern has been with third parties who are the subject of adverse and disparaging remarks and the extent, if any, to which the Privileges Committee should protect their interests, possibly in their absence in relation to those remarks.

118. We envisage two possible situations which need to be distinguished from each other, namely,:

(a) where the adverse and disparaging remarks are made in an attempt to discredit or otherwise impugn the reliability of the evidence given by a witness to the Committee if they are relevant to its inquiry and where the Committee could be expected to follow up their correctness in order to sort out any inconsistency in evidence *ie* where the third party has given evidence to the Committee as a witness; and

(b) the same kind of remarks are unnecessary for the Committee to carry out its inquiry so that the Committee decides not to follow up their correctness.

We deal with those situations in that order.

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[76] We are not entirely clear about the position in the case of the House Privileges Committee but it is possible that the same Committee also recognises those rights as a matter of practice because of its decision to follow the recommendations in Appendix C of the House Procedure Committee Report at paras (6), (7), (9) and (10).
[77] See earlier discussion above paras 51 - 53.
[78] Ibid para 58.
[79] Ibid paras 89 - 90.
[80] See the references to that earlier discussion noted above in nn 77- 78.

Situation (a)

119. In this regard we find it instructive to draw guidance from developments which have occurred in relation to public inquiries established under legislation or by the executive (eg Royal Commissions in Australia and Tribunals of Inquiry in the United Kingdom). It is now clearly accepted that the proceedings of those bodies are subject to the rules of procedural fairness - a point emphatically recognised in the *Mt Erubus* case [81] where a serving judge of a superior court was held by the Privy Council not to have observed the rules of natural justice in a public inquiry conducted by him into the causes of an aircraft disaster when an a commercial aircraft crashed into Mt Erebus in Antarctica.

120. The essential minimum requirement which flows from that acceptance is that witnesses before inquiries must be afforded the opportunity to rebut adverse evidence given about them which could damage their standing and reputation. We feel this should necessarily entail being given particulars of that evidence. The acceptance of this requirement in the context of parliamentary inquiries is of course already recognized by the resolutions and / or practices of both Houses of the Australian Parliament.[82]

121. Beyond that, there has been a controversy in relation to public inquiries concerning whether third parties should be accorded the rights to:

(1) legal representation and reimbursement of costs so incurred to be borne at public expense;

(2) adducing evidence by calling witnesses either personally or through their legal representatives; and

(3) examination and cross examination of witnesses either personally or through their legal representatives.

122. These rights were recommended in the authoritative and influential *Report* of the *Royal Commission on Tribunals of Inquiry* in the United Kingdom in 1966.[83] But

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[81] *Mahon v Air New Zealand* [1984] 1 AC 808 (Privy Council). See also *Lord Saville; Ex parte A* [1999] 4 All E R 860 , 872-3 [38] (Eng CA); *Winebox Inquiry Case* [1999] 2 NZLR 164, 186, 199, 204 (NZ CA); and generally G Lindell, "Tribunals of Inquiry and Royal Commissions": *Law and Policy Paper* No 22 (ANU Centre for International and Public Law and Federation Press, 2002), 34 – 36 where it was suggested that the same view would almost certainly be taken in relation to Royal Commissions in Australia in view of certain High Court decision cited there: at 36 n 121 ("Lindell, Law & Policy Paper.")

[82] Resolutions on Parliamentary Privilege agreed to by the Senate on 28 February 1988, paras 1(13), 2(1) – 2(2) and House of Representatives Privileges Committee Report A paras (1) - (2) at 3. See also the recommendations in the House Procedure Committee Report para (11) at 94 and also those contained in its 4th Report: "Committee procedures for dealing with witnesses" (April 1989) paras (6)at 4 and (11) at 9.

[83] The Commission was chaired by Lord Justice Salmon and recommended six cardinal principles which have since been popularly known as the "Salmon Principles". See *Report of the Royal Commission on Tribunals of Inquiry* (1966), Cmnd.3121 at 17-8 [32], at 23-4 [54-5] and Recommendation 3(iii), 15 and 16 at 44-5 in relation to (1) in the text above; at 18 [32] at 24-5 [57-8] and Recommendation s 3(iv) – (vi) and 16-8 at 44-5 as regards (2) – (3) in the text above. The term "rights' in the text is not used in its strict legal sense since they only had the status of guidelines and

since then there has been much modern debate about whether such rights are fully consistent with the nature of inquisitorial proceedings; and also whether to accord them can be reconciled with the needs to keep costs and delays within reasonable bounds in the interests of efficiency.[84] Moreover they are not, so far as we are aware, generally accorded to ordinary witnesses in proceedings before a court of law where such persons appear to be at the mercy of the parties conducting the litigation.

123. Without descending into the details, the upshot of the debate is we think best expressed in the views taken by a British body which inquired into the procedures to be followed to protect witnesses appearing before public inquiries in 1996. In its advice to the British Lord Chancellor, the *Council on Tribunals* saw some advantages in, and envisaged some circumstances, where oral testimony, cross-examination and re-examination could provide a quicker and more effective way for clarifying outstanding issues than that provided by the submission of written statements.[85] The Council thought that an Inquiry should be ready to exercise its discretion in favour of hearing the legal representative and oral testimony and allowing cross examination wherever it seemed appropriate. It felt that it was counterproductive to start from the position that legal representatives will only be heard exceptionally.[86]

124. The advice given by the Council seems instructive as a guide to the kind of flexibility which courts have over time accepted as both desirable and inevitable in applying the rules of procedural fairness to the particular circumstances of each case even if the price of that flexibility has been to create uncertainty. It also seems instructive for the resolution of the issues presently under discussion in the context of the work of the Privileges Committee in dealing with third parties.

125. We are aware that the present resolutions and / or the practice of parliamentary committees in both Houses of Parliament is to allow witnesses to have access to their legal representatives without according to those representatives the right to speak or lead evidence or cross examine other witnesses.[87] We support the continued availability of access to legal representatives. But what we are suggesting is that the Privileges Committee should in addition retain and exercise its discretion of allowing a third party to lead evidence and cross examine other witnesses either personally or

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were only to be accorded in some cases at the discretion of the Tribunal of Inquiry. For a general description and critical discussion of these recommendations see Lindell, Law & Policy Paper at 50 – 8.

[84] See Lindell, Law & Policy Paper at 44 – 58. This concern was also shared in the Law Officers Paper referred to above at n 57 as regards parliamentary committees generally. The Law Officers thought that as a general rule if witnesses were allowed to cross examine other witnesses either themselves or through their legal representatives it would unnecessarily prolong investigations and would formalise them: ibid.

[85] Lindell, Law & Policy Paper at 54. The advice in question was contained in its report , "Advice to the Lord Chancellor on the procedural issues arising in the conduct of public inquiries set up by Ministers" (July 1996) ("Council on Tribunals: Advice to Lord Chancellor's Department")

[86] Council on Tribunals: Advice to Lord Chancellor's Department at 20 [7.14] referred to in Lindell, Law & Policy Paper at 54.

[87] Resolutions on Parliamentary Privilege agreed to by the Senate on 28 February 1988, paras 1(14) and (15), 2(4) and the recommendations of the House Procedure Committee Report para (3) at 3 even though the relevant provisions only refer to "an adviser". See also the recommendation in the House Procedure Committee Report para (12) at 95 which however refers to "counsel or an adviser" and the recommendations made by the same Committee in its 4th Report: "Committee procedures for dealing with witnesses" (April 1989) para (12), at 9.

through their legal representatives in appropriate cases. We feel this is as far as the Parliament should go in order to ensure compliance with the rules of procedural fairness. This is so particularly having regard to the flexible way in which the courts recognize that there may be some circumstances, where as we have pointed out before, one party might be allowed to cross examine a witness, but to deny this to other parties. [88]

126. But we do stress the need for the Committee to be ready to afford these rights in appropriate circumstances and this will require the Committee to give sympathetic consideration to the merits of each application made to it. It is worth remembering, in that regard, the suspect value of relying on untested evidence about sensitive matters. There may be occasions where evidence given before the Committee should be tested, not only in the interests of protecting the reputation of third parties, but also in arriving at the truth or falsity of the allegations of breach of parliamentary privilege.

127. Although we have given some thought as to whether it is sufficient to rely on counsel assisting the Committee to protect the interests of third parties, we have concluded that the same counsel, even if appointed, could not always be expected to be properly sensitive to their legitimate interests.

128. We also think it is appropriate and highly desirable to ensure that the Committee could at its discretion either authorize or recommend the payment out of public funds of some or all the costs of any legal representation incurred by a third party. Such an authority is recognized in cases where a person would suffer substantial hardship due to the liability to pay the costs of such representation in relation to the proceedings of the Senate Privileges Committee. [89]

Suggestions

129. With those considerations in mind, we suggest that procedural fairness requires that third parties:

(1) be given notice of, and be afforded the opportunity to, refute any adverse or disparaging remarks made about them. This could be done by affording them the kind of protections afforded in suggestions 7 and also 9 above in section A;

(2) should continue to be allowed to have access to their legal representatives; and

(3) only have, at the discretion of the Committee, the following rights either personally or through their legal representatives to:

[88] See our earlier discussion in the text accompanying n 64. We note that in the Law Officers Paper the view was taken that "the protection of witnesses and third parties is more likely to be achieved by the wise exercise of discretions as the hearing [of a parliamentary committee] proceeds rather than by the adoption of rigid procedures which might over formalise the proceedings and destroy the effectiveness of the committee as an instrument of parliamentary investigation" : para (vi) at 75.

[89] Resolutions on Parliamentary Privilege agreed to by the Senate on 28 February 1988, para 2(11). The procedures outlined in the House Privileges Committee Report only seem to contemplate reimbursement of reasonable travel costs of witnesses appearing before the committee": para (7) at 4.

(i) adduce evidence by calling witnesses;

(ii) examine and cross examine witnesses; and also

(iii) be paid out of public funds some or all the costs they incur for any legal representation they engage in relation to the proceedings. [90]

Situation (b)

130. The remaining situation can be disposed of quite briefly. It will be recalled that this situation involves third parties where the Committee does not find it necessary to resolve the correctness or truth of allegations or remarks which damage their reputations. This may arise in cases where the Committee has chosen not to rely on them or they are irrelevant to the issues to be resolved by the Committee.

Suggestions

131. We suggest that it is sufficient in those circumstances if:

(1) the Committee ensures that the evidence is not taken in public or otherwise made public in any way,

(2) although it may wish to warn the person, against whom the remarks were directed, that the person making those remarks has the protection of parliamentary privilege and so could not be sued for making them.

132. As seems to be presently recognized, at least in the case of the Senate Privileges Committee, the Committee should take care to ensure that the evidence is not given in public and does not appear in any written record of its proceedings. [91] Although not specifically mentioned above the protection suggested in the preceding paragraph should also apply to cases where the Committee has found it necessary to pursue the correctness or truth of allegations or remarks which damage their reputations.

Part III Procedural fairness: proceedings of the House

133. The current practice of the House upon receipt of a report from the Privileges Committee is first to order that it be made a Parliamentary Paper.[92] The House may then order that it be considered at the next sitting or on a specified day. Once considered, motions may be moved to indicate the view of the House on the report and to impose a sanction. The House is, presently, not bound to accept any or all of

[90] As to which see suggestion 12 above in Section A discussed at paras 109 - 111.

[91] Resolutions on Parliamentary Privilege agreed to by the Senate on 28 February 1988, paras 1(11) – 1(12). We are not entirely clear about the position in the case of the House of Representatives Privileges Committee but it is possible that the same Committee follows that procedure as a matter of practice because of its decision to follow the recommendations in the House Procedure Committee Report at para (7) which envisages such a possibility.

[92] I C Harris (ed), *House of Representatives Practice*, 5th ed 2005 at 750-1.

the Report's findings or recommendations. The House alone is empowered to impose a penalty or reprimand; this role cannot be delegated to any Committee.[93]

134. To ensure that procedural fairness is accorded by the House upon receipt of a report from the Privileges Committee, certain key principles should be observed by the House to ensure, as far as possible, a fair hearing and an objective assessment. Accordingly, we recommend that the following procedure should be prescribed by resolution:

1. The report from the Privileges Committee should include the full transcript of the evidence of its proceedings.

134.1 This is necessary to enable the members of the House to assess the Report's findings and recommendations. Disclosure would not be required of those parts of the transcript which were expunged by the Committee on the basis that the evidence concerned was irrelevant to the Committee's current or any future inquiry, or on national security grounds

2. Seven sitting days notice to be given for any motion for finding contempt and for imposing any sanction for contempt, except when earlier prorogation or dissolution is to occur. [cf Recommendation 22, 7.70; 7.67-7.70]

134.2 The 1984 Joint Committee Report was highly critical of the scant two days which elapsed in the *Browne and Fitzpatrick Case* between the presentation of the Privileges Committee Report to the House of Representatives on 8 June 1955 and the motion for their imprisonment being both moved and passed two days later on 10 June. Accordingly, the Report recommended a cooling off period of at least seven days between the moving of a motion to impose a fine or imprisonment and when the House considers that motion - unless the House is about to be sooner prorogued or dissolved (para 7.67). Such a period enables the members of the House to read the report and its accompanying transcript, consult with colleagues, and assess the public reaction.

134.3 While the 1984 Joint Committee Report considered no comparable rule was required for the imposition of non-penal sanctions (para 7.69), we see no basis for drawing such a distinction, given that any finding of contempt is a serious matter which warrants careful consideration by the House. Furthermore, we consider a similar cooling off period is required for a finding of contempt, even if no sanction is proposed. This is the approach adopted by Senate Resolution 8 which prescribes a period of seven days between giving a notice of motion and moving that motion where the motion is to determine that a contempt has been committed or to impose a penalty. The House should adopt a similar resolution to Senate Resolution 8 but make it clear that the cooling off period should be seven *sitting* days.

[93] Erskine May and para 3 of the Memorandum of Clerk of UK House of Commons, *Powers of Select Committees to Send for Persons, Papers and Records.*

3. If the House wishes to consider further evidence not previously provided to the Privileges Committee, the accused must be given an opportunity to respond to that evidence.

134.4 The 1984 Joint Committee Report recognised the limited opportunity for an individual investigated by the Privileges Committee to present his or her case again to the House after the Committee has reported on the matter.[94] At most, the House might invite the individual to make an address from the Bar of the House, as occurred in the *Browne and Fitzpatrick Case*. Despite that precedent, we consider that provided the individual concerned has previously been given full opportunity to respond to the proposed findings of the Committee as suggested above[95], there appears to be no need for that person to address the House on those findings.[96] But this is a matter which is entirely within the discretion of the House.

134.5 However, an opportunity to address the House should be provided if the House were to rely on evidence not previously put to the accused. Such a right was clearly recognised in relation to the Executive branch in *South Australia v O'Shea*[97] where Brennan J considered that the South Australian Cabinet would have been required to give O'Shea an opportunity to be heard at that level if it had taken into account new evidence on which O'Shea was not previously heard before the Parole Board.[98]

134.6 The House may decide whether the response is provided orally or in writing. If the former, representation by a lawyer should be permitted. And a reasonable time to prepare one's response ought to be recognised.

4. Opportunity to address the House on any proposed punitive penalty.

134.7 Given the special seriousness attached to the imposition of a fine or imprisonment, the accused should be given an opportunity to address the House on any proposed punitive penalty either by written submission or orally from the Bar of the House (personally or through a legal representative).

134.8 If the House proposes to impose a lesser penalty than a fine or imprisonment, it is probably unnecessary for the accused to address the House orally if an opportunity has already been afforded to address the Privileges Committee on that issue. See the discussion of this above at para 99.

5. The House should not impose a penalty which exceeds that recommended by the Privileges Committee.

134.9 While the 1999 UK Joint Committee Report recommended that the UK Houses retain, rather then vest in the Privileges Committee, the ultimate power to decide if a contempt has been committed by members and the penalty to be imposed, it recommended a significant restriction, on the ground of procedural fairness, whereby

[94] At para 7.52.
[95] See Part II para 96.
[96] Cf UK House of Commons practice: para 14 of the Third Report from the Committee of Privileges 1976-77.
[97] (1987) 163 CLR 378.
[98] Ibid at 409, 410 and 412. See also Mason CJ at 389.

the House cannot *increase* the penalty recommended by the Committee [294]. The House remains free to impose no penalty or a lesser penalty. We recommend that this restriction against increasing the penalty be adopted by the House of Representatives in order to limit the risk of political interference in all cases of contempt.

6. The House should not overturn a finding of no contempt by the Privileges Committee.

134.10 This restriction is based upon the premise that the Privileges Committee is better placed to provide procedural fairness than the House itself. That is self-evident from the detailed nature of the specific requirements of procedural fairness suggested in Part II of this review. Moreover, this restriction shares with restriction (5) above the object of reducing the opportunity for political interference in the exercise of the contempt jurisdiction of the House. Of course, it is clear that if both these restrictions are only adopted by a resolution of the House and not by statute, they are vulnerable to being overridden by further resolution of the House. While we appreciate that the House is capable of overriding its own resolutions, any decision by the House to overturn a finding of no contempt by its Privileges Committee would require the House to adopt all of the procedures which the Committee should follow in order to provide procedural fairness. This seems to us to be impractical.

7. Any member who initiated the allegation of contempt ought to refrain from voting on any motions finding contempt or imposing any penalty.

134.11 This is the minimum requirement of procedural fairness that the accuser takes no part in the resolution of the accusation. For the reasons earlier articulated, it is far preferable for a court to impose any punitive penalty for contempt. But if this suggestion is unacceptable to the House, then at least when a House makes a finding of contempt and determines the imposition of any penalty, any member who raised the alleged contempt or was implicated in the allegation of contempt should take no part in the determinations of the House. This occurred in the *Browne and Fitzpatrick Case* where the complainant member, Mr Morgan, took no part in the divisions within the House.

Part IV Summary of suggestions

134.12 We conclude by setting out a summary of the suggestions we have made in this review.

Part I suggests that the penal jurisdiction of the House should be transferred to the High Court provided the House retains the sole power to initiate judicial proceedings for contempt. (paras 12 – 25)

Part II suggests the adoption by the House of Representatives of resolutions to prescribe the following procedures and protections in relation to the proceedings of the Privileges Committee. Unless otherwise specifically mentioned, we suggest that the House expressly adopt by resolution the same procedures adopted by Senate Resolutions 1 and 2. (para 42)

Section A Protection of accused and suspects

1. **All Committee hearings should be held in public subject to a discretion to hear evidence in private in appropriate cases. (paras 49 - 55)**

2. **A transcript of all evidence presented to the Committee should be published as soon as possible, subject to a discretion to withhold evidence taken in private. The transcript should also be presented to the House with the Committee's report. (paras 56 – 58)**

3. **Committee members should be disqualified for apparent bias. (paras 59 – 64)**

4. **Any person who is the subject of proposed investigation by the Committee must be notified in advance of the specific nature of the allegations made against them, preferably formulated as a specific charge, or if this is not possible, of the general nature of the issues being investigated, in order to allow them to respond. (paras 65 – 74)**

5. **Persons charged with specific allegations against them, must be given a reasonable time to prepare their response (paras 75 – 77)**

6. **Right of the person charged to be present throughout whole proceedings, save for deliberative sessions and subject to a discretion to exclude when proceedings held in private. (paras 78 – 81)**

7. **Right to adduce evidence. (paras 82 – 91)**

8. **Right of accused and other witnesses to cross examine witnesses. (paras 92 – 95)**

9. **Right to address the Committee upon conclusion of all evidence, and in response to any draft adverse findings. (paras 96 – 98)**

10. **Right of accused to address the Committee in relation to penalty. (Paras 99 – 101)**

11. **Right of accused to full legal representation. (paras 102 – 108)**

12. **Provision made for Committee to authorise payment of legal representation and other expenses. (paras 109 – 111)**

Section B Protection of third parties

1. **Right of third parties to apply to have sensitive evidence taken in private and not made public and to object to answering questions - be the same as those accorded by the Senate under its resolutions. (paras 115 - 116)**

2. **Rights of third parties who are the subject of adverse or disparaging remarks made about them:**

   (i) They should be given notice of, and be afforded the opportunity to, refute any adverse or disparaging remarks made about them. (paras 117 - 129)

   (ii) They should continue to be allowed to have access to their legal representatives. (paras 117 - 129)

   (iii) But the following rights should only lie at the discretion of the Committee, namely, the ability of third parties, either personally or through their legal representatives, to:

      (a) adduce evidence by calling witnesses;
      (b) examine and cross examine witnesses; and also
      (c) their right to be paid out of public funds some or all the costs they incur for any legal representation they use in relation to the proceedings. (paras 117 - 129)

   (iv) The Committee should ensure that the adverse or disparaging remarks are not given evidence in which is taken in public or otherwise made public in any way. (paras 131-132)

Part III suggests in relation to the proceedings of the House, upon receipt of a report from the Privileges Committee, the adoption of resolutions to give effect to the following:

1. **The report from the Privileges Committee should include the full transcript of the evidence of its proceedings. (para 134.1)**

2. **Seven sitting days notice to be given for any motion for finding contempt and for imposing any sanction for contempt, except when earlier prorogation or dissolution is to occur. (paras 134.2-134.3)**

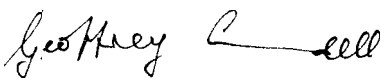
3. **If the House wishes to consider further evidence not previously provided to the Privileges Committee, the accused must be given an opportunity to respond to that evidence. (paras 134.4-134.6)**

4. **Opportunity to address the House on any proposed punitive penalty. (paras 134.7-134.8)**

5. **The House should not impose a penalty which exceeds that recommended by the Privileges Committee. (para 134.9)**

6. **The House should not overturn a finding of no contempt by the Privileges Committee. (para 134.10)**

7. **Any member who initiated the allegation of contempt ought to refrain from voting on any motions finding contempt or imposing any penalty. (para 134.11)**



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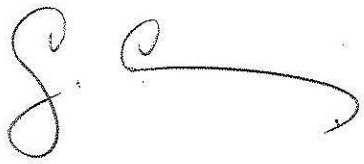

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