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JOINT SELECT COMMITTEE ON PARLIAMENTARY PRIVILEGE

Final Report

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(32ND PARLIAMENT)

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Senator G.J. Evans (Deputy Chairman)

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

Senator G. Georges

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Senator D.S. Jessop

Mr Barry Jones, M.P.

Senator B.F. Kilgariff

Senator M.J. Macklin

Mr J.R. Porter, M.P.

Secretary: Mr B Wright

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Senator M.J. Macklin

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CHAPTER 1

THE COMMITTEE'S RECOMMENDATIONS

1. THE PENAL JURISDICTION

Retention of the penal jurisdiction

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

No substantive change in the law of contempt

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

Sparing exercise of the penal jurisdiction

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

Guidelines for matters which may constitute contempt

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

Interference with the Parliament

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

Improper influence of Members

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

Molestation of Members

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

Contractual arrangements, etc.

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

Disobedience of orders

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

Obstruction of orders

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

Interference with witnesses

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

Molestation of witnesses

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

Offences before committees

A person before either House or a committee shall not:

(a) without reasonable excuse, refuse to make an oath or affirmation;

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

(c) give any evidence or furnish any information which he knows to be false or misleading in a material particular.

A person shall not, without reasonable excuse:

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

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

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

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

Disturbance of Parliament

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

Publication of in camera evidence

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

Premature publication of reports

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

False reports of proceedings

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

Service of writs, etc.

A person shall not serve or execute any criminal or civil process in the precincts of either House on a day on which that House sits except with the consent of that House; provided that criminal process may be served or executed where the consent of the Presiding Officer in question has first been obtained.(R. 32)

Attempts and conspiracies

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

Defamatory contempts

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

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

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

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

(c) That the defences of:

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

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

A. the statement had been made after reasonable investigation;

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

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

should be available.(R. 16)

2. TREATMENT OF COMPLAINTS OF BREACH OF PRIVILEGE OR CONTEMPT

Raising of complaints

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

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

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

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

(d) During the period while the complaint is under consideration by the Presiding Officer it shall be open to the Member to withdraw the complaint but the Member may not, during this time, raise the matter in the House;

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

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

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

Procedures for conduct of Privileges Committee inquiries

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

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

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

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

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

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

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

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

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

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

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

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

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

Seven days' notice for imposition of penalty

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

Penalties

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

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

That where an individual is judged to be in breach of the privileges of Parliament or otherwise in contempt of Parliament he shall be liable to a fine not exceeding $5,000 and that to impose such a fine shall be an alternative to the imposition of a period of committal. In no case should both a period of committal and a fine be imposed.(R. 19)

Expulsion of Members

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

Forms of resolutions and warrants for committal

That:

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

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

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

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

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

Privileges Committee inquiries and the reputations of third persons

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

Consultation between Privileges Committees

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

3. PROCEEDINGS IN PARLIAMENT

Expanded definition of proceedings

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

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

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

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

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

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

Questions as to whether any person is, or is acting as, an officer of either of the Houses or of a committee of either or both Houses, or any sub-committee thereof, for the purposes of the protection given by Article 9 and any of the proposals contained in recommendation 1 should be determined by Parliament.(R. 2)

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

That:

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

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

(c) Complaints to the committees:

(i) should be succinct;

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

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

(d) The committees in dealing with complaints:

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

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

(e) That this operation should operate for an initial period of one year or such further period as each House may think appropriate;

(f) That at the end of that period the operation of this recommendation should be reviewed. (R. 3)

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

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

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

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

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

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

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

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

That, when reviewing the operation of recommendation 3, consideration be given to the desirability of extending the processes set out in that recommendation so that a person who claims that the contents of a paper authorised to be printed or published under the Parliamentary Papers Act contains an unfair or groundless attack on his good name and reputation would have available to him the processes set out in Recommendation 3 for the purposes of seeking to have incorporated in Hansard an answer to the essentials of what is said about him. (R. 5)

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

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

Reports of proceedings

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

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

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

Reference to Parliamentary documents in courts

That each House agree to resolutions in the following terms:

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

(2) That in all matters falling within Paragraph 1 of this Recommendation, this House requests the Attorneys-General of the Commonwealth and of the States to seek to develop procedures to ensure that the Presiding Officer is promptly advised of each such matter so that the House can be kept appraised of the use being made of its records, or of records of its Committees. (R.8)

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

4. PARLIAMENTARY COMMITTEES

Protection of witnesses

(1) That Parliament enact a Witnesses Protection Act.

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

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

Rights of witnesses

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

5. OTHER MATTERS

Modification of immunity from civil arrest

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

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

Modification of immunity from attendance as a witness

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

(2) That when requested to attend to give evidence, or served with a subpoena to give evidence, the Member may, after paying due regard to the need of his House for his services, elect not to insist on the application of the immunity and instead to attend in court. (R.12)

Jury Service

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

Delineation of precincts

That:

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

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

CHAPTER 2

Establishment of the committee

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

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

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

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

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

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

Conduct of the inquiry

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

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

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

2.8 On 7 June 1984 the Exposure Report of the committee was tabled in the House of Representatives. It was later tabled in the Senate. The Committee took the course of tabling an Exposure Report so as to obtain the views of members of Parliament and other interested parties on its preliminary conclusions.

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

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

ENDNOTES

1. VP 1980-83/805-06.

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

3. VP 1983/52-3; J. 1983/63-4.

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

CHAPTER 3

Background to the inquiry:

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

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

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

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

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

Parliamentary privilege: nature and origin:

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

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

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

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

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

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

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

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

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

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

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

3.13 Lastly - and this is of great importance - the powers, privileges and immunities of Parliament, including the power to punish for contempt of Parliament, developed in the context of the vindication of the rights of Parliament against outside authority. Perhaps for this reason, and perhaps also because of the wholly different political, social and economic circumstances of those days, not a great deal of thought appears

to have been given to the rights of others. In particular, the rights of those who criticise Parliament and Members of Parliament - a fundamental of any democratic society - and the rights of those who are called by Parliament to explain why they should not be held in contempt of it, have not always had as much regard paid to them as we think they deserve.

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

Summary of privileges of Parliament and its Members:

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

Rights and immunities of Members:

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

3.17 The 1967 Commons Report also included, as one of the rights and immunities of Members, "freedom from appointment as a sheriff". This exemption from appointment was, the committee thought, "somewhat complicated".[9] Happily, since the office is unknown in Australia, these complications may be disregarded. But the existence of such a "freedom" - which developed in an entirely different historical context - as a privilege of the *House of Commons throws into relief the incongruities* that can emerge from tying the Australian Parliament to the privileges of the House of Commons.[10] The 1967 Commons Report also included "freedom from molestation" amongst the rights and immunities of Members. It is doubtful whether such a specific right or immunity exists,[11] and we think "molestation" more properly

falls under Parliament's power to punish as contempt actions which impede or may impede its work. We have therefore excluded molestation from this summary.

Rights of the Houses in their corporate capacities:

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

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

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

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

(v) The right to administer oaths to witnesses.

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

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

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

So far as we are aware, the right to direct the Attorney-General to prosecute for contempts which are also criminal offences has never been exercised. Electoral offences are now covered by the elaborate provisions of Part XVII of the Commonwealth Electoral Act. The consideration of prosecution for offences under Part XVII is primarily the responsibility of the Electoral Commisioner, however the function of instituting and conducting prosecutions is the responsibility of the Director of Public Prosecutions. While it would seem that the Houses still retain the rights to direct the Attorney-General to prosecute in these areas, these rights now appear to be of academic interest only.

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

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

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

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

Contempt of Parliament:

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

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

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

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

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

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

ENDNOTES

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

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

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

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

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

6. 1967 Commons Report, para 30

7. See para 5.4 and following paragraphs of this report

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

9. 1967 Commons Report, para 105

10. See also; Quick, J., & Garran, R.R., The Annotated Constituted of the Australian Commonwealth, Angus & Robertson, Sydney, 1901, pp 501-02, (hereafter Quick & Garran) which, somewhat more elaborately, lists the following as the principal powers, privileges and immunities of each House and its Members, drawn from the law and custom of the House of Commons at 1901:

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

- the power to order the arrest and imprisonment of persons guilty of contempt or breach of privilege;

- the power to order the arrest for breach of privilege by warrant of the Speaker;

- the power to issue such a warrant for arrest, and imprisonment for contempt or breach of privilege, without showing any particular grounds or causes thereof;

- the power to regulate its proceedings by standing rules and orders having the force of law;

- the power to suspend disorderly Members;

- the power to expel Members guilty of disgraceful and infamous conduct;

- the right of free speech in Parliament, without liability to action or impeachment for anything spoken therein; established by Article 9 of the Bill of Rights 1689;

- immunity of Members from legal proceedings for anything said by them in the course of parliamentary debates;

- immunity of Members from arrest and imprisonment for civil causes whilst attending Parliament, and for 40 days after every prorogation, and for 40 days before the next appointed meeting;

- immunity of Members from the obligation to serve on juries;

- immunity of witnesses, summoned to attend either House of Parliament, from arrest for civil causes;

- immunity of parliamentary witnesses from being questioned or impeached for evidence given before either Houses or their committees, and

- immunity of officers or either House, in immediate attendance and service of the House, from arrest for civil causes.

11. 1967 Commons Report, paras 109-111

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

13. Jowitt, W.A., The Dictionary of English Law, 2nd ed., Sweet & Maxwell, London, 1977, p.939.

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

15. 1967 Commons Report; Minutes of Evidence para 127

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

CHAPTER 4

THE AUSTRALIAN EXPERIENCE

Attempts at reform

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

4.2 In 1908 each House appointed a select committee:

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

The joint committee was trenchantly critical of procedures of punishment inherited from the Commons:

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

It recommended that:

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

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

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

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

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

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

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

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

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

The court also said:

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

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

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

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

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

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

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

4.12 Up to the time of the establishment by the last Parliament of this committee at least 83 matters had been raised in the House as matters of privilege. We do not imply that these matters were all properly described as issues of privilege or contempt. The majority of complaints related to matters properly classified as contempt, rather than as breaches of specific privileges. Of the matters raised, 13 could be characterised as complaints relating to intimidation or alleged attempts improperly to influence Members; 17 involved reflections or misrepresentations concerning the House, Parliament or Members thereof generally (including reflections or misrepresentations made, or allegedly made, by Members); 15 concerned reflections or misrepresentations about identified Members and five related to committee matters. The balance ranged over issues such as censorship of correspondence, the administration of Parliament, service of process in the precincts, and alleged unlawful imprisonment.

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

4.14 The Senate's record has been altogether less turbulent. It did not establish a Senate Committee of Privileges until the 1st January 1966 and before that date, only one matter was investigated by the Senate. Since the establishment of the committee, only nine cases have been referred to it. These cases have concerned: premature disclosure of committee material (4 cases), claims for Crown privilege, the security of Parliament, the use of unparliamentary language in debate, the arrest and imprisonment of a Senator and repeated abusive telephone calls to a Senator.

4.15 The stimulus for the establishment of this committee came from the publication in the Sydney Daily Mirror of the 2nd September 1981 of an article by Mr Laurie Oakes. In it, Mr Oakes made a number of uncomplimentary references to Members of Parliament - references which could easily have been read as

relating to Senators, but the Senate declined to bother itself with these matters. A complaint was made in the House, the Speaker found that prima facie there had been a contempt, some Members of the House not agreeing on this point forced a division, and after the division - not on party lines - the matter was referred to the Privileges Committee. That committee, when it came to report, was unanimously of the view that a comprehensive inquiry which had been proposed in a resolution of the House of Representatives of the 13th April 1978 should be commenced without delay. (The committee's findings on the reference were that the article in question constituted a contempt, that it was irresponsible and reflected no credit on the author, the editor and the publisher, but it considered that the matter was not worthy of occupying the further time of the House).[8]

Criticisms

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

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

> "By and large the records of our elected Parliament in the exercise of its powers, privileges and immunities over eighty two years deserve more than public denigration. Its record is worthy of acclaim, as well as criticism; that acclaim, however, should not give rise to self satisfaction or complacency. Considerable room remains for improvement; there is much to be done." (Evidence from Professor G.S. Reid)[9]

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

With these views may be contrasted:

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

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

The committee's task

4.18 However useful it may be to look to the history and past application of the law and practice of parliamentary privilege, and however valuable the contribution of witnesses and others, in the end the issues before the committee resolve themselves down to these. Firstly, what are the laws and practices of parliamentary privilege? Secondly, are they appropriate today for the independent, efficient, and fearless working of Parliament as the body responsible for governing the affairs of the nation? Thirdly, if in any respect they are not, what changes are desirable? More broadly stated, the issues may be put in this fashion: what is the proper scope of parliamentary privilege?

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

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

ENDNOTES

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

2. ibid, p.4

3. ibid, p.5

4. ibid

5. Report from the House of Representatives Committee of Privileges relating to articles published in the Bankstown Observer, H of R 2(1954-55); VP 1954-55/269-71.

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

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

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

9. Transcript of Evidence, p.571

10. Transcript of Evidence, p.94

11. Transcript of Evidence, p.213

12. Transcript of Evidence, p.792

CHAPTER 5

RIGHTS AND IMMUNITIES

Freedom of speech

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

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

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

5.2 We emphasise that the prohibition against calling into question freedom of speech and debates or proceedings in Parliament is not intended to inhibit the most trenchant criticism of the political process. It is a cardinal feature of our democratic system that such criticism should be made. We believe there are two bedrock elements to a democratic parliamentary system. Firstly, absolute protection must be given to a Member for his participation in debates and proceedings in

Parliament - protection in the sense that what he says or does in those debates and proceedings can never be the subject of any challenge by the courts, or by the executive, or by any other authority. Secondly, the most complete freedom to criticise the actions of Governments, Parliament itself, political parties represented within Parliament, and Members.

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

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

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

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

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

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

a technical parliamentary term, primarily denotes the formal transaction of business in one of the Houses, or of a committee of one or both of the Houses, such as voting, or the giving of notices of motion. More widely, it clearly covers the asking of and reply to oral parliamentary questions, the giving of written questions and of notices printed on the Notice Paper, and everything done or said by a Member as a Member of a committee of one or both of the Houses. (We later return to the question as to whether the protections given to a committee are in any way dependent on whether the business is transacted within the precincts of Parliament).

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

5.8 It is open to doubt whether the protection extends to drafts of oral questions or questions on notice or to drafts of motions, which a Member may wish to show to another to seek his advice as to form, content or propriety. The same comment applies to a draft of a speech intended to be made in Parliament, on which advice may also be sought, and which may, for reasons quite beyond the control of the individual Member, never be made.[3] A clear example of our doubt as to the present legal position is evidenced by the practice presently adopted in dealing with Questions on Notice: namely, during adjournments answers are given to Members who have asked for them but these answers are not distributed to the media.

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

5.10 In February 1957, the Right Honourable G.R. Strauss, a Member of the House of Commons, wrote to a Minister of the Crown. Mr Strauss was critical of certain actions of the London Electricity Board and asked the Minister to look into them. The Minister brought Mr Strauss's views to the attention of the Board. It was offended, took legal advice, and through its solicitors wrote to Mr Strauss advising him that if he was not prepared to withdraw and to apologise, he would be sued for libel.

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

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

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

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

or constituency purposes, unless leaked to and published in the media, will necessarily have a far more restricted audience than questions or motions in Parliament.

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

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

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

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

5.19 What if the complaint had been made by a wealthy organisation determined to take Mr O'Connell to the courts? It is not ranciful to suggest such a case could arise, and in delicate and contentious matters where a Member believes he will or may be exposed to the risk of defamation proceedings if he puts his constituent's case in the terms he thinks he should put it, he may decide the wisest course is to protect himself rather than to fearlessly and at risk to himself advance his constituent's position.

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

5.21 In our Exposure Report we concluded that the considerations in favour of making it clear beyond argument that absolute privilege should attach to correspondence of the Strauss kind were persuasive. We therefore recommended that for the purposes of the law of defamation, "proceedings in Parliament" should include:

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

5.22 This recommendation was not a unanimous view of the Committee. We have since reconsidered it and we have concluded that while the arguments are finely balanced, no specific recommendation should be made to confer absolute immunity on communications between Members and Ministers. Our reasons for reconsidering our views may be summarily stated. In the first

place, it has been forcibly put to us that to specifically provide that absolute immunity should attach to those sorts of communications could have the effect of protecting a Member who, actuated by malice, deliberately made a defamatory attack on another person. Secondly, there is in the community a view, which we think we should heed, that except for the most compelling of reasons further specific protections or privileges should not be granted to Members of Parliament. Thirdly, there is the general consideration that laws specifically providing for absolute immunity with regard to what is said about the reputation of others should be strictly confined. The words of Mr Justice Evatt, in Gibbons v. Duffell, provide an eloquent and powerful caution against specific extensions of the defence of absolute immunity in defamation proceedings. He said:

> "Absolute immunity from the consequences of defamation ... is so serious a derogation from the citizen's right to the State's protection of his good name that its existence at all can only be conceded in those few cases where overwhelmingly strong reasons of public policy of another kind cut across this elementary right to civic protection; and any extension of the area of immunity must be viewed with the most jealous suspicion, and resisted, unless its necessity is demonstrated".

He went on to say that "the extension of the privilege by reason of analogies to recognised cases is not justified". We conclude with these observations. Firstly, nothing we say should be taken as amounting to an opinion as to what the courts should find if action should be taken against a Member of Parliament in respect of communications made by him to a Minister in the discharge of his Parliamentary duties. The courts may, or may not, find that absolute protection should in any event be conferred on such communications by virtue of Article 9 of the Bill of Rights. The recommendation contained in our Exposure Report, and quoted above, was directed towards clarification; it was not founded on any concluded view of the extent of the protection the courts may in the future judge to be conferred by Article 9. Secondly, should a case analogous to be Strauss case arise in this Parliament it would be open to the House concerned not only to treat a threat of legal proceedings, or actual proceedings, as a contempt by virtue of the effect, or likely effect on a Member's discharge of his duties, but also, to consider afresh whether specific legislative protection should be conferred on communications between Members and Ministers. We express no view as to what action should be taken if the situation just hypothesised were to arise.

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

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

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

5.26 Enough has been said to indicate the real difficulties, uncertainties and anomalies that may arise in the application of the protection conferred on proceedings in Parliament to the workings of a modern Parliament. What should be done? It is certainly true that our decision on the very important subject of communications to Members - a matter which we still think should be treated in some detail in this Report because of its importance - results in an important deletion from our Exposure Report Recommendation. Nevertheless, we think it would be unsatisfactory to allow matters to stand as they are. With the

qualification we have expressed in relation to communications between Members and Ministers we think it is preferable that the law should be clarified so that it is put beyond doubt that the protection given by Article 9 of the Bill of Rights extends to matters essential to the workings of a modern Parliament, but in respect of which the present protection may be uncertain or obscure or doubtful or arguable.

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

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

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

5.28 We acknowledge that there are differing views as to the need for clarification of the meaning of the expression "proceedings in Parliament". Some would go further than we propose and seek to provide a comprehensive statutory definition. Some, while not going so far as to propound a comprehensive definition would advocate a specific extension to cover communications between Members and Ministers. Others would prefer to let matters stand as they are and would argue that the very absence of court judgments in this area is a good reason for assuming that it presents no problems. For the reasons we have sought to express, we do not think either the more traditional or the more radical views should be embraced. But having come to the conclusion that there are ambiguities and uncertainties, we think that so far as possible we should seek to clarify matters. To do less would be to leave to the future a task which we think falls squarely within our terms of reference.

Recommendation 1

5.29 We therefore recommend:

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

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

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

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

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

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

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

5.31 It will be appreciated that the recommendations just made are limited to the defence of absolute privilege in actions or prosecutions for defamation. It is in this area that practical problems are likely to arise. We do not take the further step of seeking expressly to give immunity in respect of criminal prosecutions where a Member or officer might otherwise be liable to be prosecuted. Whether, in such circumstances, a Member or officer would have immunity from prosecution would depend on the application of Article 9 of the Bill of Rights to the facts in question. Should the question arise for determination by the courts, it may be that at some time in the future it will be held that the protection conferred by Article 9 extends to all of the matters in respect of which we think it wise that specific provision should be made. If this should happen, then these recommendations would become quite redundant. But, in the meantime, for the reasons we have sought to express, we think that clarification is essential.

5.32 In making these recommendations we have been careful to limit the areas in which we have sought to clarify the law. We add that in the preparation of the recommendations in this part of our report, we have been greatly assisted by the work of the 1967 Commons committee, and the 1976-77 recommendations of the Privileges Committee of that House on the recommendations of the Select Committee on Parliamentary Privilege.

5.33 A related question arises out of the substantive recommendations just made: should the courts, or Parliament, determine who is or is not acting as an officer of the House, of a committee etc., for the purpose of the protection of the recommendations just made? In our view it would be inconsistent with Parliament's exclusive control over its own proceedings to allow the court to determine these questions. We therefore recommend that:

Recommendation 2

> Questions as to whether any person is, or is acting as, an officer of either of the Houses or of a committee of either or both Houses, or any sub committee thereof, for the purposes of the protection given by Article 9 and any of the proposals contained in Recommendation 1 should be determined by Parliament.

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

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

warranted. We think that the wiser course is to leave any other problems in this area - should they emerge - to be dealt with in the light of their own particular facts.

Misuse of Privilege

5.35 One of the most difficult and contentious of areas, and one that has occasioned a great deal of public criticism and has caused us a great deal of concern, is the misuse of parliamentary privilege. Here is to be found a clear conflict of public policy: between on the one hand Parliament's rights to, and its need of, the fearless, open and direct expression of opinions by its Members, and on the other the citizen's right to his good reputation. All of us are familiar with the claims that Members of Parliament misuse the privilege of freedom of speech by making groundless attacks on others. The committee received diverse views both on the question of the extent of any probable misuse and as to the means by which the matter should be redressed. For instance, the written material from the Rt. Hon. J.D. Anthony, C.H., and Dr the Hon. D.N. Everingham, M.P., Mr S. Perry and Mr P.B. Stapleton indicated that each considered the problem a serious one which ought to be dealt with. Of those who gave oral evidence, most conceded that there were periodic instances of the misuse of privilege. Nevertheless, most acknowledged the fundamental importance of freedom of speech, and even those who agreed something should be done to minimise or deal with misuse of privilege tended to stress that the privilege itself must be maintained. The committee has found some difficulty in assessing the extent and the significance of the problem. But it must be acknowledged that the very great privilege or immunity for what is said by a Member in Parliament carries with it inherent dangers of misuse, and that in any robust assembly there will be instances of real misuse of this privilege.

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

5.37 Where the person attacked is a Member, he has the right of reply to which the same privilege attaches. Those who are not Members find themselves in an entirely different position. If attacked, they can in theory exercise a public right of reply.[14] But how many can attract the attention of the media?

And what is the use of the theoretical right of reply if it does not command the same media audience? A public statement to which little public attention is paid is a poor form of reply to a privileged attack which may attract wide and damaging publicity. Alternatively, the person attacked can seek the good offices of a Member to intercede on his behalf and to put his case under the same cloak of privilege. But how often can this be done? And what of those who do not know how to go about getting a Member's help or would be diffident about seeking such help, or who cannot interest Members in their plight?

5.38 Freedom of speech in Parliament has never been considered to "involve unrestrained licence of speech within the walls of the House".[15] There are a number of limitations on the absolute freedom of speech imposed both by standing orders and by practice. We furnish two examples. By standing orders, Members are prohibited from using offensive words against other Members. A Member who wishes to make serious charges against another Member should do so only by way of substantive motion, although we must concede that there are many instances when this practice is not followed. The sub judice convention is an example of a practice which imposes a limitation on freedom of speech and which is applied with real rigour by the Chair. While there are rules, and practices, limiting the absolute freedom of speech, none of them help a member of the public who has been at the receiving end of a parliamentary attack.

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

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

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

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

5.43 What should be the essential elements of such a mechanism? Firstly, that complaints be subject to rigorous screening. Secondly, that there be clear limits on what may be put in an answer which is to be incorporated in Hansard. One option the committee considered was to have complaints referred directly to the Presiding Officer with the Presiding Officer being required to decide whether to refer them on for consideration. We think this course undesirable as it would place the Presiding Officer in the invidious position of taking responsibility for the threshold decision. We think the better course is that complaints be raised directly with the Privileges Committees. We choose the Privileges Committees because of their central role in examining complaints referred to them from within the Houses. We see no need to create additional committees to deal with these specific matters. It may well be that the Privileges Committees would wish to operate through sub-committees. This could easily be accommodated through amendments to the standing orders. We are reluctant to propose detailed procedures to control the Privileges Committees in these matters as the whole proposal is novel, and the committees must be given some flexibility in determining how they are to discharge this function. This being said, it is obviously necessary that we propose some guidelines as to how the mechanism should work. We suggest the following as an appropriate model:

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

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

(c) Complaints to the committees:

(i) should be succinct;

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

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

(d) The committees in dealing with complaints:

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

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

5.44 In offering this suggestion we are aware that Members will be concerned not to permit anything that could in any way erode the freedom of debate. We share this concern. Of all the recommendations of our exposure report that which follows aroused the greatest comment. Views have ranged from criticism of the perceived inadequacy of the process to prevent misuse, to expressions of concern at the difficulties that might be encountered in the operation of the process. We have given most careful consideration to these views. However we remain convinced that some means should be sought to meet the legitimate concern of those who, regardless of the reasons, have been subjected to unfair or groundless parliamentary attack on their good names and reputations. We acknowledge that it is not possible to know with any certainty in advance how the process will actually work, how many complaints will made, or whether what we propose will work in a way which is both practical and does not in any way affect Members' freedom of speech. We therefore recommend that the mechanism should operate for a trial period of one year or such further period as each House may think appropriate.

Recommendation 3

We therefore recommend that:

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

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

(c) Complaints to the committees:

(i) should be succinct;

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

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

(d) The committees in dealing with complaints:

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

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

record. In doing so, they should have regard to the fundamental desirability of not causing, unnecessarily adding to, or aggravating any damage to the reputation of others, and of not invading the privacy of others.

(e) That this operation should operate for an initial period of one year or such further period as each House may think appropriate;

(f) That at the end of that period the operation of this recommendation should be reviewed.

5.45 As we have sought to make clear, we have no doubt that the absolute privilege of freedom of speech must be maintained. We believe that this privilege carries with it heavy responsibilities, and that Parliament and its Members must demonstrate an awareness of these responsibilities and a care for the reputations and rights of others when making claims or allegations that can significantly affect the rights and reputations of Members of the public. We believe the safeguarding of this privilege and the continuing demonstration of its necessity and its proper use is a duty of each Member. In the end, the real answer to the problem of misuse of the privilege lies in the care and responsibility of Members, their recognition of the legitimate rights of others, and the development of what one witness called a "corporate conscience". Therefore, and quite independently of the proposal we have outlined in paragraph 5.43, we recommend:

Recommendation 4

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

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

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

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

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

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

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

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

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

Related matters: tabled papers

5.47 There is some concern that documents containing accusations of or reflections on individuals can be tabled and a motion authorising their printing or publication pursuant to the Parliamentary Papers Act can be agreed to with widespread dissemination of the damaging statements then taking place. This can - and does - happen without any real assessment being made by the House concerned before the motion is agreed to. Various ways of overcoming this kind of problem can be imagined. It was put to us that notice could be given of the motion to authorise printing or publication, or alternatively, documents could be referred for appraisal to a parliamentary committee before the

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

5.48 To require notice to be given of a motion to authorise the printing or publication of a document would also present difficulties. Members would need to have access to the documents to assess them and there would be great pressure to make them more generally available. This may not be an altogether bad thing, but in practice the demands of parliamentary life are such that we think the giving of notice would be of little practical utility. The workload of Members is heavy and the demands on their time when Parliament is sitting to deal with matters currently before their Houses, coupled with committee work, constituency work, and projects related to their parliamentary and constituency work, would leave little time for prior and close examination of material proposed to be printed or published. And there is a real political difficulty, namely, most material put to the House is put by a Minister. In doing so he is reflecting the wishes of the Government. It would be unlikely - though not impossible - that a Government would agree to withdraw a report or other paper because of the damaging effects it, or parts of it, may have on individual reputations. In short, once the Government gets to the position of proposing that a paper be printed or published, it has made up its mind on the question and the likelihood of changing its mind is small. Any division could be expected to be resolved on party lines. Nevertheless the problem remains. We think that the proposal put in paragraph 5.43 could be adapted to provide an opportunity for redress for those who consider they have been subjected to unfair or groundless attack in tabled papers. However, we think the main and most immediate challenge is to establish a means of response or redress in answer to attacks made in Parliament. We therefore consider that, should the mechanisms proposed in Recommendation 3 prove successful, the Houses should consider

their extension to those who claim they have been reflected on in papers ordered to be printed or published.

Recommendation 5

We therefore recommend:

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

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

Recommendation 6

5.50 We therefore recommend:

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

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

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

Related matters: repetition of statements made in Parliament

5.52 May observes:

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

What is said in a debate, or in proceedings in Parliament, stands on quite a different footing to the repetition of that statement. Where the repetition of parliamentary material is absolutely protected it is absolutely protected because statutes so provide. Thus, certain broadcasts and re-broadcasts of the proceedings of Parliament are protected by the Parliamentary Proceedings Broadcasting Act, just as the Parliamentary Papers Act provides absolute immunity to those involved in the publication of the official Hansard record, and for certain other specific actions.

5.53 We are not aware of any decided cases in Australia on the re-publication by Members of what they have said in Parliament. According to old decisions of the English courts - given in 1857 and 1868 - a Member who publishes a speech separately for the information of his constituents is protected

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

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

5.55 Next, broadly speaking, and without going into the intricacies of the various jurisdictional rules, the publication of fair and accurate reports of parliamentary proceedings and the publication of extracts from or abstracts of papers ordered to be printed or authorised to be published are protected by qualified privilege. In the great majority of cases reports of parliamentary proceedings and the publication of extracts from or abstracts of papers ordered to be printed or authorised to be published are made in the national media, and are the prime means of informing members of the public of what Parliament is doing. There is therefore a very great national interest in Members of the Australian public having access to such material.

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

Recommendation 7

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

We hope that the tenor of this recommendation (as well as the views expressed in para 5.54) will be taken up by those presently working on co-operative defamation legislation. We expressly refrain from entering into any question of detail such as where the burden of proof or disproof of malice should lie. But we are of the very clear opinion that if co-operative legislation does not achieve uniformity in these areas uniformity should be achieved by legislation of the national Parliament.

Broadcasting and televising arrangements

5.56 The Joint Committee on the Broadcasting of Parliamentary Proceedings is currently undertaking an inquiry into the broadcasting and televising of proceedings of both Houses. We do not intend to trespass on their terms of reference, but because of the inseverable link between what is said within the House, and the dissemination of that material to the Australian public, we do think there are one or two comments we should make on existing arrangements. We hope that what we

now say may be of some assistance to the Joint Committee on the Broadcasting of Parliamentary Proceedings. Members, the media, and many others are aware of the practices that presently exist for the broadcasting of Parliamentary proceedings and the protection given to broadcasts and rebroadcasts made within the protection of the Parliamentary Proceedings Broadcasting Act, which provides:

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

We stress that this protection applies only to authorised broadcasts and rebroadcasts by radio transmission by the Australian Broadcasting Corporation.

5.57 One of the anomalies of the present system is that while it is, of course, open to any journalist to quote what a Member of Parliament has said, under the Parliamentary Proceedings Broadcasting Act the Joint Committee on the Broadcasting of Parliamentary Proceedings appointed pursuant to that Act has power to determine the conditions under which a rebroadcast may be made of any portion of the proceedings of either House and no rebroadcast may be otherwise than in accordance with the conditions so determined. As matters presently stand, rebroadcasts - save the rebroadcast of Question Time in the House not broadcast on a particular day - are not permitted. For our part, and once again expressing a desire not to trespass upon the terms of reference of the Joint Committee, we think it desirable that rebroadcasts of the proceedings of either of the Houses be permitted, subject to appropriate safeguards. We have in mind the practices adopted by the House of Commons which permit the rebroadcast of material subject to conditions such as the requirements that no use can be made of rebroadcasted material in light entertainment or satire programmes. While we do not propose to make any recommendations which would trespass on their terms of reference of the Joint Committee, we are of the very clear view that if the existing rules are to be changed and rebroadcasts of a selective nature are permitted that those rebroadcasts should, so far as applicable, be governed by the tenor of recommendations just made. Obviously, such matter as malicious rebroadcast would not be within that recommendation.

Use of Hansard and other parliamentary records in Courts and other tribunals

5.58 The two Houses have generally followed the former practice of the House of Commons of requiring persons who wish to use their records in Court proceedings - usually the Hansard record of debate - to first petition the House concerned to seek its permission to do so. Theoretically, this practice is linked

to the protection conferred by Article 9 of the Bill of Rights. However, the practice appears to derive from a resolution of the House of Commons of 1818 which in fact only required leave of the House for the attendance in court of officers to give evidence concerning proceedings. Standing orders of the Senate and of the House apply this principle to the Commonwealth Parliament.[20]

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

5.60 In our view the present practice is no longer justifiable. At first sight it seems somewhat remarkable that Hansard itself should not be proved in courts except with leave of the House concerned.[21] Debates in Parliament are constantly the subject of report, comment and criticism in the national media. The dissemination of those debates, and comment on them is vital to an informed electorate. Yet, as the practice stands, if the Hansard record of a debate is to be admitted in evidence before a court , leave of the House from which it comes must first be obtained.

5.61 What interest is served by such a restriction? Regardless of whether or not such a restriction is to continue, when tendered in court the Hansard record continues to attract the protection in undiminished vigour of Article 9 of the Bill of Rights. Thus, a debate cannot be called into question once the relevant record is tendered and it is the duty of the court to ensure that this part of the law of the land is given full force and effect. That "the procedure by way of petition for leave and a subsequent order for leave has now become a meaningless formality and of little practical value in maintaining the privileges of the House" - to adopt the words of the Clerk of the House of Commons in his evidence to the Committee of Privileges reported to the House on 7th December, 1978 - appears undeniable. Certainly, that is the view taken by the House of Commons which by resolution of 31st October, 1980 resolved that while reaffirming the status of proceedings in Parliament conferred by Article 9 of the Bill of Rights, leave be given for reference to be made in future court proceedings to the official record of debate and to published reports of evidence of committees in any case in which, under the practice of the House, it was required that a petition for leave should be presented and that the practice of presenting petitions for leave to refer to parliamentary papers be discontinued. The House of Commons has traditionally been very jealous of its

privileges. We think it in the highest degree unlikely that it would agree to a course which would diminish any of those privileges. Patently, it did not intend by its resolution to achieve that result, and patently it has not done so as the protection conferred by the Bill of Rights remains. Indeed, regardless of the views expressed by the House in its resolution as to the status of that protection, it endures because it is part of the law of the land and cannot be altered by a resolution of the House of Commons or by resolution of our Houses.

5.62 We think therefore that no interest of Parliament is served by the maintenance of this ancient petitioning procedure. Looked at from the vantage point of members of the public, their interests, and the interests of the administration of justice, lie in discarding this practice. It is quite possible that in an urgent case there would be no time to go through the petitioning process and injustice might be occasioned. Even the possibility of such a consequence following from a practice which is of no practical utility should not be entertained. We note that to overcome problems that can arise when Parliament is not sitting the Presiding Officers have been prepared to act on their own initiative and to report their actions thereafter to their Houses. In 1982, both the Speaker of the House of Representatives and the President of the Senate received and approved requests by the Royal Commission into the Australian Meat Industry to refer to portions of Hansard, having satisfied themselves that to do so would not in any way affect the privileges of Members.

5.63 The committee took particular interest in the actions of Mr President McClelland and Mr Speaker Jenkins in 1983 in respect of the Royal Commission into Australia's Security and Intelligence Services - the Hope Royal Commission. Both Mr President and Mr Speaker received requests for permission for certain Hansard reports to be adduced into evidence, and with neither House sitting, permission was granted, however with the overriding effect of Article 9 of the Bill of Rights being stressed. Nevertheless, with the publication of a statement of issues to be resolved in respect of one part of the Commission's terms of reference, Mr Speaker became concerned that, in resolving certain of the issues, there was ground for concern that the privileges of the House could be affected. Mr Speaker's concern, which was shared by the Acting President, was conveyed to the Commission. Mr Speaker considered that the issues were of such significance that it was prudent to brief counsel on the matter. This was done, and the Hon. T.E.F. Hughes, Q.C. was, on the 1st August 1983, granted leave to appear before the commission when the general issue of parliamentary privilege was argued. Submissions by Mr Hughes were accepted and the proposed issues to be addressed were accordingly modified. Mr Speaker and the Acting President were represented by junior counsel at other stages of the commission's hearings when Members appeared as witnesses.[22]

5.64 The committee commends the actions of the Presiding Officers in this matter. So far as the committee is aware these circumstances are unique. However, the actions of the Presiding Officers serve as timely reminders of the significance of the immunity potentially at threat and, by permitting reference to parts of the Hansard record subject to the requirements of Article 9, recognition was given to the real meaning of its provisions and by this means emphasising the distinction which the committee believes can properly be made between questions of form or procedure, and questions of real substance.

5.65 We think therefore that for the courts, and because of their status and the way in which they are constituted, for royal commissions set up under State or Federal or Territory laws, the petitioning process should be dispensed with.[22] It is notorious that in recent years there has been a proliferation of tribunals exercising administrative and quasi judicial functions. As to these tribunals, we think the best approach is, so far as any question of Article 9 of the Bill of Rights may arise, to specify tribunals which would be treated on all fours with courts and royal commissions and that this should be done either by resolution of the Houses or by regulations made under any statute enacted to give effect to those of our recommmendations which require implementation by statute. While completely confident that our recommendation on this matter will not in any way lead to the erosion of the privilege of freedom of speech, we acknowledge the value of the Houses being advised of the use of their records, or those of their committees. This is, we emphasise, not a matter of seeking permission, but only of advice. The appropriate means to achieve this aim is to request courts, Royal Commissions and other specified tribunals to notify the relevant Presiding Officer of the relevant facts.

Recommendation 8

5.66 We therefore recommend:

(1) That each House agree to resolutions in the following terms:

That this House, while reaffirming the status of proceedings in Parliament conferred by Article 9 of the Bill of Rights, gives leave for reference to be made, to or for the admission in evidence of, in future Court proceedings, or in proceedings before any Royal Commission constituted under Federal or State or Territory laws, the official record of debate and to published reports and evidence of Committees and to any other documents which, under the practice of the House, it is

presently required that a petition for leave should be presented and that the practice of presenting petitions for leave to refer to such documents be discountiuned.

(2) That in all matters falling within Paragraph 1 of this Recommendation, this House requests the Attorneys-General of the Commonwealth and of the States to seek to develop procedures to ensure that the Presiding Officer is promptly advised of each such matter so that the House can be kept appraised of the use being made of its records, or of records of its Committees.

It hardly needs pointing out that unauthorised or unpublished material does not fall within this recommendation.

Recommendation 9

We further recommend:

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

Arrest in civil causes

5.67 While difficulties can arise, in practice the importance of this immunity has diminished very greatly as arrest in cases of an undoubtedly civil character has largely become a dead letter. In the past, the area of most importance was imprisonment for debt. This is now virtually non-existent in Australia. Nevertheless, we think that the immunity should be retained. The justification for this view is the need of Parliament to the first claim on the services of its Members, even to the detriment of civil rights of third parties. But we do not think there is any reason to retain the immunity's application to forty days on either side of the sitting of the House. The period of forty days before and after sessions of Parliament could in practice continue for years on end. The purposes of the immunity is to permit the Houses to have first claim on the services of their Members, not to permit Members - should they in any way be subject to arrest on civil process - to avoid that consequence even though their services are not

needed by their Houses. Since the objective of the immunity is to enable Members to attend Parliament, and these days, as well, to enable Members to serve on committees, we think it is met by limiting the application of the immunity to sitting days, to days on which a committee or a sub-committee thereof of which the Member concerned is a member, and five days before and after such days. Such protection is ample. Opponents of the change that we contemplate would argue that there is no need to alter the immunities which apply in respect of arrest in civil causes (and similarly in respect of attendance as witnesses which latter matter is dealt with later in this Chapter). It has also been put to us that it may be difficult for a court to ascertain when a Parliamentary committee is meeting, and that a member could extend the duration of the immunity simply by ensuring that he is involved in a large number of committee meetings. We think this objection is somewhat unreal, and we point out that the present effect of the common law rule on the duration of the immunity means that in practice it always exists - which is precisely the state of affairs we seek to overcome.

5.68 Difficulties can arise in some cases as to whether the matter in question is civil or criminal in character. We think that these questions, if they arise in the future, are best left to the determination of the courts and that we should not essay a comprehensive definition of what constitutes a civil cause. Our reasons are these: in the first place, there is but very limited opportunity these days to invoke the immunity. In short, the relative unimportance of the matter does not merit attempting a comprehensive definition which, if formulated, in theory could apply to or impinge on all jurisdictions throughout our federal system. Secondly,over the years within the courts consideration has been given to the distinction between civil and criminal and civil and quasi criminal cases. We think it would be unwise to intrude by definition into this area - an area which can give rise to some very nice distinctions - and that the wiser course is to leave matters to the courts. This leaves the possibility of a jurisdictional conflict in the future between Parliament and the Courts. Witness Mr Uren's case which could have given rise to such a conflict.[24] But we think that the risk of any real conflict is relatively small, and that its resolution could be left to the good sense of Parliament and the legal judgment of the courts.

5.69 It has been suggested to us that the immunity should be extended to what might broadly be described as quasi criminal cases. The case of Senator Georges is illustrative. In 1979 Senator Georges was charged in the Brisbane Magistrate's Court with two offences : disobedience of a traffic direction given by a policeman and taking part in a procession without a permit under the relevant law. Senator Georges pleaded guilty, was fined and did not pay his fines within the prescribed period. He was arrested and imprisoned. However, the fines were paid and Senator Georges was released. The President of the Senate was not informed of Senator Georges' arrest. The Senate referred

three questions to its Committee of Privileges : the failure of any appropriate authority to advise the President of the matter; whether the matter leading to the arrest and imprisonment of Senator Georges was of a civil or criminal character; and, if it was of a civil character, whether the matter constituted a breach of the privileges of the Senate. The committee found that the matter was not civil in character and therefore could not attract the immunity but recommended the adoption by the Senate of a resolution asserting its right to be notified of the detention of any Senator and the duty of the court so to notify it (a practice followed in Britain), and in February 1980 the Senate agreed to such a resolution.[25]

5.70 By reason of the federal character of our system there can be differences between the various jurisdictions as to what constitutes an action that attracts the sanctions of the criminal law. While in Brisbane permits may be required for street processions, in other parts of the Commonwealth the same act may be perfectly legal without a permit. But this of itself does not suggest to us a reason why the present immunity should be enlarged. Nor in principle do we think that there is a case for the enlargement of the immunity. We see no reason why a Member of Parliament should, in respect of any quasi criminal matter (or indeed of any criminal matter) be placed on a footing different to any other Australian citizen. We do think that his House should be notified of his detention, and whether that detention be in a civil or a criminal matter, but that is an entirely separate matter. It does not place Members in a privileged position vis a vis other citizens; it simply recognises that the Houses need to be informed of lawful impediments to a Member's presence and also need to be informed of any matter which might give rise to a breach of the immunity against arrest in civil causes. We therefore recommend:

Recommendation 10

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

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

Jury service

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

Recommendation 11

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

Attendance as witnesses

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

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

5.74 How is the matter to be resolved? On the one hand there persists Parliament's paramount claim, a claim which we uphold, to the services of its Members. On the other there are the fair demands of the administration of justice. We think that the matter is resolvable as follows. Firstly, the immunity should be limited to the same times as that proposed for the immunity against arrest in civil causes. Secondly, it should be open to the Member to waive the immunity. In saying this, we fully understand that the immunity is held and exercised on behalf of Parliament. However, there seems to us to be no objection to making provision for Members themselves waiving the immunity since it could be expected that Members would only do so after considering their parliamentary commitments and making appropriate arrangements. Thirdly, it is possible to envisage cases where a Member's services are required as a witness, where it would inconvenience neither the Member in the discharge of his parliamentary duties nor the House if his services were not to be available while giving evidence, but where for reasons of his own the Member may desire to avoid entering the witness box. In our Exposure Report we took the view that a means should be devised to meet this kind of possibility. Such a process was incorporated in recommendation 12(3). However it has been pointed out to us by Mr Speaker that, if recommendation 12(3) of the Exposure Report were to remain, it could place Presiding Officers in extremely difficult situations. That recommendation read:

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

Mr Speaker's concern is that the Presiding Officers would not wish to be placed in a position of having to decide between the competing claims of a party to legal proceedings and a Member who asserted that his Parliamentary obligations had to be given priority. This is a very legitimate problem when looked at from the standpoint of the Presiding Officers. For example, a claim could be made under Recommendation 12(3) of our Exposure Report, for the attendance of a senior Opposition spokesman to give evidence. That spokesman having asserted that his Parliamentary duties had to be given paramount consideration, how could the Speaker adjudicate on such competing claims? It would be exceedingly difficult for him to do other than accept what was put to him by the Opposition spokesman. After all, he could hardly enter into an adjudication of the issue as to whether the Opposition spokesman's parliamentary duties required to be given

paramountcy. Aside from a personal decision by the Presiding Officer, we can think of no other realistic alternative to meet the situation which Recommendation 12(3) of our Exposure Report addressed. We therefore think that that Recommendation should not be taken up and we do not include it in this, our final report.

Recommendation 12

5.75 We therefore recommend:

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

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

ENDNOTES

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

2. May, p.94

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18. May, p.85.

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

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

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

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

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

24. See 'Commitment to prison of Mr. T. Uren, M.P.,' Report of Committee of Privileges (House of Representatives) PP 40(1971); see also correspondence from Premier of NSW and the Attorney-General of NSW incorporated in Hansard 23 August 1971. (H.R.Deb. (23.8.71) 526-9).

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