CHAPTER 6

PARLIAMENT'S SELF PROTECTIVE POWERS

- CONTEMPT OF PARLIAMENT

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

The penal jurisdiction

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

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

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

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

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

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

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

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

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

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

Recommendation 13

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

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

Sparing exercise of the penal jurisdiction

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

6.13 However, we agree with the view expressed by the Commons Committee that it is doubtful whether this principle of self-restraint has been applied as rigorously in the past as it should have been. This may be no more than a reflection of the pressures of parliamentary life and of the need, to which we shall refer later, under existing practices to raise any question of breach of privilege or other contempt at the earliest possible occasion. Nevertheless, this principle should be rigidly adhered to and the penal jurisdiction should be invoked as sparingly as possible and only when it is essential to provide reasonable protection to the Houses, their Members committees, and officers. We agree with and endorse the views expressed on this question by the 1967 Commons Committee, which views were later endorsed by resolution in the House of Commons, to the effect of the recommendation that next appears. Not only should the Houses be sparing in the exercise of the penal jurisdiction, but at all stages beginning from the initial consideration of whether a complaint should be made, the Houses

and their Members should bear steadily in mind this principle of self restraint. We therefore recommend that each House agree to resolutions in the following terms:

Recommendation 14

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

Defamatory contempts

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

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

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

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

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

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

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

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

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

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

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

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

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

6.19 In this, as in many areas, there are contrary views to those we have reached. It has been argued that if defamatory contempts were to be abolished by resolutions of the Houses, this would not bind future Houses. We agree, but we think it clear that if defamatory contempts are to be abolished this matter should be dealt with by statute. (The general question of implementation of our recommendation is dealt with in Chapter Ten). It has also been argued that there would be a risk of court review of virtually every contempt case because, it is said, so often contempts involve publication in some form. The fear has been expressed that actions could be brought in the courts to attempt to establish that contempts fell within the abolished category and that it could be very difficult to distinguish between contempt by defamation and other forms of contempt such as intimidation. We point out that if our recommendation on this point was to be implemented by statute, Parliament would always remain in control of its contempt jurisdiction and does so by force of section 49 of the Constitution. Its hands are never tied. We most certainly do not

hold the view that the courts would be allowed to review every contempt case. Elsewhere in this Report we have been at pains to point to the need to diminish to the greatest extent possible any potential for clashes between Parliament and the courts. The safeguard we propose later in relation to warrants for committal is, and very intentionally, limited in its effect to only permitting the High Court to examine the words used in a warrant, and does not permit the court to go behind the warrant and examine the facts relevant to the Houses' decision. Accordingly, if defamatory contempts were abolished by statute, and in the future, a House decides that some matter relating to publication should be treated as intimidation, that would be an end to the matter. Any statutory provision would need to make perfectly plain that the examination of contempt cases by the Houses should be immune from any kind of judicial review, save for the limited safeguard proposed in Recommendation 23.

6.20 We therefore recommend that:

Recommendation 15

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

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

Recommendation 16

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

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

(c) That the defences of:

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

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

A. the statement had been made after reasonable investigation;

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

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

should be available.

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

ENDNOTES

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

2. This is, the Committee recognises, itself a difficult area and, of course, the Attorney-General has now referred the question to the Australian Law Reform Commission for investigation. In April 1984 the Commission in fact released an Issues Paper on the reference.

3. 1967 Commons Report, para 40

4. May, pp. 70-1

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

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

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

8. Constitution of the United States of America, Annotated Edition, (1963), p.116; prepared by the Librarian of the Congress pursuant to a joint resolution of the House and the Senate.

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

CHAPTER 7

THE PENAL JURISDICTION

The proper forum for the exercise of the penal jurisdiction

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

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

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

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

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

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

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

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

7.8 Next, the Court of Parliament - as it may loosely be called - may not always be wise but saving the case of Browne and Fitzpatrick it has never gone beyond such punishments as rebukes or admonishments[5]. Parliament has an inherent flexibility. Its mood and the penalties it may impose may be tempered by factors the courts could never entertain, chiefly the potent force of public opinion and the political consequences for Parliament and

the principal Parliamentary actors if they act harshly, capriciously or arbitrarily when dealing with a complaint of contempt. A court is denied this kind of flexibility. Its concern would be to determine the issues before it in accordance with legal rules - since that is all it can do - and when a case is made out impose, or refrain from imposing, a penalty. Inherently less flexible, the courts might well be disposed to be more severe than Parliament has been. Even its critics concede that Parliament, in the imposition of penalties on outsiders, has been a lenient judge.

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

that referred the matter by resolution to disagree with the court's findings. More subtly, discontent with the handling of matters in courts could emerge and focus on perceived deficiencies in the courts and their understandings of Parliament and Parliamentary life.

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

7.11 We therefore recommend:

Recommendation 17

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

Penalties

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

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

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

Secondly, either House can admonish or reprimand an offender. Thirdly, a public apology may be required. This has been required in the past of newspaper publishers, and failure to comply with adirection to apologise publicly could itself be treated as a

contempt of Parliament. Fourthly, as Parliament controls its own precincts, either House can make an order that Members of the public be excluded from the precincts. This sanction is of special importance to members of the Parliamentary Press Gallery, as exclusion from the precincts of the Gallery has an obvious effect on their ability to work. Because of the division that exists within Parliament between the precincts under the control of the House and the precincts under the control of the Senate - and we put to one side for the present the question of authority over grey or common areas - an order made by one House has no effect in the precincts of the other. However, in a past case, where an apology was demanded by the Senate from representatives of a newspaper and no apology was forthcoming and those representatives were by order excluded from the precincts of the Senate, a complementary order was made by the Speaker of House.[8] Nowadays Members of the media working in the building require passes and these may be revoked by the Presiding Officers. In practice the Presiding Officers consult on these matters. In 1973, for example, the Gallery Pass of one journalist was withdrawn, although this was not in connection with a matter of privilege or contempt as such. Incidental to the execution of these powers, each House possesses the powers to do all such things as may be necessary for giving effect to its orders. Thus, if (as in the Browne and Fitzpatrick Case) orders are made for committal, the House making the orders can make whatever ancillary orders are necessary to give effect to the committal.

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

doubtful.[12] Cetainly, the balance of authority favours the view that the power to impose a fine either does not exist or is extremely doubtful.

7.15 It must be remembered that the Senate has no separate or additional powers to those which the House of Representatives has. Each derives its powers from an identical common authority, section 49 of the Constitution, which looks back to the powers of the House of Commons.

7.16 The House of Lords claims the power to inflict a fine, asserting that it does so as a Court of Record. It last exercised that power in 1801. Whatever may be the powers of the House of Lords, by force of section 49, its position has no bearing on that of the Senate.

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

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

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

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

7.19 The Mahon decision was made on party lines and it is a decision which we find troubling. We believe that if the power to expel is to remain - we will have something to say later on this question - it should be exercised only in the most outrageous and compelling of cases. This follows both from the great severity of the sanction and the consideration that it is for the electors to determine who should be in Parliament, rather than the Houses themselves. This latter consideration may be answered by the argument that it would be quite competent for the expelled Member to recontest his seat and to be re-elected. This argument

overlooks the political reality that the mere fact of expulsion may so blight the expelled Member's political reputation that his prospects of successfully recontesting an election (or obtaining pre-selection) would be negligible.

7.20 Having thus briefly canvassed the powers of the Houses to deal with breaches of privilege and other contempts we come to the sanctions the Houses need to have.

7.21 In addressing this question we think that at the outset we should deal with the question as to whether sanctions of a truly penal kind should remain. (We interpolate that the debate on the question of sanctions is bedevilled by the emotionally charged issues that arise out of the exercise by Parliament of its penal jurisdiction against those judged guilty of defamatory contempts. If our recommendation on this subject is accepted, defamatory contempts will cease to trouble Parliament.) It may be argued that no such sanctions should be available to the Houses, and that they should be content with their powers of reprimand, admonishment, and exclusion from the precincts. We believe there are basic flaws to this kind of argument.

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

with fortitude a verbal rap over the knuckles. And, even if the course were to be taken to reprimand or admonish him, in the absence of real sanctions, how could his attendance before the bar of the House summoning him be compelled? That House would be left in the absurd position of admonishing or reprimanding in absentia, something which offenders could regard with some amusement.

7.23 And what of other cases? For example, the concerted harassment of a Member of Parliament for the purposes of intimidating him and obstructing him in the performance of his Parliamentary duties. He could complain to the authorities and seek the institution of criminal proceedings, or he could go to the courts for the purposes of getting some kind of injunctive relief, but should a Member be placed in this position - and in such a case should Parliament be powerless? We think not, and we believe that our opinion would be shared by most of those who are concerned to ensure the effective operation of Parliament as the ultimate forum of our nation.

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

7.25 The House of Commons Committee of Privileges in its Third Report (in 1977) recommended that if there was to be a power to fine, the power to impose a sentence of imprisonment should be abolished. It believed that "the House would nowadays be extremely reluctant to impose a sentence of imprisonment for an offence of contempt."[16] This recommendation has not been accepted, and the House of Commons' powers remain in substance identical to those of our two Houses. At first sight, the substitution of the power to fine has attractions. We believe most Members of Parliament would agree that it would only be with the greatest reluctance that either House would move to imprison a person judged guilty of a breach of privilege or other contempt. But this does not mean that there may not be circumstances which will justify that course - a last resort though most certainly it is. And on examination, the aboliton of the power to commit and the substitution of a power only to fine presents some real problems. Firstly, how is the fine to be collected? Since no mechanism presently exists, it seems clear that special procedures would need to be established for collecting fines.[16A] Decisions would need to be made on this point, but in either case where there is a failure or refusal to pay a fine the only alternative remedy, save for seizing and selling assets of the offender (which would be a cumbersome process and one desirably to be avoided) is an order of committal. Next, cases may arise where a power to fine is an

inadequate remedy. A witness may be quite willing to face the prospect of a fine for contempt of a committee for refusing to produce documents when required to do so, but be markedly less enthusiastic about the prospect of a period of imprisonment. It would be anomolous and distasteful if the extent to which the sanctions of Parliament really had bite - and we repeat, it is our desire that these sanctions should always and only be ultimate remedies - should depend on the depth of the purse of the offender. Thirdly, the very existence of the sanction of committal is in itself calculated to deter individuals who may, for a wide variety of reasons, be willing either to breach the acknowledged privileges of Parliament or otherwise be contemptuous of the fair and reasonable requirements of Parliament. We well appreciate that there is in the community concern about the reach of Parliament's powers and the opportunities that undoubtedly exist for their abuse. Abuses of powers or privileges can never be eradicated; this is an inevitable result of the fallibility of human nature. But concern about abuses, or the potential for abuse, should never obscure the need for Parliament in the interests of the community at large to have the powers essential for its proper functioning.

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

Recommendation 18

We therefore recommend:

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

7.27 If the power to commit was the only real sanction open to the Parliament when faced with a real need to apply a sanction, we believe, as we have said, that nowadays Parliament would be most reluctant to apply that sanction. It is very much a sanction of last resort. This being so, we think it would be far better if Parliament had available to it the power to fine for breaches of privilege or other contempts. This kind of sanction is particularly apt for corporations for the good and obvious reason that a corporation cannot be imprisoned and one must look to its officers - a process that can be laborious and intricate when one comes to deciding which of the officers of the corporation are responsible for its refusal or failure to accede to the proper demands of Parliament, whether those demands are made by one of the Houses, or by a committee of either or both of the Houses. After considering a number of alternatives we are of the view that firstly, a distinction needs to be drawn between the maximum fine that may be levied against a corporation and the maximum fine that may be levied against an individual, and secondly that the maximum fine for a corporation should be $10,000 and for an individual $5,000. We acknowledge but do not apologise for the fact that here again it is very much a matter of judgment as to what is proper. We add that in the case of individuals it should be obvious that a decision to impose a fine should be an alternative to committal, and we again reiterate our view that the imposition of such a sanction is a tactic of last resort. We believe however that the existence of real sanctions makes it far more likely that the proper demands of Parliament and its committees will be met without the need to resort to those sanctions.

Recommendation 19

We therefore recommend:

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

(2) That where an individual is judged to be in breach of the privileges of Parliament or otherwise in contempt of Parliament he shall be liable to a fine 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.

Raising of complaints of breach of privilege or other contempts

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

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

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

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

7.32 The practice presently adopted by the Australian Parliament accords with the practice which used to be followed by the House of Commons. In our view the present practice has a number of serious defects. In the first place, the requirement that a complaint be made at the earliest opportunity can result in a rushed and ill-considered decision. The abolition of this requirement and its replacement by a more flexible rule would give a Member who may wish to complain opportunities for reflection, of more considered judgment, and of consultation with his colleagues. Furthermore, the earliest opportunity rule can result in a matter not being accorded precedence where there is

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

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

Recommendation 20

7.34 We therefore recommend:

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;

(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;

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

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

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

Procedures for conduct of Privileges Committee inquiries

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

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

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

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

7.41 It is established practice in the House of Representatives that both deliberative meetings and hearings of the Privileges Committee are held in camera. It is not usual to publish the committee's evidence and in only one case has the full text of evidence been published by the committee.[21] In the Browne and Fitzpatrick Case the committee published extracts of evidence in its report. Minutes of the proceedings of the committee are always tabled with its report to the House. The practice in the Senate is that while deliberative meetings are always held in camera, some hearings of evidence by the Privileges Committee have been held in public and the evidence published. Minutes of proceedings are not presented to the Senate.

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

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

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

7.43 Before the House of Representatives Privileges Committee a witness accused of breach of privilege or other contempt is not permitted to be present when other witnesses are giving evidence and has no right to cross-examine witnesses. Nor has he any right to a transcript of evidence of other witnesses. In the "Daily Telegraph" Case of 1971, an accused witness was expressly refused permission to be present when other witnesses were giving evidence.[24] In the Senate Privileges Committee other witnesses have been allowed to be present during the examination of witnesses and transcripts of evidence other than their own have been furnished to them. But the right of cross-examination has never been extended to any witness.

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

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

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

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

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

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

7.50 We are conscious that the principles of natural justice and how the needs of those principles are met are not fixed and inflexible matters. What the requirements of natural justice are in any particular case depend on such matters as the occasion, the tribunal, and the gravity of the consequences that may flow from adverse findings by that tribunal. In essence natural

justice imports the right to a fair and impartial hearing, a right to be heard, a right to know the case put against one and to test it, and a right to confront adverse witnesses. It does not necessarily import the right to legal representation but, however the functions of the Privileges Committees and of the Houses are looked at, it seems irrefutable that what is involved is a very serious matter for anyone whose conduct attracts the attention of one of the Houses and is brought before its Privileges Committee. Accordingly, the onus is on the Houses to accord to him the fairest of hearings, and the most complete opportunity to defend himself.

7.51 We therefore unreservedly support the view that the practices of the Privileges Committee should be reconstituted to meet basic requirements of natural justice. The case in support may be put in terms of a question. If the question be asked - these days, can the proposition be sustained that a person may be gaoled or fined a substantial sum yet have no opportunity to cross examine or confront witnesses, to adduce evidence on his own behalf, or to be represented by lawyers skilled in those matters - we think there can be only one answer. Our view on this important question is strengthened by the knowledge that the Committee of Privileges of the New Zealand Parliament has, in recent years, taken a number of steps toward conferring rights on witnesses and reforming procedures to accord with principles of natural justice without, so far as we are aware, any ill effects.

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

7.53 Nor should it be forgotten that the very fact of having one's conduct investigated by such a committee can seriously damage an individual's reputation. A full examination of the facts may demonstrate his innocence of any intent to breach the privileges of Parliament or otherwise to commit a contempt. Should not anyone so placed have a full opportunity to clear his name? An alleged contempt of Parliament, even on its face trivial, can attract serious consequences. By referring the alleged contempt to the Privileges Committee the House expresses an interim judgment that the complaint deserves the most serious consideration. Given the very nature of the alleged offence, the powers of the committee, the high authority of the body empoweredto pass ultimate judgment, the sanctions that may be imposed, and the possible effect of adverse findings reflecting on reputations, does it not follow that the interests of justice require that those whose conduct brings them before the Privileges Committee should have the right to have their matters considered according to the rules of natural justice?

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

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

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

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

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

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

7.60 While, as a general rule, we can see no good reason why a person against whom a complaint is made should not be present throughout the hearing, we acknowledge it is possible that circumstances might arise which will make it desirable for him to be excluded from the hearing, just as circumstances may arise which will make in camera hearings desirable. When excluded, it is important, in the interests of justice that, so far as possible, and subject to such safeguards as may be thought appropriate, the person excluded should be put on notice of any relevant matter arising in the <u>in camera</u> proceedings. (For example by being permitted to examine the transcript of evidence taken in camera, subject to appropriate limitations as to the use that may be made of information so derived. Otherwise he may suffer in the presentation of his case).

7.61 From time to time committees will be called on to decide disputed questions of fact. In that exercise they may be greatly assisted by cross examination, and cross examination from the camp of one who has an interest to protect is likely to be far more pointed and far better informed than cross examination from, say, counsel assisting the committee who is, and properly should be, disinterested in the outcome. As to the right to call witnesses, it seems obvious that this should be available when any question of fact is in dispute. For example, the issue may be an alleged attempt to improperly induce a Member not to speak in the House on a particular subject or not to advance certain

views. Should not the person against whom this allegation is made be entitled to demonstrate that the case made against him is false? The committee will have ample power to prevent abuses of this right.

7.62 We turn now to the role of legal representatives. It is our view that those whose conduct is being inquired into should have full rights to legal representation. Their representatives should be able to examine and cross examine witnesses and to put submissions on behalf of their clients. We are not fearful that the presence of lawyers will lead to endless complexity, technicality, and to great protraction in hearing times before the committee. Members of Parliament are not, by nature, shrinking violets. They are quite capable of controlling lawyers and making sure that matters stay on the rails. In many cases, where the facts are not in dispute, the role of the lawyer may be quite limited. But when facts are in dispute it is through the examination and cross examination of witnesses by those skilled in this trade that truth is most likely to emerge. And, when one comes to submissions at the end of a hearing we think trained lawyers should add relevance and point to what is before the committee. The committee, of course, is always entitled to seek such legal advice or assistance as it desires. However, the position of the complaining Member is different. He is merely the vehicle for setting in train the penal jurisdiction of his House and we see no reason why he should need legal representation. No doubt, if it was thought that legal representation on his behalf was desirable, the committee would so permit.

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

7.64 We turn now to costs. If our recommendation as to the allowance of legal representation is adopted, we think that the committee should have a discretion to make a recommendation for costs to be met in favour of any person who is represented before it. There is good precedent for the allowance of costs to those whose actions are being investigated in what amounts to an investigation made in the public interest and it is easy to visualise cases where it would only be just to make provision for costs. For example, it may be determined after a lengthy examination of a disputed question of fact that a person thought to be in contempt of Parliament was wholly innocent. If so, he should not be put to expense for the purposes of establishing that fact. Or, a Member or some other person not the subject of

the complaint may have his conduct examined in the course of a hearing. Because of the gravity of the allegations made legal representation may be permitted by the committee. (The question of legal representation for third parties in considered later.) Here again, if legal representation was warranted in the first place, and the matters that touch or concern the action of that person are demonstrated not to reflect adversely on him, a discretion should be open to the committee to have him reimbursed for the costs of protecting his reputation. We are not proposing raids on the public purse. What we do propose is that, when the interests of justice so require, the committee should have power to make appropriate recommendations for the payment of costs of legal representation. The payment or reimbursement of any agreed fees could either be made from funds available to the Parliament, or from Executive funds. In a practical sense, the Executive has much greater funding flexibility and so could meet any request with less difficulty than Parliament. Nevertheless privilege matters are of deep significance to the Parliament. It would be inappropriate in principle for either of the Houses to have to go to the Executive to get funds to meet costs its Privileges Committee has determined should be met. The better course is that any recommendation should be made to the relevant Presiding Officer, who should, if he agreed, endorse payment our of Parliamentary funds.

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

questioning. We leave these sorts of procedural questions for determination by future Privileges Committees. It is better that they should be left with a wide and flexible discretion in such matters.

Recommendation 21

7.66 We therefore recommend that:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Recommendation 22

7.70 We therefore recommend that:

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

Form of resolutions and warrants of committal

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

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

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

7.73 A warrant issued under the authority of one of the Houses and expressed in perfectly general terms for the commitment of a person to prison is open to the obvious criticism that effectively it is unreviewable. However, if the warrant states the cause of committal, it seems that the courts can review the validity of the decision to commit. This point was acknowledged by the High Court in the Browne and Fitzpatrick Case (see 4.7) and was trenchantly made as long ago as 1811 by Chief Justice Ellenborough in Burdett v. Abbott who said that if the House of Commons

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

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

7.74 Here we enter a most difficult area. On the one hand there is the claim of the Houses - a claim which we consider right and which our recommendations uphold - to enforce the privileges of the Houses and to punish, by penal sanctions if need be, those who breach those privileges or who otherwise

commit contempts of the Houses. Furthermore, the practice of issuing general warrants is old and well established. But it seems to us difficult to justify the proposition that the Houses should have the power to commit for up to six months (on the basis of our recommendations), or for the life of the session and then to recommit if such a course is thought desirable (as at present) but under no circumstances should the imposition of that penalty be reviewable. We have concluded that the absence of any kind of review is unjust and should not continue. We think that some power - although of a limited nature - to review Parliament's actions is needed. In our opinion the best answer lies in requiring that the ground of commitment be stated in the resolution for commitment and in the warrant that is to be issued pursuant to that resolution and that it should be open to the Full High Court, and only to the Full High Court, to examine the question of whether the ground stated in the warrant is capable of amounting to a breach of privilege or other contempt. In exercising its review the court should be empowered only to declare whether or not the exercise of the power to commit is on a ground, as stated in the warrant, which is capable of constituting a breach of privilege or other contempt. It should not be entitled to make consequential orders.We do not think it wise that there should be any power for the court to make consequential orders - for example, orders against the person holding the offender in custody and which, if not complied with, could be treated as contempt of court. We take this course because we desire to avoid, or at least minimise to the greatest possible extent, the occasion for any clash between the Houses and the High Court. Hence, if a declaration were to be made by the High Court that a particular warrant for commitment was beyond the power of the House from which it issued because the ground stated was not capable of constituting a breach of privilege or other contempt, it would then be a matter for the House to decide what course it should take.

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

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

7.77 We do not believe the same considerations apply to the imposition of fines: in this area our concern is the liberty of the subject. However, since it is possible that a resolution

directing the payment of a fine could, on non-payment of the fine, lead to a further resolution that the person who has failed to pay the fine be committed, we think that in such latter cases the resolution of committal should state, and the warrant issued pursuant to that resolution should state, the ground on which the fine was imposed as it is on that ground that the further resolution for commitment is based. In such cases it should be open to the Full High Court to determine whether the ground stated in the warrant is capable in law of constituting a breach of privilege or other contempt of Parliament. (We add that, of overseas legislatures, the South African Parliament provides a relevant analogy. In its Powers and Privileges of Parliament Act, 1963, by sub-section 13(1), it is provided that the warrant that may be issued to enforce, by arrest or imprisonment, a contempt decision of the Parliament "... shall specify the nature of such contempt."). Once again, this is a question on which there are differing views. The committee acknowledges this, and, in particular, the comment that can be made to the effect that, if the Houses are to be trusted with the power to deal with contempts, there is no point in inviting the High Court to rule on particular cases of contempt. What we propose should not, however, be read as an invitation to the High Court to rule ondecisions of the House. Rather we have proposed what we see as a safeguard and one which is very carefully circumscribed so that the role of the Full High Court, and only the Full High Court, is not to review the conclusion of a House, but instead, if required to do so, to satisfy itself for the purposes of answering one question only, namely, whether the ground stated in the warrant is capable of constituting a breach of privilege or other contempt. It therefore follows that should a House act on a ground which was plainly misconceived - and we hope this would never happen - then, so long as the terms of the warrant were conformable with the test that the matter stated was capable of constituting a breach of privilege or other contempt, that would be an end to the matter.

Recommendation 23

7.78 We therefore recommend that:

(a) Where a person is committed for breach of privilege or other contempt, the resolution of the House and the warrant for committal shall each state the ground 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 ground 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 ground stated in the warrant for committal was not capable of constituting a breach of privilege or other contempt of the House;

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

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

The Privileges Committees' operations and the reputations of third persons

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

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

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

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

Recommendation 24

7.82 We therefore recommend that:

> Where it appears to the Privileges Committee that the reputation of a person may be substantially in issue, the committee may advise that person that his reputation may be substantially an issue and may permit him such rights as the committee considers just in all the circumstances such as the right to attend 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.

Expulsion of Members

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

7.84 May describes the power to expel in these terms:

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

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

House (in 1667, 1694 and 1695), conduct unbecoming the character of an officer and a gentleman (1796 and 1891), and contempts, libels and other offences committed against the House on various occasions. The last occasion when the House of Commons exercised its power to expel was in 1954 when Mr P.A.D. Baker was expelled following his conviction on a number of counts of forgery. A somewhat more notable case of expulsion occurred in 1947. The offender was a Mr Allighan who was found guilty of a grave contempt. Mr Allighan had written an article for a newspaper in which he claimed some Members of the House of Commons were paid - in money or in kind - for leaking information. Ironically, the Privileges Committee found Mr Allighan guilty of the practice he had imputed to his colleagues. It said "In the case of Mr Allighan, this contempt was aggravated by the facts that he was seeking to cast suspicion on others in respect of the very matter of which he knew himself to be guilty, and that he persistently misled the Committee".[31] The publishers of the newspaper in which these allegations were printed were summoned before the Bar of the House and severely reprimanded.

7.86 The United Kingdom has no written constitution. In that country persons may be disqualified from serving in the Commons either by reason of what they are, or by reason of what they have done. The first category includes certain members of the clergy, peers, minors, and persons disqualified by office or service. The latter category includes persons found guilty of corrupt or illegal practices at parliamentary elections (who are disqualified for various periods according to the nature of the offence either for the constituency for which the election was held or for any constituency) and persons convicted of treason (who cannot be elected or sit or vote until they have suffered the alloted or any substituted punishment or have been pardoned). Until recently it seems to have been the law that persons convicted of other offences, and regardless of the nature of the offence or punishment exacted, were not by virtue of that fact disqualified from being elected to or sitting in the Commons. Where a Member was convicted of such an offence it was for the House to judge whether he should be expelled. Now by force of the Representation of the People Act 1981, persons who are sentenced to be detained or imprisoned indefinitely or for more than one year for any offence are disqualified, their election or nomination is void, and the seat of any Member who becomes so disqualified becomes vacant. The disqualification is limited to the period whilst a person is (or should be) detained. Under the Representation of the People Act 1983 a candidate personally guilty of a corrupt practice is disqualified from election for the particular constituency for ten years, and disqualified from election for any constituency for five years.

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

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

- is under any acknowledgement of allegiance; obedience or adherence to a foreign power;

- is a subject or a citizen or entitled to the rights or privileges of a subject or citizen of a foreign power;

- is attainted [convicted] of treason;

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

- is an undischarged bankrupt or insolvent;

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

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

7.89 By section 45 if a Member of the House of Representatives:

- becomes subject to any of the disabilities mentioned in section 44;

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

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

his place thereupon becomes vacant.

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

7.90 It will be seen that the Constitution makes detailed provision for disqualification from being or remaining a Member of Parliament. The provisions embodied in sections 44 and 45, and their automaticity of operation, should be contrasted with the position in the United Kingdom. In particular conviction of any offence punishable under laws of the Commonwealth or of a state by imprisonment for one year or longer has the effect of disqualifying forever the person so convicted, regardless of the length of any prison sentence given to him, and notwithstanding that no sentence of imprisonment may have been imposed.

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

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

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

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

According to the Prime Minister this statement was completely corroborated by the other three affidavits. From the Prime Minister's long and passionate speech it seems that this statement, coupled with an attack on "those who are now obeying the orders of the King" who, so the Prime Minister said, were described by Mr Mahon as "thugs and murderers", constituted the gravamen of the charge. Mr Mahon, he said "cannot attack the Empire and yet be loyal to his oath of allegiance". Taking the worst view of the case against Mr Mahon, his actions did not, we think, amount to a hanging matter. But the House thought otherwise. The Leader of the Opposition, Mr Tudor, moved an amendment to the motion to omit all words after "That", and substitute:

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

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

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

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

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

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

Recommendation 25

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

Consultations between the Privileges Committees of the Houses

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

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

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

Recommendation 26

The Committee recommends:

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

ENDNOTES

1. Transcript of Evidence, p.801

2. Transcript of Evidence, pp.867-8

3. Transcript of Evidence, pp.422, 502, 633

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

5. Although there have been occasions on which Press Gallery passes have been withdrawn by the Presiding Officers.

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

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

7. 1967 Commons Report, para. 193

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

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

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

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

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

13. Pettifer, J.A., (ed.) House of Representatives Practice, A.G.P.S., Canberra, 1981, p.668, hereafter referred to as House of Representatives Practice

14. Senate standing orders 438 ff.

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

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

16A. Advice from the Attorney-General's Department has been received to the effect that legislation could be enacted providing that an amount ordered by a House to be payable by way of a fine or penalty should be a debt due to the Commonwealth and recoverable in an appropriate jurisdiction on that basis. Letter from P. Brazil, Secretary Attorney-General's Department, to Mr John Spender QC, MP, Chairman of the Joint Select Committee on Parliamentary Privilege, dated 18 September 1984, p. 4

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

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

19. 1976-77 Commons Report, para. 10

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

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

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

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

24. PP. 242 (1971) 9

25. House of Representatives Practice, p.674

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

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

28. 1811 14 East at 150

29. May, p.139

30. May, pp.139-40

31. HC 138 (1947), para 23

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

CHAPTER 8

OFFENCES AGAINST PARLIAMENT

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

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

Offences at statute or common law

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

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

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

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

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

8.8 From what we have just said it will be understood that we do not think our terms of reference require or permit us to embark on an examination of offences at statute or common law which, while they may embrace facts which themselves amount to infringements of Parliament's privileges, are properly characterised as criminal offences, and as so characterised are truly extraneous to our terms of reference.

Offences against Parliament

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

Desirability of clarification

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

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

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

Independence of Members

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

8.13 The difficulty for the committee, and for Members, is to distinguish those matters which are part of the reality of political life from others which can properly be considered an improper attempt to influence a Member. The traditional stress on the complete independence of Members, as with so many aspects of parliamentary life, reflects a House of Commons of times long past, when party organisation was either non-existent, or in a very primitive stage of development and when independence was truly prized. These days, virtually without exception, Members are elected as nominees of parties, rather than as individuals elected on their personal merits. Both before and after election they are, as all the world knows, subject to varying degrees of party influence, discipline and pressure. The sanctions for those who disregard these realities can be severe. In practice

some very difficult decisions may have to be made in this area. Restraint and realism will serve Parliament better than a propensity to invoke whatever mechanisms may be available against persons offending or possibly offending. An illustration is provided by a finding by Mr Speaker Jenkins on a matter raised on 8 November 1983. Based on media reports, it was claimed that the Prime Minister had intimidated Government Members in the party-room consideration of policy on uranium mining. Mr Speaker referred to the principle of restraint followed in the House of Commons and noted that arrangements within political parties were unlikely to raise matters of contempt.[4]

8.14 The improper influence of Members may take many and various physical and non-physical forms. Here, as in so much of human affairs, it is not easy to construct watertight compartments. A necessary condition which must apply before action is taken in respect of an alleged offence is that the act in question must concern the Member in his capacity as a Member. This has been emphasised in the past[5] and is a very important condition if the community is to appreciate that all rights, immunities and protections are only enjoyed by Members in order to protect and support the proper operation of the Parliament - they are not the personal perquisites of Members. Improper influence includes bribery and the offer of inducements or benefits, and fraud, threats or intimidation. Such actions can be directed to influencing the voting of a Member, to influencing the views he might or might not express, or to attempting to secure his absence from Parliament. Inevitably, the circumstances of each case will be critical.

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

> "... it is inconsistent with the dignity of the House, with the duty of a Member to his constituents, and with the maintenance of the privilege of freedom of speech, for any Member of this House to enter into any contractual agreement with an outside body, controlling or limiting the Member's complete independence and freedom of action in Parliament or stipulating that he shall act in any way as the representative of such outside body in regard to any matters to be transacted in Parliament; the duty of a Member being to his constituents and to the country as a whole, rather than to any particular section thereof".[6]

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

8.17 Our recommendations in this area - many of which are self-explanatory - reveal the inherent tension between providing detail and retaining flexibility. But our recommendations on defamatory contempts should help assuage the concerns of those troubled by the scope of the contempt power. We also think the principles of restraint expounded by us in relation to the exercise of the penal jurisdiction and which are of general application should be a helpful guide in the assessment of complaints in this area.

Recommendation 27

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

Interference with the Parliament

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

Improper influence of Members

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

Molestation of Members

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

Contractual arrangements, etc.

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

Orders of the Houses and committees

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

8.19 There will be occasions when the recipient of an order of a House either may not be able to comply with it (for example he might not possess documents sought) or when he has good reason for doubting the order's validity. Therefore, any recommendation we make must be qualified to take account of circumstances which constitute a reasonable excuse for non-compliance. In order to ensure compliance with orders properly given, the Houses must be able to deal with persons who obstruct or impede, or attempt to obstruct or impede anyone acting on behalf of a House or a committee.

8.20 The power of committees to obtain information is crucial to their operations. This power must be enforceable. In the great majority of cases, problems encountered during the conduct of an inquiry will be resolved before recourse to the ultimate sanction of invoking the penal jurisdiction comes into play. Crown privilege and conflict between the Executive's claim to uphold that privilege against a House or committee seeking information is considered later.[7] Other than to acknowledge that it may be an issue arising in the conduct of committee inquiries, we have nothing to add here to the views expressed

below. We emphasise again that the capacity to pursue and determine a matter as a possible contempt is that of the Houses, rather than committees, which may only report the circumstances to the relevant House. There are good reasons for this, in terms of the status of committees as creatures of the Houses, and in terms of the opportunities for the filtering of, and possible resolution of, any problems. The protection of witnesses is dealt with in detail in Chapter 9 where we make specific recommendations concerning the rights and protection of witnesses. Nevertheless we include offences concerning witnesses in our enumeration of contempts as the Houses themselves and committees must be able to pursue problems involving witnesses. Again, much of what now follows is self-explanatory.

Recommendation 28

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

Disobedience of orders

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

Obstruction of orders

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

Interference with witnesses

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

Molestation of witnesses

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

Offences 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.

Unathorised publication of material and false reports of proceedings

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

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

8.23 False or misleading reports of proceedings of a House or a committee raise a related issue. Readers of Hansard will know that Members frequently claim to have been misreported and misrepresented. Nevertheless, the records of the Commonwealth Parliament do not reveal any occasion when a complaint of misrepresentation or misreporting has been treated as a contempt. However, wilful misrepresentation of proceedings can have grave consequences: the public may be misled on important issues and public debate may become distorted. We therefore think that the wilful publication of false or misleading reports of proceedings in Parliament should remain amenable to Parliament's contemp powers.

Recommendation 29

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

Publication of in camera evidence

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

Premature publication of reports

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

False reports of proceedings

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

Protection of the Houses from physical disturbance/disruption

Direct disruption

8.24 It is patently clear that the Parliament must be protected from physical disruption, disturbance and obstruction. There is no doubt that the Houses are able to protect themselves. Nor is there any doubt as to the general application of the criminal law within the precincts of Parliament.[8] This latter proposition was recently reaffirmed in a case heard in the Supreme Court of the Australian Capital Territory. In that case a conviction on a charge of obstructing a police officer by failing to obey a request to move from the area immediately adjacent to the front steps during a demonstration was upheld.[9] As all Members would be aware, the practice is to deal with certain actions, although they may technically constitute contempts, either through administrative action under the authority of the Presiding Officer, for example the removal of persons from the galleries, or by remitting the matter to the law authorities for criminal proceedings. These matters are not usually pursued by the ordinary mechanism for the investigation and determination of breaches of privilege or contempts, and there are very good reasons for this. Many cases may in fact be of a trivial nature and the employment of the mechanism of inquiry by the Privileges Committee would be entirely inappropriate, perhaps serving to provide extra publicity or notoriety to the perpetrator of an essentially insignificant action. Other cases, perhaps quite serious, may, for varying reasons, such as the nature of the matter - for example an assault - be best pursued through the ordinary course of the law.

8.25 In this area there are two issues to be resolved. Firstly, doubt exists as to the extent of the application of certain statutory provisions to the precincts of Parliament: for example the Public Order (Protection of Persons and Property) Act to the Chambers. Secondly, the absence of an authoritative delineation of the precincts.[10] We think these matters should be clarified. The application of particular laws could be clarified by amending statutes which have no express or implied application to the precincts, or, should a statute be enacted to give effect to certain of our recommendations, specific provisions could be incorporated in it. The delineation of the precincts (both in the present Parliament House and in the new building) could be done either by statute, or by resolutions of the Houses. The difficulty with resolutions is that they would essentially be no more than the expression of opinions of the Houses, and accordingly delineation of the precincts by statute is preferable. Any delineation of the precincts by statute should contain a provison for variation in the future, and also some form of delegation for the Parliament, or the Presiding Officers, to be able to declare that a particular place is or is not to be considered a part of the precincts. This would obviate

the necessity for amendment to any statute to cover, for example, the temporary occupation of another building for parliamentary purposes.

Recommendation 30

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

Disturbance of Parliament

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

Recommendation 31

We therefore recommend that:

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

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

Indirect disruption

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

the House. Mr Speaker noted that the strike was not directed towards Parliament but affected the whole of Canberra. He concluded that

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

8.27 We agree with the views expressed by the two Speakers. While always allowing for the variety cases which may arise, our firm view is that Parliament should be very reluctant to extend the contempt power. In particular, Parliament should exercise great restraint in considering complaints about actions which may affect the operation of Parliament but are not directed against Parliament.

Service of process within the precincts

8.28 There are precedents for treating the service, or attempted service, of process within the precincts as contempt.[12] The rule is stated in House of Representatives Practice in these terms:

> It is a contempt or breach of privilege to serve, or attempt to serve, civil or criminal process within the precincts of the House on a day on which the House or any committee thereof is to sit, is sitting or has sat, without having obtained the leave of the House. The privilege is enjoyed by the House in its corporate capacity on the ground that the service, or attempted service of the process of an inferior tribunal in the presence, actual or constructive, of the House, is clearly a violation of the dignity of the Parliament, regardless of whether the person served, or attempted to be served, is a Member or another person.

8.29 We are not convinced that there is good reason for disturbing this rule in relation to the service or execution of civil process but we think it should be confined to sitting days of the Houses. It does not seek to prevent the service or execution of civil process on or against individuals; rather, it seeks to prevent that happening in a particular place. Once outside of the precincts no barrier exists. But criminal process stands on a different footing.

8.30 Some criminal process may issue in respect of quite trivial matters, such as parking offences. But others, of course, issue for offences that run the whole gamut of the criminal law. We do not think any impediment should exist to the

service or execution of what might be described as serious criminal process and where it is desired to take such action in the precincts of either of the Houses, we think that the simplest expedient is to give to the Presiding Officer the power to authorise whatever may be necessary. Theoretically, unauthorised action taken in an emergency could be treated as a contempt but it is inconceivable that the Houses would take that course.

Recommendation 32

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

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

Recommendation 33

> We therefore recommend that guideline be adopted by the Houses pointing out that the following matters may be treated as contempts:
>
> Attempts and conspiracies
>
> > Generally, attempts or conspiracies made or entered into in respect of matters set out in the foregoing recommendations may be dealt with as contempts.

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

ENDNOTES

1. Crimes Act 1914
2. Commonwealth Electoral Act 1918, Part XVII
3. Transcript of Evidence, p. 608-9
4. H.R. Deb. (8.11.83) 2362; (9.11.83) 2460-1
5. House of Representatives Practice, p. 643 May, p. 143; 1967 Commons Report, para 12
6. Journals of the House of Commons. 15 July 1947
7. Paragraphs 9.11-9.15 of this report
8. Rees v. McKay, 1975 25 FLR, 228; Bradlaugh v. Gosset (1884) 12 QBD
9. O'Dea v. Castle No. SC 1305 of 1982
10. Transcript of Evidence, pp. 243, 319-21, 331, 49-51
11. H.R. Deb (15.3.78)760
12. May, p. 154-5; House of Representatives Practice, P. 661.

CHAPTER 9

THE CONDUCT OF PARLIAMENTARY INVESTIGATIONS

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

Protection of witnesses

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

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

Standing orders of the two Houses re-affirm this protection:

> "witnesses are entitled to the protection of the [Senate/House] in respect of anything that may be said by them in their evidence."[2]

Furthermore, it is a contempt for any person to seek to interfere with a witness, by intimidation force or threat, or to inflict any injury on a witness in consequence of his having given evidence before a committee. Unquestionably, a committee has full powers to raise such matters as contempt. The question is: are the existing powers sufficient? Is it sufficient to rely on committees and the Houses for the protection of witnesses? Or is some other means of protection required? The 1972 Greenwood - Ellicott report, observed:

> "It is difficult to speak of the standing orders, by themselves, as affording to witnesses legal rights. A right is only of

this character if it is enforceable in a Court of law. Standing orders can, as indicated, create procedures designed to protect witnesses, but a breach of those standing orders is, of itself, a matter for the House."[3]

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

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

to be fined or imprisoned. By that Act it is also provided that the court should have power to award costs and compensation to a person who has been injured. Inquiries, for the purposes of the Act, include parliamentary committee inquiries.[4]

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

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

who have suffered intimidation or discrimination would have the right to sue for damages those responsible...."[5]

9.5 We think the position of witnesses demands special attention, and that legislation to protect witnesses should be enacted. If this view is accepted, it would follow that there would co-exist with the power to treat interference with witnesses as contempt a specific sanction under the criminal law and a specific civil remedy. We do not think this presents a real practical difficulty. So far as we are aware the co-existence of sanctions available to Parliament and within the courts in the United Kingdon since 1892 has occasioned no difficulties. In our own Parliament, by virtue of sections 19 and 32 of the Public Accounts Committee and the Public Works Committee Acts, respectively, statutory form is given to the protection of witnesses before those committees, yet these provisions appear to have created no problems. Should any question arise in the future as to whether a matter should be treated as a contempt, or whether there should be a prosecution, we think it should be left to the good sense of the committee in question and its House to resolve. Certainly, we do not think that double sanctions should apply.

9.6 When a witness who gives evidence in good faith suffers injury because he has given evidence to a committee, and suffers because of the deliberate actions of others, in our view he should have a remedy in damages against those who have injured him. We do not suggest that he should have the right of action for injured feelings. But in those circumstances a witness who has suffered damages quantifiable by the courts, such as the loss of a job, or the loss of an opportunity for advancement, quite independently of contempt or criminal proceedings, should have the right to sue for damages in the civil courts. It is only just that he should have this remedy and it is only just that Parliament should assist him. Also, the existence of such a right may tend to dissuade from action those who otherwise might be minded to penalise witnesses. While we think that the civil remedy we here propose should be limited to actual witnesses, we emphasise that actions of whatever nature taken against prospective witnesses for the purposes of either dissuading them from co-operation with a parliamentary committee or influencing their evidence may be treated as a grave contempt.

Recommendation 34

We therefore recommend:

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

(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, unless such evidence was given in bad faith, shall be guilty of an offence and shall be liable to damages at the suit of that witness which may be awarded by the court before which a person may be convicted of such an offence, or awarded in civil proceedings brought by the witness.

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

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

Rights of witnesses

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

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

9.10 We do not propose to provide a detailed analysis of the recommendations which follow, since we think they are self explanatory. They are based substantially on a statement of Senate practice supplied by the Senate department and they provide, we think, a sound set of guidelines. We acknowledge that as guidelines they will not be universally applicable. For

example, to the Joint Committees on Public Works and of Public Accounts because of the provisions of sections 23 and 11 of the respective Acts regulating those committees. Rather, in the ultimate, procedural questions such as whether evidence should be heard in camera, the degree to which counsel should be involved, and the admissibility of questions must be left to the committees and beyond them to the Houses. We believe that committees would take care to have due regard to the rights of those who appear before them. We think it likely that if committees were to become too intensely inquisitorial, to use the words of one witness, or to display continuing disregard for the reasonable expectations of witnesses, their standing as microcosms of the Houses, and consequently the standing of the Houses would be devalued, and their actions would become the subject of public scrutiny and of public criticism. The importance of public scrutiny and of public criticism to redress abuses in this area should never be underestimated.

Recommendation 35

We therefore recommend:

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

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

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

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

(3) A witness shall be given reasonable notice of a meeting at which he is to appear, and shall be supplied with a copy of the committee's terms of reference and an indication of the matters expected to be dealt with during

his appearance. Where appropriate a witness may be supplied with a transcript of relevant evidence already taken in public.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Crown or Executive privilege

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

9.12 Much has been written and said on this issue. While clashes most certainly have occurred, and while they concerned matters of real importance, and while the question as to the proper balance between the Executive and Parliament is one of very great importance, there has yet to be a major constitutional crisis arising from such clashes. This may not be a comforting observation because it does not exclude the possibility of such a crisis in the future. Thinking in this area has evolved considerably in recent times. In particular, there have been major developments with regard to claims for Crown privilege in respect of court proceedings. In the leading case of Sankey v. Whitlam and others[6] the High Court asserted its rights to examine documents in dispute in order to determine itself from the documents whether or not the claims should be upheld. Simply put, it is evident that the trend has been away from ready recognition of claims for Crown privilege and towards examining these claims closely and carefully weighing competing "public interest" considerations. It seems at least possible that an analogous evolution in thinking may develop in Parliament to help resolve cases where disputes arise between

committees requesting information and Executives resisting their requests. But we cannot presume this will happen. We are faced with two options. Firstly, to allow matters to stand as they are; secondly, to propose means for the resolution of future clashes.

9.13 Some Parliaments have mechanisms for resolving disputes over the production of Executive documents, or the provision of information by members of the Executive or by public servants to committees. We instance the Parliamentary Powers and Privileges Act of Papua New Guinea and the Legislative Assembly (Powers and Privileges) Ordinance of the Northern Territory. By these laws procedures are provided to the effect that if an objection is taken to the answering of questions or the production of documents the matter is not proceeded with for a specified period. The Speaker or the Chairman reports the matter to the National Executive Council (in Papua New Guinea) or to the Administrator (in the Northern Territory) and asks whether the objection is supported. The Head of State (PNG) or the Administrator (NT) must then, within a fixed period, certify whether the objection is upheld. If he so certifies, that is an end to the matter. If he declines so to certify, the documents must be provided or the information given. We acknowledge that such procedures are at first sight attractive. But we do not think they or any procedures involving concessions to Executive authority should be adopted. Such a course would amount to a concession the Commonwealth Parliament has never made - namely, that any authority other than the Houses ought to be the ultimate judge of whether or not a document should be produced or information given.

9.14 Some assistance will be found in the guidelines we have just proposed (see guideline 14), and in the revised guidelines for official witnesses recently issued by the Government. But these latter guidelines are Executive Guidelines and in no way binding on the Parliament.

9.15 However ingenious, guidelines can only reduce the areas of contention: they can never be eliminated. This follows from the different functions, the inherent characteristics, and the differing interests of Parliament and the Executive. In the nature of things it is impossible to devise any means of eliminating contention between the two without one making major and unacceptable concessions to the other. It is theoretically possible that some third body could be appointed to adjudicate between the two. But the political reality is that neither would find this acceptable. We therefore think that the wiser course is to leave to Parliament and the Executive the resolution of clashes in this quintessentially political field.

Endnotes

1. May, p. 88

2. Standing orders 390 and 362 of the Senate and the House, respectively.

3. Greenwood and Ellicott, op.cit. p. 18

4. Witnesses (Public Inquiries) Protection Act, 1982.

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

6. 1978 142 C.L.R. 62-4

CHAPTER 10

IMPLEMENTATION OF THE COMMITTEE'S RECOMMENDATIONS

10.1 In our view, it is unarguable that, if our recommendations are supported by Members, they should be implemented. To do otherwise, and to consign this report to gathering dust on a shelf specially reserved for studies into such arcane matters as parliamentary privilege would be to acknowledge that the committee's work has been pointless and that it is futile to contemplate changes to the law and practice of parliamentary privilege, and the means of enforcing Parliaments' privileges. Nor is any answer to be found in deferral or in the reference of our Recommendations to some other committee for a further report. The issue of change cannot be avoided. We do not advocate change for the sake of change but only when after careful analysis we think change is needed, so that the law and practice of parliamentary privilege reflects the needs of our times and of Parliament as the ultimate custodian and protector of the rights of the Australian people. It is for Members of Parliament, acting in the best interests of the people of Australia and of Parliament, to make the ultimate decision on our recommendations. We do not suggest this decision should be rushed, and it was for this reason we took the step of putting before Parliament an Exposure Report so that the most careful consideration could be given to our recommendations before they were finally settled. We have now had the benefit of a number of most thoughtful comments on our earlier proposals and our final report has been prepared with them in mind. We now express the view as forcefully as we can that if Parliament's opinion favours our recommendations no time should be wasted in implementing them.

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

Effectively, this would amount to legislation by resolution which is not only contrary to the forms and procedures of the House of Commons, but is fundamentally inconsistent with the constitutional processes of this country. Where section 49 refers to a declaration of the "Parliament" it means the Parliament as constituted by section 1 of the Constitution as consisting of both Houses and the Queen. If the position were otherwise, the singular consequence would follow that one of the Houses, by resolution, could greatly extend its privileges and could do so in a way that impinged on the rights of Australian citizens. Should any residual doubt remain, we think it should be set at rest by the words of the High Court in R. v. Richards, ex parte Fitzpatrick and Browne (1955) 92 CLR 157 at 164. In its joint judgment the High Court said this:

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

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

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

In our opinion it does not follow from the High Court's judgment that Parliament must make specific provision for each of its privileges in a statute passed pursuant to section 49 of the Constitution. Instead, it is perfectly competent for the Parliament to legislate by:

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

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

10.5 We hope that we have made plain that what we propose is not a statutory codification of the powers, privileges and immunities of the Houses. The very word "codification" conjures up in the minds of some Parliamentarians the fear that Parliament may inadvertently find itself in a straitjacket. For our part, we think that the difficulties of codification are frequently exaggerated and that the merits of the arguments for and against codification were neatly summarised by the Honourable T.E.F. Hughes, Q.C. when he said

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

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

Recommendations which require implementation by statute

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

Recommendation 1

(Proposed expanded definition of proceedings in Parliament - 5.29)

Recommendation 2

(Parliament to determine status of officer, if necessary, in determining the application of proposed definition of "proceedings" - 5.33)

Recommendation 6(2)

(Removal of any doubt concerning protection of staff in supplying documents - 5.50)

Recommendation 7

(Laws applying to reports of proceedings - 5.55)

Recommendation 9

(Leave for reference to parliamentary documents in specified tribunals - 5.66, so far as that recommendation refers to regulations being made under an Act of Parliament specifying tribunals to which the record of debates and other parliamentary documents may be furnished without a petition for leave.)

Recommendation 10(1)

(Modification of duration of immunity from civil arrest - 5.70)

Recommendation 12(1)

(Modification of immunity from attendance as a witness - 5.75)

Recommendation 15

(Abolition of defamatory contempts - 6.20)

Recommendation 18

(Modification of Houses' power to commit - 7.26)

Recommendation 19

(Power for Houses to impose fines - 7.27)

Recommendation 23

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

Recommendation 25

(Abolition of power to expel members - 7.96)

Recommendation 31

(Delineation of precincts - 8.25)

Recommendation 34

(Witnesses Protection Act - 9.6)

Recommendations to be implemented by standing orders

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

Recommendation 3

(Proposed committees to deal with complaints from persons arising out of statements about them in Parliament - 5.44)

Recommendation 20

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

Recommendation 22

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

Recommendation 26

(Consultation between Senate and House Privileges Committees - 7.99)

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

10.9 The critical factor in determining the suitability of this means of implementation of our recommendations is the nature of the recommendation in question. Resolutions would be quite inappropriate to achieve changes in the law of the land. But for other matters - and particularly when a House wishes to state a decision, declare a policy or attitude or make a statement of a practice to be followed, resolutions are the best means to achieve its ends.

10.10 Implementation by resolution may be seen by some as lacking in force and possibly not binding on "successor Houses". This latter point has no relevance to the proposed resolution on misuse of privilege, as we recommend that this should be reaffirmed at the commencement of every session. But there is some substance to the criticism that resolutions are not binding on successor Houses as they lack the force of legislation. Nevertheless, resolutions of the Houses can and do give continuing effect to a wide variety of decisions of the Houses. As the House of Representatives Practice states:

> "The binding force of this type of resolution on a continuing basis is implicit rather than explicit in that it relies on the acquiesence of the House for its continuing operation. Such acquiesence does not deny the power of the House simply to ignore the resolutions of previous sessions; to state explicitly that such resolutions have no effect in succeeding sessions; to rescind them explicitly; or, as above, to pass other resolutions, notwithstanding them. The types of orders and resolutions which are most commonly regarded as having continuing effect are those which are concerned with the practice and procedure of the House, that is, those relating to the internal workings of the House."

10.11 Our opinion as to the suitability of the use of resolutions to implement some of our recommendations is reinforced by the decision of the House of Commons to implement by resolution a number of recommendations of its Committee of Privileges following its review of the recommendations of the 1967 Select Committee. On the 6th February 1978, the House resolved that it:

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

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

Recommendations to be implemented by resolutions

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

Recommendation 4

(Proposed resolution concerning use of privilege of freedom of speech - 5.45)

Recommendation 8

(Leave for reference to parliamentary documents in courts - 5.66)

Recommendation 9

(Leave for reference to parliamentary documents in specified tribunals and, in the absence of legislation, empowering the Presiding Officers to make certain relevant decisions - 5.66)

Recommendation 10(2)

(Requirement for notification of detention of member - 5.70)

Recommendation 12(2)

(Modifying in certain cases the application of immunity from attendance as witness - 5.75)

Recommendation 14

(Resolution urging sparing use of penal jurisdiction - 6.13)

Recommendation 16

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

Recommendation 21

(Conduct of inquiries by Privileges Committees - 7.66)

Recommendation 24

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

Recommendations 27-30, 32, 33

(Matters which may constitute contempt - Ch 8)

Recommendation 35

(Protection and rights of witnesses before committees - 9.10)

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

JOHN SPENDER
Chairman

October 1984

ENDNOTES

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

2. ibid.

3. 234 Journals of the House of Commons 170.

DISSENT BY SENATORS JESSOP AND PETER RAE

General Comment

Now that the Committee has abandoned any notion of making sweeping changes to the law of parliamentary privilege, such as complete statutory codification and transfer of the contempt jurisdiction to the courts, we do not consider that it is advisable to be making alterations to lesser matters, particularly when there are no existing difficulties or problems to be overcome by such alterations. We refer particularly to the following matters.

Proposed Definition of Proceedings in Parliament
(Recommendation 1)

The proposed statutory definition is unnecessary in our view. We do not consider that, because there are no court judgements on specific questions in the area of parliamentary privilege, it should be assumed that the answers to those questions are "doubtful" and therefore require statutory treatment to remove the supposed doubt. In particular, there is no basis for the supposed doubt about whether parliamentary committees meeting outside the precincts have privilege: it is clear that parliamentary privilege is not a geographical concept.

The proposed definition deals only with the meaning of "proceedings in Parliament" in the context of defamation actions, but the immunity contained in the Bill of Rights applies to other actions as well. It is irrational to limit the definition in this way. The definition would create an anomaly in that the expression "proceedings in Parliament" could be taken to have one meaning in defamation actions and a different meaning in other proceedings.

Immunity from Civil Arrest and Attendance as Witnesses (Recommendations 10 and 12)

We consider that there is no need to alter the duration of the immunities; the practical effect of the common law rule as to their duration is that they are permanently in existence. We consider that the proposed statutory provisions would create more anomalies and uncertainties than exist at present; for example, it may be difficult for a court to ascertain when a parliamentary committee is meeting, and a member could extend the duration of the immunity simply by ensuring that he is involved in a large number of real or bogus committee meetings.

Defamatory Contempts (Recommendation 15)

We consider that it is unnecessary and undesirable to "abolish" the category of contempt by defamation. If this is to be done by resolutions of the Houses (which would be logical, since the Committee has not recommended the transfer of the contempt jurisdiction to the courts), such resolutions would not be binding on the Houses in the future in any case. If it is to be done by statute, this would allow the courts to review virtually every contempt case, because most contempts hinge on publication in some form, and an action could be brought in the courts to establish that any contempt fell within the statutorily prohibited category. The Committee has already rejected such review by the courts elsewhere in the report. It may not be possible in particular cases to clearly distinguish between contempt by defamation of the Houses and their members and contempt by intimidation of members.

Penalties (Recommendations 18 and 19)

We regard as unnecessary the proposal to legislate on penalites to be imposed by the Houses. In particular, there is no sound basis for the doubts about the powers of the

Houses to impose fines: the fact that the House of Commons has not exercised the power for many years does not mean that it is not a power adhering to the Australian Houses under section 49 of the Constitution. The Senate has asserted that it has the power to fine, and we believe this assertion to be correct.

Warrants of Committal (Recommendation 23)

We do not consider it is necessary to adopt the recommendation concerning warrants of committal. In our view, if the Houses are to be trusted with the power to deal with contempts, as the report proposes, there is no point in inviting the High Court to rule on particular cases of contempt.

Expulsion of Members (Recommendation 25)

In our view there is no justification for abolishing the powers of the Houses to expel members. The contention that the House of Representatives abused the power on one occasion is no reason for its abolition. It is irrational to say that the Houses can be trusted with their powers in relation to contempts but not with this power over their own members, which may be used by the Houses in extreme cases to rid themselves of members whose activities seriously obstruct the Houses' operations.

(Don Jessop)

(Peter Rae)

APPENDIX 1

JOINT SELECT COMMITTEE ON PARLIAMENTARY PRIVILEGE

TERMS OF APPOINTMENT

32ND PARLIAMENT

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

(2) That the committee consist of 10 members, 3 Members of the House of Representatives to be nominated by the Prime Minister, the Leader of the House or the Government Whip, 2 Members of the House of Representatives to be nominated by the Leader of the Opposition, the Deputy Leader of the Opposition or the Opposition Whip, 2 Senators to be nominated by the Leader of the Government in the Senate, 2 Senators to be nominated by the Leader of the Opposition in the Senate and 1 Senator to be nominated by any minority group or groups or independent Senator or independent Senators.

(3) That every nomination of a member of the committee be forthwith notified in writing to the President of the Senate and the Speaker of the House of Representatives.

(4) That the members of the committee hold office as a joint committee until the House of Representatives is dissolved or expires by effluxion of time.

(5) That the committee elect as chairman of the committee one of the members nominated by either the Prime Minister, the Leader of the House or the Government Whip, or by the Leader of the Government in the Senate.

(6) That the committee elect a deputy chairman who shall perform the duties of the chairman of the committee at any time when the chairman is not present at a meeting of the committee, and at any time when the chairman and deputy chairman are not present at a meeting of the committee, the members present shall elect another member to perform the duties of the chairman at that meeting.

(7) That 5 members of the committee constitute a quorum of the committee.

(8) That the committee have power to send for persons, papers and records, and to move from place to place.

(9) That the committee have power to authorise publication of any evidence given before it and any document presented to it.

(10) That the committee be provided with necessary staff, facilities and resources.

(11) That the committee have leave to report from time to time.

(12) That the foregoing provisions of this resolution, so far as they are inconsistent with the standing orders, have effect notwithstanding anything contained in the standing orders.

APPENDIX 2

JOINT SELECT COMMITTEE ON PARLIAMENTARY PRIVILEGE

TERMS OF APPOINTMENT

33RD PARLIAMENT

(1) That a joint select committee be appointed to review, and report whether any changes are desirable in respect of--

(a) the law and practice of parliamentary privilege as they affect the Senate and the House of Representatives, and the Members and the committees of each House;

(b) the procedures by which cases of alleged breaches of parliamentary privilege may be raised, investigated and determined, and

(c) the penalties that may be imposed for breach of parliamentary privilege.

(2) That the committee consist of 10 members, 3 Members of the House of Representatives to be nominated by the Prime Minister, the Leader of the House or the Government Whip, 2 Members of the House of Representatives to be nominated by the Leader of the Opposition, the Deputy Leader of the Opposition or the Opposition Whip, 2 Senators to be nominated by the Leader of the Government in the Senate, 2 Senators to be nominated by the Leader of the Opposition in the Senate and 1 Senator to be nominated by any minority group or groups or independent Senator or independent Senators.

(3) That every nomination of a member of the committee be forthwith notified in writing to the President of the Senate and the Speaker of the House of Representatives.

(4) That, in addition to electing a chairman, the committee elect a deputy chairman who shall perform the duties of the chairman of the committee at any time when the chairman is not present at a meeting of the committee, and at anytime when the chairman and deputy chairman are not present at a meeting of the committee the members shall elect another member to perform the duties of the chairman at that meeting.

(5) That 5 members of the committee consitute a quorum of the committee.

(6) That the committee have power to send for persons, papers and records, and to move from place to place.

(7) That the committee have power to consider and make use of the evidence and records of the Joint Select Committee on Parliamentary Privilege appointed during the previous Parliament.

(8) That the committee have power to authorise publication of any evidence given before it and any document presented to it.

(9) That the committee have leave to report from time to time.

(10) That the foregoing provisions of this resolution, so far as they are inconsistent with the standing orders, have effect notwithstanding anything contained in the standing orders.

APPENDIX 3

LIST OF WITNESSES:

(In each case we have indicated the occupations, or offices held by, witnesses at the time of their appearance.)

Mr G.D. Bates, Legal Adviser, John Fairfax & Sons Ltd

Mr P.A. Costigan, President, Federal Parliamentary Press Gallery

Mr A.R. Cumming Thom, Clerk of the Senate

Mr H. Evans, Principal Parliamentary Officer, Department of the Senate

Professor J.L. Goldring, Professor of Law, Macquarie University

Mr B.M. Hogben, Group General Manager, Editorial, News Ltd

Mr M.C. Jacobs, Member, Australian Journalists' Association

Mr J. Lawrence, Federal President, Australian Journalists' Association

Mr C.R. Macdonald, Managing Director, David Syme & Co. Ltd.

Professor D.C. Pearce, Professor of Law, Australian National University

Mr J.A. Pettifer, C.B.E., former Clerk of the House of Representatives

Professor G.S. Reid, (then) Deputy Vice-Chancellor, University of Western Australia

Miss D.D. Ross, Vice Chairman, Australian Press Council

Emeritus Professor G. Sawer, Chairman, Australian Press Council

Hon. G.G.D. Scholes, M.P.

Mr M.V. Suich, Chief Editorial Executive, John Fairfax & Sons Ltd.

Mr B.G. Teague, Member, Law Council of Australia

Mr B.K. Wheeler, Editor-in-Chief, Australian Associated Press

Mr W. Wodrow, Private Citizen

APPENDIX 4

LIST OF SUBMISSIONS

(In each case we have indicated the occupation of, or office held by, witnesses at the time the submissions in question were lodged.)

Persons and organisations who made written submissions

Rt. Hon. J.D. Anthony, C.H., M.P., Deputy Prime Minister

Senator B.R. Archer, Chairman, Joint Committee on Publications

Mr I.R. Arnold, John Fairfax & Sons Ltd

Mr I.J. Booth, Private Citizen.

Mr D.M. Connelly, M.P., Chairman, Joint Committee of Public Accounts

Mr. P.A. Costigan, President, Federal Parliamentary Press Gallery

Mr. A.A. Deme, Private Citizen

Department of the Senate

Dr. the Hon. D.N. Everingham, M.P.

Professor J.L. Goldring, Professor of Law, Macquarie University

Hon. R. Groom, M.P.

Mr J. Guest, M.L.C., Parliament of Victoria

Mr B.M. Hogben, Group General Manager, Editorial, News Ltd

Hon. Mr Justice Kirby, Chairman, Australian Law Reform Commission

Mr J. Lawrence, Federal President, Australian Journalists' Association

Mr R. Lucas, Canberra College of Advanced Education

Mr C.R. Macdonald, Managing Director, David Syme & Co. Ltd

Mr M. Maher, M.P.

Professor D.C. Pearce, Professor of Law, Australian National University

Mr S. Perry, Private Citizen

Mr F.E. Peters, Private Citizen

Mr J.A. Pettifer, C.B.E., Clerk of the House of Representatives

Professor G.S. Reid, Deputy Vice-Chancellor, University of Western Australia

Emeritus Professor G. Sawer, Chairman, Australian Press Council

Mr. G.G.D. Scholes, M.P.

Mr R.F. Shipton, M.P., Chairman, Joint Committee on Foreign Affairs and Defence

Mr P.B. Stapleton, Private Citizen

Mr D. O'Sullivan, Western Australia Newspapers

Mr A.F. Smith, Member, Law Council of Australia

Mr B.K. Wheeler, Editor-in-Chief, Australian Associated Press

Mr W. Wodrow, Private Citizen

In addition, the Standing Orders Committee of the House of Representatives resolved to refer to the Joint Committee the matter of unsubstantiated allegations made in the House which the House had referred to the Standing Orders Committee on 16 March 1982.

APPENDIX 5

The Committee sought detailed information from a wide range of overseas Parliaments as, with the exception of the House of Commons, the documentation available to the Committee was not as detailed as it wished.

National Parliaments from which additional information was received were:

Canada

Federal Republic of Germany

India

Israel

Italy

Japan

Netherlands

New Zealand

Norway

Papua New Guinea

South Africa

Sweden

In addition, useful material was received from State Parliaments, and notes from the 1982 Conference of European Speakers, in London, were very useful.

APPENDIX 6

COMMONWEALTH ACTS WHICH HAVE PARTICULAR SIGNIFICANCE TO THE OPERATION OF PARLIAMENT

The Parliament has enacted the following statutes which relate directly to its operation:

Parliamentary Papers Act 1908
Parliamentary Proceedings Broadcasting Act 1946
Public Accounts Committee Act 1951
Public Works Committee Act 1969
Jury Exemption Act 1965

The Parliamentary Papers Act 1908 provides for either House to authorise the publication of papers laid before it. The Act authorises the Government Printer to publish parliamentary papers, unless there is a contrary order. Where a paper is ordered to be printed, the protection of the Parliamentary Papers Act applies only in respect to the publication printed by the Government Printer as a parliamentary paper and not to the publication of the paper in any other form.

The Act grants protection from civil and criminal proceedings to any persons publishing any document or evidence published under an authority given pursuant to the provisions of the Act. It is under this Act that the publication of the complete Hansard report of debates of each House is covered by absolute privilege. Further, it is lawful for a Committee of either or both Houses to authorise the publication of any document laid before it or of any evidence given before it.

The Parliamentary Proceedings Broadcasting Act 1946 governs the broadcasting of proceedings of the House of Representatives, the Senate, or any joint sitting.

At the beginning of the first session of every Parliament a Joint Committee on Broadcasting of Parliamentary Proceedings is appointed pursuant to the Act. The Committee is empowered to recommend the general principles under which the parliamentary broadcasts take place and to exercise control over broadcasts according to the principles adopted by each House. Determinations made by the Committee remain in force on a continuing basis until varied or revoked by a later Joint Committee.

Members are covered by absolute privilege in respect of statements made when the House is being broadcast. Absolute privilege also applies to persons authorised to broadcast or re-broadcast parliamentary proceedings. The Act requires the Australian Broadcasting Corporation to broadcast proceedings. The Act was amended in 1974 with respect to the broadcasting and televising of a joint sitting.

The Public Accounts Committee Act 1951 and the Public Works Committee Act 1969 provide for the appointment of these Committees at the commencement of each Parliament. Each Act defines the functions, constitution and powers of the respective Committees. The powers of the two Committees are similar.

Each Committee may summons a person to appear before it to give evidence and provide documents. If a witness who has been summonsed fails to appear, or fails to continue in attendance, without proof of reasonable excuse, a warrant may be issued for his apprehension.

A person summonsed to appear before either Committee may not, without just course, refuse to be sworn or make an affirmation, answer any question put to him by the Committee or any Member, or produce a document required by the Committee.

A witness before each Committee has the same protection and privileges as a witness in proceedings in the High Court. A witness is protected against defamation proceedings in respect of anything said during an inquiry in relation to the matter under investigation. Both Acts also provide a witness with legal protection against any physical harm which may be inflicted on him on account of his giving evidence. Penalties are specified in both Acts for failure to comply with their provisions. Wilfully giving false evidence on oath or affirmation is punishable by five years imprisonment. Other penalties may include monetary fines and/or short terms of imprisonment.

The Jury Exemption Act 1965. The right of Parliament to the service of its Members in priority to the claims of the courts is one of the oldest of parliamentary privileges, from which derives the exemption of Members from jury service. The duties of a Member in Parliament are held to supercede the obligation of attendance in a court. This exemption has been incorporated in the Act. Certain officers of the Parliament are exempted from jury service by way of regulations under the Act.