

## *Parliamentary privilege*

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

### **PRIVILEGE DEFINED**

*May* describes parliamentary privilege as:

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

### **THE COMMONWEALTH PARLIAMENT'S PRIVILEGE POWERS**

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

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

In addition, section 50 of the Constitution provides that:

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

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

### **Certain minor powers declared by statute**

The Parliament has not declared its powers, privileges and immunities under section 49 of the Constitution, except in relation to a few relatively minor matters:

- *Parliamentary Papers Act* 1908—protection of Government Printer and others;
- *Parliamentary Proceedings Broadcasting Act* 1946—protection of the Australian Broadcasting Commission;
- *Public Accounts Committee Act* 1951 and *Public Works Committee Act* 1969—privileges of, and protection of, witnesses who appear before these committees, and
- *Jury Exemption Act* 1965—exemption from jury service of Members and certain officers.

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

<sup>2</sup> *May*, p. 67.

The Parliament is, therefore, strictly limited to the powers, privileges and immunities of the House of Commons as at 1 January 1901, being the date of establishment of the Commonwealth.

### Judicial interpretation of section 49

The privilege powers of the Commonwealth Parliament were tested and confirmed in a significant High Court judgment arising from the case of Browne and Fitzpatrick. On 10 June 1955, the House of Representatives judged Mr F. C. Browne and Mr R. E. Fitzpatrick guilty of a serious breach of privilege<sup>3</sup> (see p. 656 for details of this case). On the warrant of the Speaker the 2 men were committed to gaol for 3 months. Subsequently, action was taken by the legal representatives of the offenders to apply to the High Court for writs of habeas corpus. The High Court heard the argument between 22 and 24 June and delivered its judgment on 24 June.<sup>4</sup>

The Chief Justice first dealt with the question whether the warrants issued by the Speaker were a sufficient return to the writs of habeas corpus. He held that such warrants if issued in England by the Speaker of the House of Commons would have constituted sufficient answer, being drawn up in accordance with the law there which was finally established in the case of the *Sheriff of Middlesex* in 1840.<sup>5</sup> In Australia the law was established authoritatively by the decisions of the Privy Council in *Dill v. Murphy* in 1864<sup>6</sup>, and in the *Speaker of the Legislative Assembly of Victoria v. Glass* in 1871.<sup>7</sup>

Stated briefly, that law provides that:

... it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise. The judgment of the House is expressed by its resolution and by the warrant of the Speaker. If the warrant specifies the ground of the commitment the court may, it would seem, determine whether it is sufficient in law as a ground to amount to a breach of privilege, but if the warrant is upon its face consistent with a breach of an acknowledged privilege it is conclusive and it is no objection that the breach of privilege is stated in general terms.<sup>8</sup>

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

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

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

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

3 VP 1954-55/267,269-71; H.R. Deb. (10.6.55) 1625-65.

4 *R. v. Richards; ex parte Fitzpatrick and Browne* (1955) 92 CLR 157.

5 11 Ad & E 273 [113 ER 419].

6 1 Moo. PC (N.S.) 487.

7 LR 3 PC App 560.

8 (1955) 92 CLR 162.

- that the power contained in section 49 was a transitional power which ceased when Parliament declared some of its powers, privileges, and immunities in 2 statutes—the *Parliamentary Papers Act* 1908, and the *Parliamentary Proceedings Broadcasting Act* 1946, and
- that the powers under section 49 are contingent upon the Houses exercising their authority under section 50, which provides that each House might make rules and orders with respect to:
  - the mode in which its powers, privileges, and immunities might be exercised and upheld, and
  - the order and conduct of its business and proceedings.

The High Court rejected, in turn, each of these arguments.

In relation to the first proposition, the court declared:

The answer, in our opinion, lies in the very plain words of s. 49 itself. The words are incapable of a restricted meaning . . . It is quite incredible that the framers of s. 49 were not completely aware of the state of the law in Great Britain and, when they adopted the language of s. 49, were not quite conscious of the consequences which followed from it.<sup>9</sup>

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

. . . in unequivocal terms the powers of the House of Commons have been bestowed upon the House of Representatives. It should be added to that very simple statement that throughout the course of English history there has been a tendency to regard those powers as not strictly judicial but as belonging to the legislature, rather as something essential or, at any rate, proper for its protection . . . It is sufficient to say that they were regarded by many authorities as proper incidents of the legislative function, notwithstanding the fact that considered more theoretically—perhaps one might even say, scientifically—they belong to the judicial sphere.<sup>10</sup>

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

. . . contemplates not a single enactment dealing with some very minor and subsidiary matter as an addition to the powers or privileges; it is concerned with the totality of what the legislature thinks fit to provide for both Houses as powers, privileges and immunities.<sup>11</sup>

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

. . . all the arguments which have been advanced for giving to the words of s. 49 a modified meaning, and the particular argument for treating them as not operating, fail.<sup>12</sup>

Browne and Fitzpatrick petitioned the Judicial Committee of the Privy Council for special leave to appeal against the decision of the High Court. However, the decision of the Privy Council was that the judgment of the Chief Justice of Australia was unimpeachable and leave to appeal was refused.<sup>13</sup>

<sup>9</sup> (1955) 92 CLR 165-6.

<sup>10</sup> (1955) 92 CLR 167.

<sup>11</sup> (1955) 92 CLR 168.

<sup>12</sup> (1955) 92 CLR 11.

<sup>13</sup> *R. v. Richards; ex parte Fitzpatrick and Browne* (1955) 92 CLR 171 (PC).

## Adherence to House of Commons practice

Whilst the House of Representatives has developed its own practice and created its own precedents in respect of most of its operations, in the area of parliamentary privilege<sup>14</sup> there is a need in some cases to be guided by the practice and precedents of the House of Commons<sup>15</sup>, from which the House's privilege powers are derived.

This chapter does not attempt to record the history of the development of the law, practice and procedure of privilege<sup>16</sup>, nor does it attempt to treat in detail all questions of privilege that may arise. It is limited to a general description and a summary of the more important aspects of the subject.

*May* is recognised as the most authoritative and comprehensive work on matters pertaining to the law, privileges, proceedings and usage of a Parliament operating in the Westminster tradition. It brings together in one volume a comprehensive summation of all important cases of the House of Commons in privilege matters and it is to *May* that the House usually turns for precedents and guidance when questions of privilege arise.

## FURTHER COMMENT ON THE NATURE OF PRIVILEGE

### Its meaning and necessity

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

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

In so far as the House claims and Members enjoy those rights and immunities which are grouped under the general description of "privileges", they are claimed and enjoyed by the House in its corporate capacity and by its Members on behalf of the citizens whom they represent.<sup>17</sup>

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

When any of these rights and immunities, both of the Members, individually, and of the assembly in its collective capacity . . . are disregarded or attacked by any individual or authority, the offence is called a breach of privilege, and is punishable under the law of Parliament. Each House also claims the right to punish actions, which, while not breaches of any specific privilege, are offences against its authority or dignity, such as disobedience to its legitimate commands or libels upon itself, its officers or its Members. Such actions, though often called "breaches of privilege" are more properly distinguished as "contempts".<sup>18</sup>

The privileges of a legislative assembly would be entirely ineffectual to enable it to discharge its functions, if it had no power to punish offenders, to impose disciplinary regulations upon its members, or to enforce obedience to its commands.<sup>19</sup>

Despite the immunity from prosecution which a Member has in respect of what he says in the Parliament in carrying out his duties, he is still accountable to the House

14 For a full list of House of Representatives privilege cases see Appendix 32.

15 S.O. 1.

16 Historical studies on the development of privilege can be found in the Bibliography. The more significant references are *May's Parliamentary Practice*, together with Anson, *The Law and Custom of the Constitution*; *Report of House of Commons Select*

*Committee on Parliamentary Privilege*, HC 34(1967-68); Hatsell, *Precedents of Proceedings in the House of Commons*.

17 HC 34(1967-68)vii.

18 *May*, p. 68.

19 Cushing, *Legislative Assemblies*, paras 532-3, quoted in *May*, p. 68.

itself in respect of his statements and actions. It is within the power of the House to treat improper conduct or the making of grossly defamatory statements as contempt of the House and to take disciplinary action against the Member accordingly.

### **Distinction between breach of privilege and contempt**

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

It would be vain to attempt an enumeration of every act which might be construed into a contempt, the power to punish for contempt being in its nature discretionary. Certain principles may, however, be collected from the Journals which will serve as general declarations of the law of Parliament. It may be stated generally that any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any member or officer of such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results may be treated as contempt even though there is no precedent of the offence.<sup>20</sup>

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

The distinction is this, I think, that the privileges of the House are known and established, and one of them is freedom of speech. Now, if Members of a Select Committee feel that they cannot speak freely for fear that somebody will intrude upon their discussions, then this constitutes in the person who commits this offence a breach of known privilege of the House. On the other hand, when the House has passed a resolution, as it did in 1837, and an outside person ignores or flouts that resolution, that constitutes a contempt. So you very often have Committees of Privilege finding that not only a breach of privilege has been committed but at one and the same time it is a contempt of the House for flouting and ignoring its Order. So you can charge a matter on either or both counts.<sup>21</sup>

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

The power of both Houses to punish for contempt is a general power similar to that possessed by the superior courts of law and is not restricted to the punishment of breaches of their acknowledged privileges . . . Certain offences which were formerly described as contempts are now commonly designated as breaches of privilege, although that term more properly applies only to an infringement of the collective or individual rights or immunities of one of the Houses of Parliament.<sup>22</sup>

### **No new privilege may be created**

In 1704, the Lords and Commons agreed:

That neither House of Parliament hath any power, by any vote, or declaration, to create to themselves any new privilege, that is not warranted by the known laws and customs of Parliament.<sup>23</sup>

This resolution does not affect the principle that it is within the competence of each House to expound the law of privilege and apply that law to the circumstances of each case as it arises.<sup>24</sup> To suggest, as has on occasions been done, that the existing privileges of the Parliament have been extended in some particular case, is incorrect.

<sup>20</sup> *May*, p. 136.

<sup>21</sup> *The Observer* case, HC 357(1967-68)39-40.

<sup>22</sup> *Halsbury's Laws of England*, 3rd edn, vol. 28, p. 465; see also Geoffrey Marshall, 'The House of Commons and its Privileges', in *The House of Commons*

in the Twentieth Century, S.A. Walkland (ed.), Clarendon Press, Oxford, 1979, pp. 205-09.

<sup>23</sup> CJ (1702-04)555,559-63.

<sup>24</sup> See *May* p. 72; for further comment see HC 34(1967-68)97-9.

## ENUMERATION OF PRIVILEGES

The following are among the principal powers, privileges and immunities of each House, and of the Members of each House, drawn from the law and custom of the House of Commons as at 1901<sup>25</sup>:

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

## FREEDOM OF SPEECH

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

That the freedom of speech and debates or proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament.<sup>26</sup>

The privilege has been variously described as a privilege essential to every free council or legislature<sup>27</sup>, as one which has always been regarded as most valuable and most essential<sup>28</sup>, as the only privilege of substance enjoyed by Members of Parliament<sup>29</sup>, and as one of the most cherished of all parliamentary privileges, without which Parliaments probably would degenerate into polite but ineffectual debating societies.<sup>30</sup> Unquestionably, freedom of speech is by far the most important privilege of Members.

Members are absolutely privileged from prosecution only in respect of anything they might say in the course of proceedings in Parliament. A Member may state whatever he thinks fit in debate in the Parliament, however offensive or injurious to the

25 See *Quick and Garran*, pp. 501-02.

26 1 Will. & Mary, sess. 2, c.2.

27 May, p. 73.

28 Hatsell, vol. I, p. 85.

29 HC 34(1967-68)91.

30 Campbell, *Parliamentary Privilege in Australia*, p. 28.

character of individuals. It is, however, incumbent upon Members not to abuse the privilege. The House itself, by its rules of debate and disciplinary powers, has the duty of preventing abuse (*see* p. 677). As *May* puts it:

... it becomes the duty of each Member to refrain from any course of action prejudicial to the privilege which he enjoys.<sup>31</sup>

Privilege does not attach to words spoken by Members outside the proceedings of the House.

### Privilege attaching to Hansard reports

Hansard reports of the proceedings are absolutely privileged and no action may lie against a Member, the Principal Parliamentary Reporter or the Government Printer, and their officers, in publishing the report.<sup>32</sup>

Privilege does not protect a Member if he publishes his own speech apart from the rest of a debate. If a Member publishes his speech, his printed statement becomes a separate publication, unconnected with any proceedings in Parliament. Similarly, a Member is not protected by absolute privilege in respect of the publication of Hansard extracts, or pamphlet reprints, of his parliamentary speech, unless the extract or reprint is published by him under the authority of the House. Even qualified privilege is probably not available unless the publication is for the information of the Member's constituents.<sup>33</sup>

### Proceedings in Parliament

Article 9 of the Bill of Rights goes further than providing freedom of speech by specifically including 'debates and proceedings in Parliament'. What constitutes 'proceedings in Parliament' has been the subject of a good deal of consideration in the House of Commons for a number of years but has not yet been defined.

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

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

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

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

However a precise definition has not been laid down. In the London Electricity Board case in 1957 (more generally known as the Strauss case), the House of Commons Committee of Privileges found that Mr Strauss in writing a letter to a Minister criticising certain alleged practices of the Board, was engaged in a 'proceeding in Parliament'.

<sup>31</sup> *May*, p. 77.

<sup>32</sup> See *Parliamentary Papers Act* 1908, ss 3,4; and see Ch. on 'Papers and documents'.

<sup>33</sup> Advice from Attorney-General's Department, dated 25 August 1978.

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

The committee also found that, in threatening a libel action against the Member, both the Board and its solicitors had acted in breach of the privilege of Parliament.<sup>35</sup> By a narrow margin of 218 votes to 213 votes, the House of Commons rejected a motion agreeing with the committee's report. An amendment declaring that Mr Strauss' letter was not a proceeding in Parliament and that no breach of privilege had been committed was carried on a non-party vote.<sup>36</sup> The decision was in contrast to the decision of the House of Commons in 1939<sup>37</sup> that notice in writing of a question to be asked in the House was 'protected by privilege'.

The uncertainty created by the decision in the Strauss case was one of the significant areas canvassed by the 1967 Select Committee on Parliamentary Privilege. That committee and a subsequent committee recommended the introduction of legislation to extend and clarify the scope of the defences of absolute and qualified privilege which are available in the courts to actions brought against Members and others—in effect, to define what constitutes 'proceedings in Parliament'.<sup>38</sup> No definitive action has yet been taken on this recommendation and uncertainty still exists as to what actions constitute 'proceedings in Parliament'.

### Use of Hansard in the courts

From 1845 the House of Commons adopted a practice requiring the presentation of a petition seeking its leave before allowing the production in court of reports of its debates. The practice was governed by 2 resolutions of the House of 26 May 1818 in the following terms<sup>39</sup>:

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

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

These resolutions were given effect in the House of Representatives through standing orders 362 and 368 respectively. However, the House has had limited experience in respect of requests for the appearance in court of officers or for the use of its records in court proceedings.

On 7 May 1963, the House authorised 2 Hansard reporters to attend in the Supreme Court of the Australian Capital Territory to give evidence in relation to a proceeding in the House (produce shorthand notebooks to prove the accuracy of a newspaper report of a particular proceeding).<sup>40</sup> No petition was presented to the House in this instance.

### *Sankey 'Loans affair' prosecution*

On 21 October 1975, a petition was presented from Mr Danny Sankey praying that the House grant leave to the petitioner and his legal representatives to issue and serve subpoenae for the production of official records of the proceedings of the House held between 2.55 p.m. and 10.09 p.m. on 9 July 1975 and of documents tabled therein and further to issue and serve subpoenae for the attendance in court of those persons who took the record of such proceedings. Mr Sankey advised the House in his petition that

35 HC 305(1956-57)viii.

36 H.C. Deb. 591(8.7.58)245.

37 The Sandys case, HC 101(1938-39) para. 3.

38 HC 34(1967-68)i; HC 417(1976-77)iv-v; and see HC 34(1967-68)xxvi.

39 CJ (1818)389.

40 VP 1962-63/464; and see Ch. on 'Papers and documents'.



he wished to institute proceedings against Mr Whitlam, Mr Connor, Dr Cairns and former Senator Murphy and the records sought were intended to be adduced in evidence in the prosecution.<sup>41</sup> On 25 February 1976, a further petition was presented from Mr Sankey seeking leave for the petitioner and his legal representatives to inspect the documents tabled during the proceedings of 9 July 1975, together with the other matters sought in the previous petition.<sup>42</sup>

On 4 June 1976, the House, after debate, agreed to the following resolution (on the voices):

That, in response to the petition of Danny Sankey presented to the House on 25 February 1976, this House grants leave—

- (1) to the Petitioner and his legal representatives to inspect the documents tabled in this House during the course of its proceedings which took place between 2.55 p.m. and 10.09 p.m. on 9 July 1975,
- (2) to the Petitioner and his legal representatives to issue and serve a subpoena for the production of the said documents in the proceedings commenced by the Petitioner in the Queanbeyan Court on or about 20 November 1975 and
- (3) to an appropriate officer of the House to attend at the hearings of the said proceedings and to produce the said documents.<sup>43</sup>

Two further petitions were presented to the House on behalf of Mr Sankey. The first was presented on 9 December 1976<sup>44</sup> and the second on 24 March 1977.<sup>45</sup> No action was taken by the House in respect of either of these petitions.

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

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

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

The extent to which the House might facilitate the administration of justice with respect to the use of or reference to the records of proceedings of the House in the Courts without derogation from the Privileges of the House, or of its Members.<sup>46</sup>

The judge's order was to the effect that certain interrogatories should be answered and verified by Mr Uren which required him to agree that certain speeches in the Parliament shown in photostat copies of Hansard as having been made by him and 2 other persons were in fact made by him or them. The judge accepted the submission by counsel that what the defendant was seeking to do did not infringe the privilege of a House of Parliament in relation to proceedings before it but merely to prove as a matter of fact that the plaintiff and others had made certain speeches in the House—not in any way to criticise them nor call them into question in court proceedings, but to prove them as facts upon which the defendants' alleged comments were made in the publication sued upon by the plaintiff. The judge ruled that this use of the fact of what was said in Parliament would not be a breach of the privilege of Parliament.

The Committee of Privileges carefully examined the order and concluded that His Honour was in error. The committee expressed concern that as a consequence of his

41 VP 1974-75/1002; H.R. Deb. (21.10.75)2292-3.

42 VP 1976-77/33.

43 VP 1976-77/247.

44 VP 1976-77/563.

45 VP 1977/39.

46 VP 1978-80/975.

order, the answers to the interrogatories may have been used by counsel in cross-examination had the case (which was settled out of court) come to trial. Such a course, if allowed, may have been used for questioning the motives of the Member when he made his speech in the House—a gross violation of the privilege enshrined in Article 9 of the Bill of Rights.

In considering the matter, the committee had the benefit of a report of the House of Commons Committee of Privileges which had conducted a similar inquiry and reported to the House of Commons on 7 December 1978. In that report the committee stated:

The practice of the House which prevents reference to the Official Report in Court proceedings except after leave given in response to a petition appears to have developed out of the Resolution of 26th May 1818 which in terms merely requires the leave of the House to be granted for the attendance of its servants to give evidence in respect of the House's proceedings. The Resolution continues to provide an essential protection for the House in the matters to which it strictly relates, but Your Committee consider that no purpose is served by its extension to the requirement of leave merely for reference to be made to the Official Report. They believe that the provisions of Article 9 of the Bill of Rights, reinforced by the care taken by the courts and tribunals to exclude evidence which might amount to infringement of parliamentary privilege, amply protect the House's privilege of freedom of speech.<sup>47</sup>

In a memorandum submitted to the House of Representatives Committee of Privileges, at its request, the Clerk of the House stated:

If the Committee is to draw on the experiences of other Parliaments, particularly the Commons Houses of the United Kingdom and Canada, it may feel disposed to recommend the adoption of a procedure whereby records of the House may be admitted into evidence in court proceedings, without the leave of the House having been first obtained, for the limited purpose only of establishing that a particular statement was made by a particular person at a specified time. To do so would accord with the Canadian practice and that proposed by the Clerk of the United Kingdom House of Commons in his submission to the Committee of Privileges of that House and subsequently recommended by that Committee.<sup>48</sup>

The Committee of Privileges presented its report to the House on 9 September 1980. The committee recommended:

- (1) that the practice of petitions being presented to the House for leave to refer to House records in the Courts, derived from the long-established practice of the United Kingdom House of Commons, should be maintained;
- (2) that upon presentation of a petition, the House shall, at the earliest opportunity, refer the petition to the Committee of Privileges for its consideration and report;
- (3) that in considering the petition the Committee of Privileges should enable the Member (or former Member) referred to in the petition to be heard on his own behalf;
- (4) that the Committee of Privileges, at the completion of its deliberations, should report to the House its views on the petition and, in addition, recommend such conditions upon the production of the record or *Hansard* report as it deems appropriate in all the circumstances.

The committee further recommended that the House of Representatives should resolve:

- (1) that the broadcast of the proceedings in the House of Representatives and the publication of those proceedings in *Hansard* do not amount to a waiver of privilege by the House of Representatives and that the decision to the contrary by Begg, J. in the case of *Uren v. John Fairfax & Sons Limited* is in error;

<sup>47</sup> HC 102(1978-79)iii.

<sup>48</sup> 'Use of or reference to the records of the proceedings of the House in the Courts', *Report of Committee of Privileges*, PP 154(1980)49.

- (2) that, whilst recognising that there are statutory exceptions, such as the Parliamentary Proceedings Broadcasting Act, and common law exceptions, such as the fair and accurate reporting of the proceedings of the House by the Press, the House reaffirms—
  - (a) that as a matter of law there is no such thing as a waiver of Parliamentary Privilege;
  - (b) that the House has a paramount right to impose such conditions as it deems appropriate on the production of any *Hansard* report or record of its proceedings in a Court; and
  - (c) that such conditions as a matter of law are binding upon the Court before which the *Hansard* report or other records of its proceedings are produced.<sup>49</sup>

The House debated the report and recommendations on 17 September 1980 and resolved that it was of the opinion that the report should be considered early in the 32nd Parliament.<sup>50</sup>

Since the completion of the House of Representatives inquiry, the House of Commons, on 31 October 1980, resolved:

That this House while re-affirming the status of proceedings in Parliament confirmed by Article 9 of the Bill of Rights, gives leave for reference to be made in future Court proceedings to the Official Report of Debate and to the published Reports and evidence of Committees in any case in which, under the practice of the House, it is required that a petition for leave should be presented and that the practice of presenting petitions for leave to refer to parliamentary papers be discontinued.<sup>51</sup>

The 1980 resolution of the Commons has no automatic application to the House of Representatives. However, in dealing with any future requests for the use of its records in court proceedings, the House may well wish to take account of that resolution.

## FREEDOM FROM ARREST

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

As it is an essential part of the constitution of every court of judicature, and absolutely necessary for the due execution of its powers, that persons resorting to such courts, whether as judges or as parties, should be entitled to certain Privileges to secure them from molestation during their attendance; it is more peculiarly essential to the Court of Parliament, the first and highest court in this kingdom, that the Members, who compose it, should not be prevented by trifling interruptions from their attendance on this important duty, but should, for a certain time, be excused from obeying any other call, not so immediately necessary for the great services of the nation: it has been therefore, upon these principles, always claimed and allowed, that the Members of both Houses should be, during their attendance in Parliament, exempted from several duties, and not considered as liable to some legal processes, to which other citizens, not intrusted with this most valuable franchise, are by law obliged to pay obedience.<sup>52</sup>

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

The duration of the privilege includes times when a Member is journeying to and returning from Parliament as indicated by *May*:

... because the ... privilege is always associated with the service of the House, it is limited to a period comprised by the duration of the session, together with a convenient and reasonable time before and after the meeting of Parliament. This convenient and reasonable time has generally been taken to be forty days before and after a session of Parliament.<sup>53</sup>

<sup>49</sup> PP 154(1980)6.

<sup>50</sup> VP 1978-80/1672.

<sup>51</sup> H.C. Deb. (31.10.80)916.

<sup>52</sup> Hatsell, vol. 1, pp. 1-2.

<sup>53</sup> *May*, p. 94.

The privilege 'has lost almost all its value since, as a result of the Judgments Act, 1838, s.1., and subsequent legislation, imprisonment in civil process has been practically abolished'.<sup>54</sup>

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

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

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

... having regard to the complexities and circumstances of the case ... the House would best consult its own dignity by taking no action in regard to the breach of Parliamentary Privilege which had occurred.<sup>55</sup>

On 23 August 1971, the House agreed to take note of the report. During the course of the debate, the Minister representing the Attorney-General tabled correspondence from the New South Wales Premier and the New South Wales Attorney-General which expressed the strong view that the committee's finding was inconsistent with decisions of New South Wales courts which held that imprisonment for costs is 'criminal in nature'.<sup>56</sup>

### Extension of privilege to others

Upon the same ground as the necessity for Members to attend their duties in Parliament, witnesses summoned to attend before the House, or a committee of the House, and others in personal attendance upon the business of the House are entitled to freedom from arrest and molestation in 'coming, staying and returning'. Officers in immediate attendance on the House are similarly privileged.<sup>57</sup>

### Exemption from jury service

Based on the House's prior claim to the services of its Members, there is the related exemption of Members from jury service:

... the service of Members upon juries not being absolutely necessary, their more immediate duties in Parliament are held to supersede the obligation of attendance in other courts.<sup>58</sup>

This exemption has been incorporated in the *Jury Exemption Act* 1965. Certain officers of the Parliament required for immediate attendance on the Parliament, are similarly exempted from jury service in the Australian Capital Territory by regulations<sup>59</sup> made under the Act.

<sup>54</sup> *May*, p. 93.

<sup>55</sup> 'Commitment to prison of Mr T. Uren, M.P.', *Report of Committee of Privileges*, PP 40(1971)6.

<sup>56</sup> VP 1970-72/667; H.R. Deb. (23.8.71)526-9.

<sup>57</sup> *May*, p. 110.

<sup>58</sup> *May*, p. 102.

<sup>59</sup> Jury Exemption Regulations, SR 131 of 1970.

**Exemption from attendance as a witness**

The Parliament also claims the right of the service of its Members and officers in priority to a subpoena to attend as a witness in court ' . . . upon the same principle as other personal privileges, namely, the paramount right of Parliament to the attendance and service of its Members'.<sup>60</sup> In the House of Commons it has been held on occasions that the service of a subpoena on a Member to attend as a witness was a breach of privilege.<sup>61</sup> Under present usage the normal practice in the House of Representatives is for the Speaker to write to the court asking that the Member be excused. The alternative is for the House to grant leave to the Member to attend.

The practice of the Speaker writing to the court was followed in 1965 when the Treasurer was served with a subpoena commanding him to attend before the Supreme Court of Victoria. In writing to the court the Speaker drew its attention to the claim of the House to the privilege of exemption of a Member from attendance as a witness before a court whilst the House was in session. The Speaker advised that the House was at the time in session and requested that the Treasurer be excused from attendance. His Honour Mr Justice Smith later directed that the Treasurer be excused from attendance before the court until the end of the sitting of the House. His Honour observed, *inter alia*, that he had had the impression that issuing service of a subpoena in those circumstances was not regarded as an infringement of privilege but that the Member had a clear privilege entitling him to refrain from attending during the continuance of the sittings of the House. His Honour ruled as follows:

In my view, the Right Honourable the Treasurer in his capacity as a member of the House of Representatives has in law a privilege to refrain from attending this Court pursuant to the subpoena that was served upon him, and that privilege, in my view, will extend throughout the rest of the current session of the House of Representatives. I do not think that the privilege is of such a limited nature as to require or enable this Court to investigate the question whether particular periods occur during the sessions of the House when a member could, without interfering with the performance of his duties as a member, attend the Court and give evidence. The privilege, in my view, is a general one which entitles the member to decline to attend the Court pursuant to the subpoena and to maintain that refusal throughout the current session of the House. That being so, it would seem to me that for this Court to excuse attendance in this case may add nothing to the rights and privileges which already exist. But as the Court has been requested by the Speaker to excuse the Minister from attendance and as it may assist to clarify the situation in the minds of persons concerned in the present problem, I direct that the Right Honourable the Treasurer be excused from attendance before this Court pursuant to the writ of subpoena which required his attendance on 10th of this month and from day to day thereafter. I direct that he be so excused until the present sitting of the House of Representatives comes to an end.<sup>62</sup>

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

In all cases in which Members of either House are arrested on criminal charges, the House must be informed of the cause for which they are detained from their service in Parliament.<sup>63</sup>

The committal of a Member for any criminal offence, including contempt of court, is similarly notified to the Speaker by the committing judge or magistrate. When Mr Uren was committed for 40 days for his failure to pay court costs of \$80 (*see* p. 651), advice of his imprisonment (and subsequent release) was conveyed to the Speaker and reported by him to the House at its next sitting.

<sup>60</sup> *May*, p. 102.

<sup>61</sup> *May*, pp. 101-02.

<sup>62</sup> *Di Nardo v. Downer* (1966) Victorian Reports 351-2.

<sup>63</sup> *May*, p. 105.

On 26 February 1980, the Senate agreed to a resolution relating to the right of the Senate to receive notification of the detention of its Members. The resolution was communicated to the Presiding Officers of the Parliaments of the States, the Attorneys-General of the States and the Speaker of the House of Representatives.<sup>64</sup>

## ACTS CONSTITUTING BREACHES OF PRIVILEGE AND CONTEMPTS

The following paragraphs are confined mainly to a record of those matters on which the House of Representatives has determined acts or conduct constituting breaches of privilege or contempt. The experience of the House, because of its relative short history, is limited and for guidance as to precedents of other acts constituting contempt, reference is made to the experience of the House of Commons as recorded in *May*.<sup>65</sup> Appendix 32 should be consulted for those other matters raised in the House but which, for various reasons, were either not concluded or which were not construed by the House as acts constituting contempt.

### Misconduct

#### *By Members and others*

Each House of Parliament has power to punish its Members or other persons for disorderly conduct and other contempts committed in the House while it is sitting and beyond its walls.<sup>66</sup>

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

Any disorderly, contumacious or disrespectful conduct in the presence of either House or any committee thereof, whether by strangers present or by persons attending as parties or witnesses, will constitute a contempt. For this purpose a Member present at a committee, who is not of the committee, must be considered as standing, in most respects, on the same footing as a stranger.<sup>67</sup>

The most frequent example of disorderly conduct on the part of strangers is the interruption or disturbance of the proceedings of the House by visitors in the galleries, generally seeking to publicise some political cause.

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

Disobedience to the orders of either House, whether such orders are of general application or require a particular individual to do or abstain from doing a particular act, or contravention of any rules of either House is a contempt of that House.<sup>68</sup>

Examples of this type of contempt include the refusal of a witness or other person to attend the House or a committee after having been summoned to attend and refusing to withdraw from the House or a committee when directed to do so. 'To prevent, delay, obstruct or interfere with the execution of the orders of either House or of committees of either House is a contempt of such House'.<sup>69</sup>

*Curtin Case* (1953)<sup>70</sup>: On 17 March 1953, the House resolved that contempt of its ruling and authority had taken place by a Member who, on 13 March, had failed to observe an order for his exclusion from the Parliament building following his

64 See Ch. on 'The Parliament'.

65 *May*, pp. 136-61. It is stated at p. 136 'It would be vain to attempt an enumeration of every act which might be construed into a contempt' (emphasis added).

66 *May*, p. 116.

67 *May*, p. 136.

68 *May*, p. 138.

69 *May*, p. 140.

70 VP 1951-53/611,609.

suspension from the House for using an unparliamentary expression. Following the resolution the Member made an apology to the House which the House resolved to accept and no further action was taken.

#### *Abuse of the right of petition*

'Any abuse of the right of petition will be treated by either House as a breach of privilege'.<sup>71</sup> Examples of this type of breach include:

- frivolously, vexatiously or maliciously submitting to either House a petition containing false, scandalous or groundless allegations against any person, whether a Member of such House or not, or contriving, promoting and prosecuting such petitions;
- presenting a petition containing gross misrepresentations, and
- inducing persons to sign petitions by false representations.<sup>72</sup>

#### *Forged or falsified documents*

It is a breach of privilege to present or cause to be presented to either House or to committees of either House forged, falsified or fabricated documents with intent to deceive such House or committees or to subscribe the names of other persons or fictitious names to documents intended to be presented to either House or committees of either House, or to be privy to, or cognizant of, such forgery or fraud.<sup>73</sup>

In 1907, a committee of the House of Representatives reported that signatures to a petition were found to be forgeries and the House 'requested' the Crown law authorities to take action with a view to criminal prosecution. The House was later advised, however, that prosecution for forgery would be unsuccessful.<sup>74</sup> In 1974, a letter published in a newspaper in the name of a Member was found by the Committee of Privileges to be a forgery and therefore appeared to constitute a criminal offence. As the author of the letter was unknown, no legal action could be taken.<sup>75</sup>

#### *Conspiracy to deceive*

It is a breach of parliamentary privilege to conspire to deceive either House or committees of either House. The abuse of the right of petition and forging or falsifying documents (*see above*) are examples of this type of breach.

#### *Deliberately misleading the House*

The House may treat the making of a deliberately misleading statement as a contempt.

In 1963 the House [of Commons] resolved that in making a personal statement which contained words which he later admitted not to be true, a former Member had been guilty of a grave contempt (*Profumo's case*, C.J. (1962-63), 246).<sup>76</sup>

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

<sup>71</sup> *May*, p. 140.

<sup>72</sup> *May*, p. 140.

<sup>73</sup> C.J. (1857-58) 247-8.

<sup>74</sup> V.P. 1907-08/165,267.

<sup>75</sup> *'Sun News Pictorial' Case* (1973); P.P. 65(1974); V.P. 1974/98.

<sup>76</sup> *May*, p. 142.

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

The acceptance by any Member of either House of a bribe to influence him in his conduct as such Member or any fee, compensation or reward in connection with the promotion of, or opposition to any bill, resolution, matter or thing submitted or intended to be submitted to the House or any committee thereof is a breach of privilege.<sup>77</sup>

The House of Commons has not confined itself to the repression of direct pecuniary corruption. To guard against indirect influence it has forbidden the acceptance of fees by its Members for professional services connected with proceedings in Parliament.<sup>78</sup>

### *Advocacy by Members*

On 22 June 1858 the House of Commons resolved, "That it is contrary to the usage and derogatory to the dignity of this House that any of its Members should bring forward, promote or advocate in this House any proceeding or measure in which he may have acted or been concerned for or in consideration of any pecuniary fee or reward".<sup>79</sup>

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

### *Arrest and molestation*

As stated earlier, it is a contempt to cause or effect the arrest of a Member, except on a criminal charge, during a session or during the 40 days before, or the 40 days after, a session of the Parliament (*see* p. 650). A similar freedom from arrest is enjoyed by officers in immediate attendance upon the service of the House.

It is also a breach of privilege to molest a Member while attending, coming to, or going from the House. Similarly, it is a breach of privilege to attempt to influence a Member in his conduct by threats or to molest any Member on account of his conduct in the Parliament.

The obstruction of officers of the House in the execution of their duty or other people employed by the House, or entrusted with the execution of its orders, or the molestation of those people on account of their having carried out their duties, constitutes contempt. It is a breach of privilege to commence proceedings against such officers or other people for their conduct in obedience to the orders of the House.

## **Attempts by improper means to influence Members in their parliamentary conduct**

### *The offer of a bribe*

The acceptance by any Member of a bribe to influence him in his duty as a Member is a breach of privilege (*see above*). The offering of a bribe to a Member to influence him in his parliamentary conduct is equally a breach of privilege.

### *Attempted intimidation of Members*

To attempt by any means to influence a Member in his conduct as a Member is a breach of privilege.<sup>80</sup> So too is any conduct having a tendency to impair a Member's independence in the future performance of his duty.

In a notable case the House of Commons Committee of Privileges in 1947 inquired into a complaint that certain actions of the Executive Committee of the Civil Service Clerical Association were calculated, improperly, to influence a Member (Mr Brown)

<sup>77</sup> May, p. 142; and *see* Constitution, s. 45.

<sup>78</sup> May, p. 142.

<sup>79</sup> May, p. 143; but *see* Ch. on 'Control and conduct of debate'.

<sup>80</sup> In the *Chairman of Sydney Stock Exchange Case* (1935) the question of an alleged threat to a Member was not pursued by the House, VP 1934-37/149-50.



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

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

It is a breach of privilege to take or threaten action which is not merely calculated to affect the Member's course of action in Parliament, but is of a kind against which it is absolutely necessary that Members should be protected if they are to discharge their duties as such independently and without fear of punishment or hope of reward.<sup>81</sup>

**'BANKSTOWN OBSERVER' (BROWNE/FITZPATRICK) CASE**

On 8 June 1955, the Committee of Privileges reported to the House that it had found<sup>82</sup>:

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

The committee's inquiry and report followed a complaint made by a Member (Mr Morgan) on 3 May 1955 that an article published on 28 April 1955 in a weekly newspaper known as the *Bankstown Observer*, circulating in his electorate, impugned his personal honour as a Member of Parliament and was a direct attack on his integrity and conduct as a Member of the House.<sup>83</sup> On 26 May 1955, the committee presented a special report to the House seeking authority to include in its investigation articles appearing in the same newspaper on 5, 12 and 19 May 1955.<sup>84</sup> The House acceded to the committee's request on 31 May 1955.<sup>85</sup>

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

81 HC 118(1947)xii.

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

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

84 VP 1954-55/225.

85 VP 1954-55/239.

following day the House would hear them at the Bar before proceeding to decide what action it would take in respect of their breaches of privilege.<sup>86</sup>

On being brought to the Bar of the House the following morning<sup>87</sup>, Mr Fitzpatrick sought permission for his counsel to act on his behalf. The request was refused by the Speaker and Mr Fitzpatrick apologised to the House for his actions and withdrew. Mr Browne was then brought to the Bar and addressed the House at some length without apologising and withdrew.

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

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

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

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

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

The action taken by the legal representatives of Messrs Browne and Fitzpatrick to apply to the High Court for writs of habeas corpus and their subsequent petition to the Judicial Committee of the Privy Council for special leave to appeal against the decision of the High Court is referred to earlier (*see* p. 641).

## Obstructing witnesses

### *Arrest*

It is a contempt of the House to:

. . . arrest or procure the arrest on civil process of witnesses or other persons summoned to attend either House or any committee of either House while going to, attending, or returning from, such House or committee.<sup>88</sup>

### *Molestation*

It is a contempt to molest any persons attending either House or committees of either House as witnesses during their attendance in such House or committee.<sup>89</sup>

. . . any molestation of, or threats against, persons who have given evidence before either House or before committees of either House will be treated by the House concerned as a breach of privilege.<sup>90</sup>

<sup>86</sup> VP 1954-55/267.

<sup>87</sup> For proceedings on this day *see* VP 1954-55/269-71; H.R. Deb. (10.6.55) 1625-65.

<sup>88</sup> *May*, p. 156.

<sup>89</sup> *May*, p. 156.

<sup>90</sup> *May*, p. 157.

*Tampering*

To tamper with a witness in regard to the evidence to be given before either House or any committee of either House or to endeavour, directly or indirectly, to deter or hinder any person from appearing or giving evidence is a breach of privilege.<sup>91</sup>

Any conduct which is calculated to deter prospective witnesses from giving evidence before either House or before committees of either House is a breach of privilege. It is upon this principle that witnesses are protected from arrest, not only while going to or attending either House or committees of either House, but while returning from such House or committees.<sup>92</sup>

Both Houses will treat the bringing of legal proceedings against any person on account of any evidence which he may have given in the course of any proceedings in the House or before one of its committees as a breach of privilege.<sup>93</sup>

*Berthelsen Case* (1980)<sup>94</sup>: A matter of alleged discrimination against and intimidation of a witness who had given evidence to a parliamentary sub-committee was referred to the Committee of Privileges on 23 April 1980. Although the committee was not satisfied, on the evidence, that a breach of privilege had been proved against any person, it found that the witness had been disadvantaged in his career prospects in the public service. The House, on the recommendation of the committee, and being of the opinion that the report be given full consideration early in the 32nd Parliament, resolved that the Public Service Board be requested to do all within its power to restore the witness' career prospects and ensure that no further disadvantage was suffered as a result of the case.

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

*Reflections on Members*

Printing or publishing any libels reflecting upon any Member of the House for or relating to his service as a Member is a 'high violation' of the rights and privileges of the House.<sup>95</sup> To constitute a breach of privilege a libel on a Member **must concern the character or conduct of the Member in that capacity.**

*'South Australian Worker' Case* (1931)<sup>96</sup>: On 12 May 1931, the House adjudged that comments published in the *South Australian Worker* on the actions of the Speaker and his control of the business of the House were gross and malicious misrepresentations of the facts. The House resolved that the editor and publisher of the newspaper were guilty of contempt.

*BMC Case* (1965)<sup>97</sup>: An advertisement showing the Leader of the Opposition addressing the House and which appeared in several newspapers on behalf of the British Motor Corporation, was found by the Committee of Privileges to represent a breach of privilege. The committee also found that it was published without malice towards the House or any Member or intent to libel any Member. On 23 September 1965, the House resolved to accept these findings and also judged the advertisement to be defamatory of the Leader of the Opposition.

*'The Sun News Pictorial' Case* (1974)<sup>98</sup>: The House agreed with the Committee of Privileges that a letter fraudulently written in a Member's name and published in a newspaper on 6 December 1973 was a forgery and as such appeared to constitute a

91 *May*, p. 157.

92 *May*, p. 157.

93 *May*, p. 158.

94 PP 158(1980); VP 1978-80/1372, 1375, 1417, 1422, 1672-3.

95 See resolution of the House of Commons 1701, CJ (1699-1702) 767; see also VP 1912/305.

96 VP 1929-31/613.

97 PP 210(1964-66); VP 1964-66/347, 386.

98 PP 65(1974); VP 1974/98.

criminal offence. The House agreed that the letter wilfully and fraudulently misrepresented the Member and the unknown writer was guilty of a serious contempt of the House.

**Other cases:** The House has considered further matters in respect of this form of contempt with the following result:

- *McGrath Case* (1913)<sup>99</sup>: In view of statements made by a Member, outside the House, in the nature of reflections on the Speaker, the House suspended the Member for the remainder of the session unless he sooner unreservedly retracted the words used. Although the Member remained suspended, the House in the next Parliament ordered the expunging of the resolution from the records as being subversive of the right of a Member to freely address his constituents.
- On 9 August 1912, a Member gave notice of motion with respect to a reflection made on him in the *Age* newspaper. The notice was withdrawn by the Member on 13 August on receipt of an apology from the newspaper representative.<sup>100</sup>
- A Member's remarks reflecting on the Chairman of Committees and published in a newspaper were the basis of a motion to suspend the Member from the House on 3 May 1945. The motion was withdrawn following an apology by the Member for the statement.<sup>101</sup>

### *Speeches or writings reflecting on the House*

To print or publish any books or libels reflecting on the proceedings of the House is a high violation of the rights and privileges of the House<sup>102</sup>, and indignities offered to the House by words spoken or writings published reflecting on its character or proceedings have been constantly punished by the House of Commons upon the principle that such acts tend to obstruct the House in the performance of its functions by diminishing the respect due to it. Reflections upon Members, the particular individuals not being named or otherwise indicated, are equivalent to reflections on the House.<sup>103</sup>

'*The Sunday Sun*' and '*The Sun*' Cases (1933)<sup>104</sup>: On 26 October 1933, the House found that comments published in *The Sunday Sun*, critical of Parliament in respect of allowances of Members, were mischievous and malicious and constituted a grave and unscrupulous attack upon the honour of the Parliament and its Members. The House declared that the printer and publishers were guilty of contempt. On the following day the same printer and publishers were responsible for an article in *The Sun* critical of the resolution of 26 October. The House, considering a motion that they be called to the Bar of the House, resolved to accept a withdrawal made in a letter to the Prime Minister, and no further action was taken.

'*The Sun*' Case (1951)<sup>105</sup>: On 13 November 1951, the House agreed with the findings of the Committee of Privileges that a breach of privilege had been committed by the publication of an article in *The Sun* newspaper. The article, which related to Members' purchases in the parliamentary refreshment rooms, was, in the view of the committee and confirmed by the House, not wholly untrue but contained statements concerning the conduct of Members which were grossly exaggerated and erroneous in their implications.

*Browne/Fitzpatrick Case* (1955)<sup>106</sup>: The House agreed with the Committee of Privileges in one of its findings in this case that some of the references to Parliament and the Committee of Privileges in articles published in the *Bankstown*

<sup>99</sup> VP 1913/151-3; VP 1914-17/181.

<sup>100</sup> NP 30(13.8.12)173; VP 1912/91.

<sup>101</sup> VP 1945-46/63.

<sup>102</sup> See resolution of the House of Commons 1701, CJ (1699-1702)767.

<sup>103</sup> *May*, pp. 144-5.

<sup>104</sup> VP 1932-34/755,757,791-2.

<sup>105</sup> VP 1951-53/171; and see Appendix 32.

<sup>106</sup> H of R 2(1954-55); VP 1954-55/267.

*Observer* constituted contempt of the Parliament (see p. 656 for further details of this case).

'*The Australian*' Case (1971)<sup>107</sup>: On 4 November 1971, the House agreed with the Committee of Privileges that the publication of a letter accusing Members (unnamed) of accepting bribes, in *The Australian* newspaper, constituted a contempt of Parliament. The House agreed that the author of the letter (unknown) and the editor were both guilty of a breach of privilege. Although it was published without malice to the House or any Member, the allegations could not be substantiated.

'*Daily Telegraph*' Case (1971)<sup>108</sup>: An article published in the *Daily Telegraph* on 27 August 1971 concerning events connected with the 'count out' of the House the previous day was found by the House, on recommendation of the Committee of Privileges, to constitute a contempt of the House. The writer of the article and the editor-in-chief were adjudged guilty of contempt.

'*Sunday Observer*' Case (1978)<sup>109</sup>: On 13 April 1978, the House agreed with the Committee of Privileges in its finding that the publication of an editorial in the *Sunday Observer* constituted a contempt of the House and that the editor-in-chief and the editor were both guilty of a contempt of the House. In the view of the committee the editorial which referred to events of the opening week of the 31st Parliament cast reflections on Members in such a way as to bring the House into contempt and contained allegations which the committee found to be without foundation.

In the '*Daily Telegraph*' Case (1971) the Speaker drew attention to a statement in the newspaper concerning an alleged criticism of a decision of the House Committee by the Prime Minister at a party meeting. The Committee of Privileges reported to the House that the publication did not contain any allegation or suggestion of dishonest or improper conduct by the House Committee or its Members in the performance of their parliamentary duties. The committee found the publication did not amount to a contempt but felt compelled to express its disapproval.<sup>110</sup>

#### *Premature publication or disclosure of committee proceedings, evidence and reports*<sup>111</sup>

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

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

Most evidence taken by parliamentary committees is taken in public and publication of the evidence is expressly authorised by the committee under the provisions of sub-section 2 (2) of the *Parliamentary Papers Act* 1908. The provisions of the standing orders (in respect of publication of committee proceedings) are not enforced when this occurs. However, the publication or disclosure of evidence taken in camera, or the publication or disclosure of draft reports of a committee before their presentation to the House, constitutes a breach of privilege or contempt.

<sup>107</sup> PP 182(1971); VP 1970-72/818.

<sup>108</sup> PP 242(1971); VP 1970-72/901-02.

<sup>109</sup> PP 120(1978); VP 1978-80/147-8.

<sup>110</sup> VP 1951-53/131,165; and see Appendix 32.

<sup>111</sup> See also Ch. on 'Parliamentary committees'.

'*The Sun*' Case (1973)<sup>112</sup>: *The Sun* newspaper having published matter relating to the contents of a draft report of the Joint Committee on Prices on 18 September 1973, the House agreed with the Committee of Privileges finding that a breach of privilege had occurred and that the editor and journalist were guilty of a contempt of the House.

'*Daily Telegraph*' Case (1971)<sup>113</sup>: In this case the Committee of Privileges expressed concern at an apparent premature disclosure of part of its proceedings. The committee found the action of the person or persons (unknown) to be a breach of standing orders and a breach of a well established privilege in that proceedings of the committee were disclosed prior to the presentation of its report to the House.

#### *Other indignities offered to the House*

Other acts besides words spoken or writings published reflecting upon either House or its proceedings which, though they do not tend directly to obstruct or impede either House in the performance of its functions, yet have a tendency to produce this result indirectly by bringing such House into odium, contempt or ridicule or by lowering its authority may constitute contempts.<sup>114</sup>

An instance of this type of contempt is disorderly conduct within the precincts of either House while such House is sitting or during committee proceedings.

#### *Serving or executing civil or criminal process within the precincts of the House*

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.

*Blakeley Case* (1922)<sup>115</sup>: On 6 October 1922, a complaint was made to the House of Representatives that a summons had been served upon a Member in the precincts of the House while the House was sitting. The Attorney-General undertook to look into the matter. On 11 October 1922, he gave the opinion that it was not desirable to proceed further in the case but that 'those entrusted with the service of process of the Court should take steps to have summonses served in the ordinary way, as it is not a desirable practice that service should, under any circumstances, be made within the precincts of this House while the House is sitting'.

It has been held that a process should not be served within the precincts of Parliament House even when the House is not sitting without the consent of the Speaker or the President.

#### **Matters incidental to House's consideration of privilege cases**

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

That, in the opinion of this House, immediate action should be taken to protect Members of this Parliament from the aspersions and misrepresentations of the newspaper press by mak-

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

113 PP 242(1971).

114 *May*, p. 147.

115 VP 1922/190,201; H.R. Deb. (6.10.22)3337-8; H.R. Deb. (11.10.22)3555.

ing an order that, when any article or paragraph appears in a newspaper reflecting upon the good conduct or integrity of a Member which, in the opinion of the said Member, is calculated to prejudice him in the eyes of the community, and the Member affected, by personal explanation or otherwise, declares that the statements so made in regard to himself are erroneous, misleading, and injurious, and the House, in good faith accepts such statement, no representative or representatives of the newspaper implicated be allowed within the precincts of Parliament House unless, or until, the explanation or contradiction made by the aggrieved Member be given in the aforesaid newspaper prominence equal to that given to the offending article or paragraph.<sup>116</sup>

On 24 October 1919, the Speaker drew to the attention of the House a matter concerning the Economies Royal Commission as it affected the privileges of Parliament. The Royal Commission proposed to investigate expenditure in connection with parliamentary services and the Speaker said that as it had no authority from the Parliament to interfere in any way with the various services of Parliament, it was his duty to call attention to the proposed serious encroachment on the rights and privileges of Parliament by a tribunal to inquire into matters over which the legislature had absolute and sole control. The Government gave an assurance that no privileges of the Parliament would be in any way infringed by the operation of the Royal Commission.<sup>117</sup>

In the *Chairman of the Sydney Stock Exchange Case* (1935) the House resolved on 28 March 1935, that a letter written by the Chairman, allegedly making a threat and reflecting on the motives and actions of a Member, did not amount to a breach of privilege but was, in effect, an exercise of the right of an individual to defend himself. The House considered, however, that the Chairman was in error in addressing a letter to the Speaker instead of direct to the Member concerned.<sup>118</sup>

## PENAL JURISDICTION OF THE HOUSE

### Power and source

By section 49 of the Constitution the House of Representatives acquired the powers, privileges and immunities of the House of Commons as at 1 January 1901, until the Parliament otherwise declares (*see* p. 645). In the absence of such a declaration of those powers, privileges and immunities, they remain those of the House of Commons as at that date.

The High Court judgment in the case of Browne and Fitzpatrick (*see* p. 642) left no doubt that the House of Representatives possessed all of the powers, privileges and immunities of the Commons.

*May* states that:

Each of the two Houses of Parliament has power to punish its Members for disorderly conduct and other contempts committed in the House while it is sitting, and one method of punishment is committal either to the custody of its own officers or to one of Her Majesty's prisons. The penal jurisdiction of the Houses is not confined to their own Members nor to offences committed in their immediate presence, but extends to all contempts of the Houses, whether committed by Members or by persons who are not Members, irrespective of whether the offence is committed within the House or beyond its walls.

It is necessary to emphasize the fact that the power possessed by each of the Houses is a general power of committing for contempt analogous to that possessed by the superior courts, and is not restricted to cases in which the privileges enjoyed by the House, in its collective capacity or by its Members as such, have been violated . . .<sup>119</sup>

<sup>116</sup> VP 1912/305.

<sup>118</sup> VP 1934-37/149-50.

<sup>117</sup> VP 1917-19/587; *see also* Ch. on 'Parliament House and the House of Representatives Chamber'.  
<sup>119</sup> *May*, p. 116.

The principal means by which the Houses may enforce the observance of their privileges and immunities and may punish people found guilty of not doing so, are by commitment to prison (*see below*) or by (public) reprimand or admonishment (*see p. 666*). The power of the Houses to punish by means of imposing a fine on people found guilty of a breach of privilege or of contempt is less certain (*see p. 664*). The usual means by which the House will take action against offenders is the requirement for an apology (publicly, if appropriate) or in the case of media representatives, their exclusion from the precincts (*see p. 667*).

In a case in which an offence may be adjudged a breach of privilege or a contempt but also an offence at law, and one in which penalties available to the House are inadequate for the offence or for some other reason, the House may choose not to exercise its power of punishment. Alternatively, it is a recognised right of the House, to direct the Attorney-General to prosecute the offender. There is no case of the House so directing the Attorney-General to prosecute, *per se*.<sup>120</sup>

In 1907, a committee of the House reported that signatures to a petition were found to be forgeries and the House 'requested' the Crown law authorities to take action with a view to criminal prosecution. The House was later advised, however, that prosecution for forgery would be unsuccessful.<sup>121</sup> In 1974, a letter published in a newspaper in the name of a Member was found by the Committee of Privileges to be a forgery and therefore appeared to constitute a criminal offence. As the author of the letter was unknown no legal action could be taken.<sup>122</sup>

Although the House may consider that a breach of privilege or a contempt has been committed it may take no further action<sup>123</sup> or it may decide, having regard to the circumstances of the case, to 'consult its own dignity' by taking no punitive action<sup>124</sup> (*and see Browne/Fitzpatrick case, p. 656*).

The only other course of action adopted by the House of Representatives in respect of enforcing its privileges has been by resolution requesting that remedial action be taken by the Public Service Board to restore the career prospects of a public service witness who was found by the Committee of Privileges to have been disadvantaged as a result of his involvement with a parliamentary sub-committee.<sup>125</sup>

## Commitment

*May* describes the power of commitment as the 'keystone of parliamentary privilege'<sup>126</sup> and, in referring to its frequent exercise and undoubted recognition over previous centuries, makes the following important comment:

In modern times the indispensibility of the power of commitment to any body responsible to public opinion, whether its functions are legislative or judicial, has been amply demonstrated by experience [reference made to House of Representatives case of Browne and Fitzpatrick, 1955]. Being shared by the courts, it is not an exclusively parliamentary privilege.

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

121 VP 1907-08/165,267.

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

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

124 See *'The Sun' Case* (1951), VP 1951-53/171; *The 'Daily Telegraph' Case* (1971), VP 1970-72/901-02. For other examples see *Uren Case* (1971), PP 40(1971), VP 1970-72/667; *'Sunday Observer' Case* (1978) 'actions of editor not worthy of occupying the time of the House', PP 120(1978), VP 1978-80/147-8.

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

126 *May*, p. 117.



"... Representative bodies must necessarily vindicate their authority by means of their own, and those means lie in the process of committal for contempt. This applies not to the Houses of Parliament only, but ... as was observed in *Burdett v. Abbott* (14 East, 138) to the courts of justice, which, as well as the Houses, must be liable to continual obstruction and insult, if they were not entrusted with such powers" (Denman, C.J., in case of *Sheriff of Middlesex*, 3 St. Tr. (n.s.), 1253).<sup>127</sup>

Although the House of Commons 'formerly imprisoned offenders for a certain time they have abandoned the practice, and they are now considered as without power to imprison for a period beyond the session'.<sup>128</sup>

Persons committed by the *Commons*, if not sooner discharged by the House, are immediately released from their confinement on a prorogation, whether they have paid the fees or not. If they were held longer in custody, they would be discharged by the courts upon a writ of habeas corpus.

Where, however, the House considers that an offender who has thus regained his liberty has not been sufficiently punished, he may be again committed in the next session and detained until the House is satisfied.<sup>129</sup>

On the only occasion when the House of Representatives has exercised its power of commitment (see p. 657), Messrs Browne and Fitzpatrick, in 1955, were committed for 3 months. No prorogation or dissolution of the Parliament intervened during the period of their imprisonment and they served the full period of their commitment.

### Form of warrant

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

In the Browne/Fitzpatrick case, the warrants issued by Speaker Cameron stated the contempt in general terms, recited the resolution of the House to that effect and stated the terms of committal (see p. 641).

### Power to fine

The House of Commons has not imposed fines on people guilty of breach of privilege or contempt since 1666. The House of Lords has claimed to be a court of record and, as such, to have power to impose fines. *May* states:

Whether the House of Commons be, in law, a court of record, it would be difficult to determine, for this claim, once firmly maintained, has latterly been virtually abandoned, although never distinctly renounced.<sup>130</sup>

The House of Commons Select Committee on Parliamentary Privilege in its report of 1967 stated that they:

... consider that the penal jurisdiction of the House is unnecessarily handicapped by the absence of any power to impose a fine. They take the view that the type of contempt likely to be committed in modern times can often best be dealt with by a fine and that the power to impose a fine would resolve the dilemma which may on occasions face the House that a mere

<sup>127</sup> *May*, p. 119.

<sup>128</sup> *May*, p. 127.

<sup>129</sup> *May*, pp. 128-9.

<sup>130</sup> *May*, p. 117.

rebuke appears to be inadequate penalty whilst imprisonment would be unnecessarily harsh. It is moreover the only penalty which can be imposed upon a limited company or other corporate body.<sup>131</sup>

Speaking to his amendment to the motion of Prime Minister Menzies to commit Browne and Fitzpatrick, Leader of the Opposition Evatt said:

He [the Prime Minister] has said, without qualification, that there is no power resident in the House to impose a fine. In the House of Commons, the power of fining has certainly not been exercised over a great period of time. That, however, does not, in itself, prove that the power does not exist. It has fallen, as lawyers would say, into disuse or desuetude. But I do not agree that it has necessarily gone, and I say that if the Parliament is of the opinion that it is desirable, it could declare that there is power to inflict a fine.<sup>132</sup>

In a press statement issued on 13 June 1955, the Prime Minister said:

I should add that the power of the House to impose a fine is extremely doubtful, having been denied by several leading constitutional authorities. As the Constitution points out the powers are those of the House of Commons. The House of Commons has not imposed a fine for breach of privilege since 1666, but has invariably proceeded, either by committal to custody or by reprimand, in appropriate cases.

The Senate Committee of Privileges, in its first privilege report presented to the Senate on 13 May 1971, stated:

That the Senate has the power, in the enforcement of its privileges, to commit to prison, to fine, to reprimand or admonish, or otherwise to withdraw facilities held, by courtesy of the Senate, in and around its precincts.<sup>133</sup>

However, the House of Representatives Committee of Privileges, in its report presented on 7 April 1978 relating to an editorial published in the *Sunday Observer* of 26 February 1978, had this to say:

The principal penalties which the House may impose upon a privilege offender would appear to be:

- (a) to reprimand
- (b) in the case of an offence committed by a newspaper or other media organisation, to exclude its representative(s) from the precincts of the House, and
- (c) to sentence to a term of imprisonment.

Administration of a reprimand can be entirely unsatisfactory in certain instances. The Committee believes that the penalty of imprisonment is inappropriate except in the case of the most serious of privilege offences.

The power to fine was once exercised by the United Kingdom House of Commons but it fell into disuse about 300 years ago. Possession by the Commons of the power of imposing fines was denied by Lord Mansfield in the case of *R. v. Pitt* and *R. v. Mead* [(1762) 3 Burr., 1335]. Consequently, the power of the House of Representatives to impose a fine must be considered extremely doubtful. It seems to your Committee that the imposition of fines could be an optional penalty in many instances of privilege offences.<sup>134</sup>

There would appear to be little, if any, doubt that without legislation the House of Representatives does not possess the power to impose a fine in respect of the offences of breach of privilege or contempt.

131 HC 34(1967-68)xlvii.

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

133 'Articles in *The Sunday Australian* and *The Sunday*

Review of 2 May 1971', *Report of Senate Committee of Privileges*, PP 163(1971).

134 PP 120(1978)3-4.

### Reprimand or admonishment

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

In the *BMC Case* (1965) (also known as the case of 'The Canberra Times' and others), the Committee of Privileges found that an advertisement<sup>135</sup> which appeared in *The Canberra Times* and other newspapers on 18 August 1965, represented a breach of privilege. The committee also found that the ultimate responsibility for publication of the advertisement lay with 10 named individuals. The publication of the advertisement was done without malice towards the House or any Member, or intent to libel any Member and appeared through negligence and lack of appreciation of what was involved.<sup>136</sup>

The committee made no recommendation to the House as to what action it might take in respect of the offenders. A number of apologies by those involved were received or printed prior to the presentation of the committee's report to the House.<sup>137</sup>

On 23 September 1965, on the motion of the Prime Minister, the House agreed that the advertisement involved a breach of privilege, that it was defamatory of the Leader of the Opposition and, while it accepted that it was published without malice and apologies had been made, the House recorded its 'censure of the advertisement and its reprimand to those concerned in its publication'. The House further resolved that 'those newspapers who published the advertisement should publish this resolution in full', which resolution was transmitted to the named offenders.<sup>138</sup>

In 1971, 2 people found guilty of a breach of privilege were called to the Bar of the Senate and were reprimanded by the Deputy President. The background to this case was that on 4 May 1971, articles published in *The Sunday Australian* and *The Sunday Review* newspapers and allegedly containing certain findings and recommendations of a Senate select committee which had not been reported to the Senate, were referred to the Senate Committee of Privileges.<sup>139</sup>

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

That, having regard to the nature of the breaches of privilege in this case, and the circumstances in which they occurred, Mr J.R. Walsh and Mr H.B. Rothwell be required to attend before the Senate, on their own behalf and on behalf of their publishers, to be reprimanded by the Presiding Officer.<sup>140</sup>

On 13 May, the Senate adopted the committee's report and resolved that the 2 editors attend the Senate at 2.15 p.m. the next day.<sup>141</sup> They duly attended and the Deputy President administered the reprimand in the following terms:

Mr Walsh and Mr Rothwell, the decision of the Senate is that you, on your own behalf and on behalf of your publishers, be severely reprimanded for the publication of contents of a

<sup>135</sup> The advertisement contained a reproduction of a photograph of the Leader of the Opposition addressing the House and was used for the purpose of advertising products of the British Motor Corporation (Aust) Pty Ltd.

<sup>136</sup> PP 210(1964-66)7.

<sup>137</sup> PP 210(1964-66)18-19.

<sup>138</sup> VP 1964-66/386.

<sup>139</sup> J 1970-72/555.

<sup>140</sup> PP 163(1971)3.

<sup>141</sup> J 1970-72/606.

draft report of the Senate Select Committee on Drug Trafficking and Drug Abuse in Australia, prior to its presentation to the Senate. I therefore, on behalf of the Senate, severely reprimand you as guilty of a breach of privilege.<sup>142</sup>

Mr Walsh and Mr Rothwell then withdrew.

### Exclusion of media representatives from precincts

In respect of offences committed by journalists of the parliamentary press gallery a further means of punishment is the withdrawal of the journalist's press gallery pass, thereby depriving the journalist or the journalist's organisation access to the Parliament building.

In 1912, a notice of motion proposing the exclusion of representatives of the *Age* newspaper from the press gallery for statements concerning a Member was withdrawn following an apology.<sup>143</sup> In June 1942, the President as 'custodian of the rights and privileges of the Senate' demanded an apology from certain newspaper representatives for the publication of an article reflecting on the Senate. When no apology was forthcoming, action was taken to exclude the persons from the precincts of the Senate after which similar action was taken by the Speaker in respect of the precincts of the House.<sup>144</sup>

### Apology

The House of Representatives has occasionally adopted the practice of requiring a suitable apology from offenders in a class of cases involving reflections on the House or its Members by speech, action or writing. While not inflicting punishment, in its strict sense, the House may consider this course sufficient vindication of its authority. Any disregard of, or non compliance with, a resolution or order of the House of this kind could, of itself, be regarded as a contempt<sup>145</sup> and attract alternative means of punishment.

On a number of occasions comments published in newspapers, or other publications, have been regarded by the House as reflections on itself and its Members and those responsible have been adjudged guilty of contempt. The House may order the offenders to publish an apology for their actions and, if the order is complied with, the House may choose not to impose further penalties.<sup>146</sup>

In *'The Sun' Case* (1933) an apology, in the form of a withdrawal made in a letter to the Prime Minister, was received and accepted by the House **before** it had decided on what action it would take against the offenders.<sup>147</sup> Similarly, in the *'Sunday Observer' Case* (1978) the editor-in-chief and the editor were found guilty of contempt by the Committee of Privileges. In view of the publication by the editor-in-chief of an apology, the House agreed with the recommendations of the committee that no further action be taken.<sup>148</sup>

<sup>142</sup> J 1970-72/612.

<sup>143</sup> VP 1912/91.

<sup>144</sup> S. Deb. (2.6.42)1806,1818-19; S. Deb. (3.6.42)1897; H.R. Deb. (3-4.6.42)2187. Press passes may be withdrawn for other reasons see Ch. on 'Parliament House and the House of Representatives Chamber'.

<sup>145</sup> May, p. 138. On 17 March 1953 the House resolved 'that contempt of its ruling and authority' had taken place by a Member who remained in the precincts when he had earlier been excluded from the building

(Curtin case). The Member having apologised, the House resolved to accept the apology and no further action was taken, VP 1951-53/611,609.

<sup>146</sup> *'The Australian' Case* (1971); PP 182(1971); VP 1970-72/818.

<sup>147</sup> VP 1932-34/791-2. For further comment see Frank C. Green, *Servant of the House*, Heinemann, Melbourne, 1969, pp. 152-3.

<sup>148</sup> PP 120(1978)3; VP 1978-80/147-8.

In *'The Sun' Case* (1973) the Committee of Privileges, having found the editor and journalist guilty of contempt, recommended the publication of an apology. This proposed action was not undertaken by the House in view of the editor's death.<sup>149</sup>

A Member has apologised for remarks made by him reflecting on the Chairman of Committees and which were published in a newspaper, in view of which a motion that he be suspended from the service of the House was withdrawn.<sup>150</sup>

## PUNISHMENT OF MEMBERS

In respect of Members who have committed contempts, the House's power to punish includes commitment or reprimand but has 2 further dimensions, namely, suspension for a period from the service of the House or expulsion from membership of the House.

Action taken by the House to discipline its Members for offensive actions or words in the House<sup>151</sup> 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.<sup>152</sup>

### Suspension

In the *McGrath Case* (1913) a Member was suspended from the service of the House for a statement made outside the House which reflected on the Speaker. The Member was suspended for the remainder of the session but in the next Parliament the House resolved to expunge the resolution of suspension from the 'journals of the House'.<sup>153</sup>

### Expulsion

The only occasion the House has exercised its power of expulsion was in the *Mahon Case* (1920) when a Member was expelled for 'seditious and disloyal utterances' made outside the House making him, in the judgment of the House, unfit to remain as a Member.<sup>154</sup>

## MANNER OF DEALING WITH PRIVILEGE MATTERS

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

Any Member may rise in the House at any time to speak upon a matter of privilege suddenly arising.<sup>155</sup> A matter at anytime arising suspends the consideration and decision

149 PP 217(1973)5; VP 1973-74/518.

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

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

152 Notwithstanding the right of Members to freedom of speech the report of the Committee of Privileges relating to remarks made in the House (H.R. Deb. (24.5.55)1000) by a Member (together with other matters) found that the remarks of the Member were not a matter of privilege but one of order. The com-

mittee stated that all words in the House are privileged, but the House is able to place restraint on conduct of Members including their offensive accusations against other Members, '*Argus' Case* (1955) (report not printed).

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

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

155 S.O. 95.

of every other question until disposed of, unless the debate on any motion moved in relation to the matter raised is adjourned.<sup>156</sup> This precedence to privilege motions (that is, debate on a motion) over other business is dependent on 2 important conditions:

- that the Speaker is of the opinion that a *prima facie* case of breach of privilege has been made out<sup>157</sup>, and
- that the matter has been raised at the earliest opportunity.<sup>158</sup>

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

- declaring that a contempt or breach of privilege has been committed, or
- referring the matter to the Committee of Privileges.<sup>159</sup>

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

When a matter is raised by a Member, the Speaker may give his opinion immediately as to whether a *prima facie* case of breach of privilege exists<sup>160</sup> or state that he will consider the matter and give his opinion later. This may be later in the same sitting<sup>161</sup> or at a subsequent sitting.<sup>162</sup> Establishing a *prima facie* case is, in a technical sense, only for the purpose of giving precedence to a motion in relation to the matter, but the practice usually provides the House with some guidance as to the nature and acceptability of the complaint. Although the Speaker may be of the opinion that a *prima facie* case has not been made out, this does not prevent a Member from lodging a notice of motion in relation to the matter, but such a motion would not be entitled to any precedence.

Although it is irregular for debate to ensue on the matter raised until a motion has been moved<sup>163</sup>, for the purposes of clarification Members have been allowed to speak by leave or indulgence to a matter raised, before the Speaker gave his opinion and without a motion having been moved.<sup>164</sup> In determining that a *prima facie* case exists, the Speaker does not give reasons as it is for the House to decide, in practice after examination by the Committee of Privileges, whether a contempt or breach of privilege has been committed. Responsibility for privilege questions has been expressed by the Clerk of the House of Commons in the following succinct statement:

Although any Member may complain of breach of privilege, the issue cannot be decided either by the Speaker or by the Committee of Privileges. The House alone is competent to pronounce on the matter; and the House has to decide, by resolution, that a breach of privilege has been committed. The Committee of Privileges can express a view, but the House does not always accept the advice of the Committee and indeed has occasionally come to a decision without referring the issue to its Committee.<sup>165</sup>

The Speaker may give reasons or make comments if, in his opinion, a *prima facie* case does not exist.<sup>166</sup> In respect of a matter raised on 19 March 1969 the Speaker would not accept a motion as a *prima facie* case had not been made out.

156 S.O. 96.

157 S.O. 96.

158 S.O. 96; VP 1978-80/1168.

159 S.O. 95.

160 VP 1978-80/1035.

161 VP 1978-80/1372, 1375.

162 VP 1976-77/123, 129.

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

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

165 HC 34(1967-68)4.

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

Two separate matters have been raised by a Member at the same time<sup>167</sup> but a Member may not raise a matter on behalf of another Member.<sup>168</sup> In the past the Speaker, normally by way of a statement, has raised matters coming within his knowledge for the consideration and action of the House as it deems necessary.<sup>169</sup> A matter should not be raised by way of a question to the Chair.<sup>170</sup> A personal explanation cannot be made under the guise of a matter of privilege and conversely a matter should not be raised as one of privilege if it could be corrected by a personal explanation.<sup>171</sup> A matter of order or a matter coming within the standing orders or practice should not be raised as a matter of privilege.<sup>172</sup> Likewise, if a question of privilege is raised, it must be in connection with something affecting the House or its Members in their capacity as such.<sup>173</sup>

A matter may be raised at any time. It is common for matters to be raised immediately after Prayers as this is often the earliest available opportunity.<sup>174</sup> Business before the House has been interrupted to raise matters.<sup>175</sup> An exception to this rule is that a matter of privilege cannot be raised during the course of a division.<sup>176</sup>

If a Member complains to the House of a statement in a newspaper, book or other publication as a breach of privilege, the Member is required to produce a copy of the publication in question and be prepared to give, if required by the House, the name of the printer or publisher.<sup>177</sup>

#### *Matter arising in committee proceedings*<sup>178</sup>

A question of privilege arising during proceedings of the committee of the whole cannot be dealt with by the committee. The proceedings are interrupted and, on a motion being agreed to to report progress (moved usually by the Member raising the matter), the Chairman leaves the Chair.<sup>179</sup> The matter is thereupon dealt with by the House. This procedure, although previously applied in practice<sup>180</sup>, was adopted by the House on 1 May 1963 following the general review of the standing orders in 1962.<sup>181</sup>

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

#### **Action by the House**

The Standing Committee of Privileges was first established, by standing order, on 7 March 1944 and is re-appointed at the commencement of each Parliament<sup>182</sup> (see p. 671). The provision in standing order 96 for the Speaker's opinion as to whether a *prima facie* case has been made out in order to justify precedence over other business was incorporated into the procedure of the House when the standing orders were adopted on 21 March 1950.<sup>183</sup>

167 VP 1976-77/123.

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

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

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

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

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

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

174 VP 1978-80/469, 529.

175 VP 1978-80/714, 1100.

176 May, p. 346. The Chair has refused to proceed with a matter of privilege raised between the moving of the closure motion and the putting of the question until after this question and the further question were re-

solved by the House, H.R. Deb. (8.6.78)3245-6.

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

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

179 S.O. 95; VP 1974-75/148-9, 150 (motion to report progress negatived; matter again raised later in the House).

180 VP 1948-49/425.

181 H of R 1 (1962-63)25.

182 S.O. 26; VP 1943-44/80.

183 VP 1950-51/36.

In 1979, the Standing Orders Committee examined the question of raising and dealing with matters of privilege which had been a cause of increasing concern because of the frequency with which some Members had obtained precedence over other business under the guise of raising a matter of privilege.<sup>184</sup> The Speaker, in giving his decision on a matter claimed to be a breach of privilege on 8 November 1979, suggested that the House might wish to consider the method by which complaints of breach of privilege were raised in the House of Representatives (under standing orders 95, 96 and 97), and indicated that the new procedures adopted by the House of Commons might be considered by the Standing Orders Committee.<sup>185</sup> On 6 February 1978, the House of Commons had passed a resolution approving new procedures on the recommendation of the Committee of Privileges which reviewed the report of the 1967 Select Committee on Parliamentary Privilege.<sup>186</sup>

The Standing Orders Committee considered the new House of Commons privilege procedure<sup>187</sup> and recommended that standing orders 95, 96 and 97 be omitted and the following standing order along the lines of the Commons procedure be substituted:

95. Upon a matter of privilege arising:

- (a) a Member shall give written notice of the alleged breach of privilege or contempt to the Speaker as soon as reasonably practicable after the matter has come to his attention;
- (b) if the matter arises from a statement published in a newspaper, book or other publication, the Member shall provide the Speaker with a copy of the newspaper, book or publication;
- (c) the Speaker thereupon will determine as soon as practicable whether or not the matter merits precedence over other business;
- (d) if, in the opinion of the Speaker, the matter does not merit precedence, he will inform the Member, in writing, accordingly and may also inform the House of his decision, and
- (e) if, in the opinion of the Speaker, the matter merits precedence, he will inform the House of his decision, and the Member who raised the matter may move a motion without notice forthwith to refer the matter to the Committee of Privileges.<sup>188</sup>

The House has not as yet considered the committee's recommended changes to the standing orders.

### Committee of Privileges

In order to assist the House in its examination of issues of privilege the House appoints at the commencement of each Parliament a Committee of Privileges consisting of 9 Members.<sup>189</sup>

On 4 December 1980, the House agreed to a sessional order to increase the membership of the committee to 11 adding the Leader of the House (or his nominee) and the Deputy Leader of the Opposition (or his nominee) as ex officio members.<sup>190</sup>

<sup>184</sup> *Standing Orders Committee Report*, PP 345(1979).

<sup>185</sup> H.R. Deb. (8.11.79)2819-20.

<sup>186</sup> *House of Commons Committee of Privileges, 3rd Report*, HC 417(1976-77); H.C. Deb. 54(6.2.78) 1198.

<sup>187</sup> A more detailed account of the revised House of Commons procedure in respect of raising matters of privilege is at p. 5 of the report; and see George

Thomas, 'Parliamentary privilege at Westminster', *The Parliamentarian* LXI, 4, October 1980, pp. 212-14 for a review of the revised procedure.

<sup>188</sup> *Standing Orders Committee Report*, PP 345(1979).

<sup>189</sup> S.O. 26.

<sup>190</sup> VP 1980-81/64; and see Supplement to Standing Orders.



The committee's purpose is to inquire into and report on complaints of alleged breaches of privilege or contempt, or occasionally, on other matters referred to it by the House.<sup>191</sup> On the basis that privilege questions are a matter for each House alone, the committee has no power to confer with the Senate Committee of Privileges. The 2 Houses, however, 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 they deem it necessary. This action was suggested following a recommendation by the House of Representatives Committee of Privileges in 1978 that 'the whole question of parliamentary privilege' be referred to it for examination<sup>192</sup> (see p. 676).

The House of Representatives Committee of Privileges has, on 2 occasions, inquired into complaints of breach of privilege arising from inquiries conducted by joint committees of the Parliament. In 1973, it inquired into the unauthorised publication of the contents of a draft report of the Joint Committee on Prices<sup>193</sup> and, in 1980, the committee gave careful consideration to the question of its jurisdiction before determining that it had the power to inquire into matters arising from an inquiry conducted by a sub-committee of the Joint Committee on Foreign Affairs and Defence.<sup>194</sup>

The chairman of the committee is normally a backbench Member of considerable parliamentary experience. During the 28th Parliament (1973-1974) the chairman was also a Minister (Mr Enderby) and the Prime Minister (Mr Whitlam, QC) was a member of the committee. The committee usually has a number of lawyers among its members. A Member may be discharged from the committee and another appointed in his place for the consideration of particular inquiries.<sup>195</sup> This may occur if a member of the committee raised the matter in the House<sup>196</sup>, or if a member is absent or will be absent for a significant part of the inquiry or for some other reason. A Member on being elected Speaker (for example, Speaker McLeay) withdraws from the committee and a Member is appointed to fill the vacancy.<sup>197</sup> In respect of certain inquiries the committee has resolved that any statements to the press were to be made by the chairman after being authorised by the committee.<sup>198</sup>

The committee does not have the power, as of right, to call for persons, papers and records, but it is normally granted this power by the House in respect of each inquiry it undertakes.<sup>199</sup> The committee may not only investigate the specific matter referred but also the facts relevant to it.<sup>200</sup> In the *Browne/Fitzpatrick Case* (1955), the committee, in a special report to the House, sought and received authority to investigate articles in editions of the *Bankstown Observer* in addition to the edition referred to it for investigation and report.<sup>201</sup>

In the *Censorship of Members' Correspondence Case* (1944), the committee regarded itself as having no jurisdiction or authority to report on a number of matters raised during the course of the inquiry.<sup>202</sup> The committee inquiring into the '*Century*' Case (1954), acting in accordance with the practice of the House of Commons of inquiring into facts surrounding and reasonably connected with the matter of the particular complaint, commented on aspects of the production of Hansard existing at the

191 The only reference given to the committee of a general nature, that is, not arising directly from a complaint, has been the inquiry into the use of House documents in the courts, VP 1978-80/975. An earlier reference to the committee relating to a petition seeking leave to use House documents in a court case was rescinded following advice that the case had been settled, VP 1978-80/972, 975. For discussion of the committee's findings see p. 649 and Ch. on 'Papers and documents'.

192 See S. Deb. (26.2.80) 284.

193 '*The Sun*' Case (1973), PP 217(1973).

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

195 VP 1973-74/432.

196 VP 1978-80/35.

197 VP 1956-57/341, 377.

198 See '*Daily Telegraph*' Case (1971), PP 242(1971)8.

199 VP 1978-80/51.

200 May, p. 675.

201 VP 1954-55/225, 239.

202 H of R I (1943-44)3.

time.<sup>203</sup> In 1955, 2 separate but related matters referred by the House were considered together by the committee and one report made.<sup>204</sup>

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

It is the established practice that both deliberative meetings and hearings are held in camera. There is no procedural reason why hearings may not be held in public and the question is one for the judgment of the committee. On occasions members of the committee have raised the question of admitting the public to hearings but the committee has not acceded to these requests. The committee's evidence is not usually published. In only one case has the full text of evidence been published by the committee.<sup>205</sup> In the Browne/Fitzpatrick case the committee published extracts of the evidence in its report. The minutes of proceedings of the committee are always tabled with its report.

Witnesses may be examined on oath, if necessary, and are not usually permitted to be represented by counsel. In respect of the House of Commons, *May* states that:

... in a few cases incriminated persons have been allowed to be heard by counsel, the hearing being sometimes limited to "such points as do not controvert the privileges of the House".<sup>206</sup>

Where defence by counsel has been allowed in the House of Commons, counsel has at times been heard in support of the charge. Where a complaint has been referred to the Committee of Privileges 'counsel [has been] allowed, by leave of the House, to examine witnesses before the committee on behalf of both the Member who had made the complaint and the parties named therein'.<sup>207</sup>

There has been no instance of defence by counsel in respect of the House of Representatives Committee of Privileges.<sup>208</sup> In the Browne/Fitzpatrick case counsel was heard on his right to appear for a witness and on the committee's authority to administer an oath.<sup>209</sup> Counsel's arguments were considered by the committee but it did not agree to the application to appear.<sup>210</sup>

In 1959 and again in 1965, during committee deliberations on matters referred for report, a member of the committee sought to change the practice in relation to the hearing of counsel. In the first instance a motion sought a resolution that any accused person be given an opportunity to be legally represented. The motion was deferred and never voted upon.<sup>211</sup> In 1965, a number of motions were unsuccessfully moved seeking a resolution of the committee concerning rights of witnesses to be legally represented.<sup>212</sup>

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

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

205 'Daily Telegraph' Case (1971), PP 242(1971)9, 39.

206 *May*, p. 167.

207 *May*, p. 168.

208 For the role of counsel in relation to committees generally see Ch. on 'Parliamentary committees'.

209 One witness initially refused to be sworn-in.

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

211 *Somerville Smith Case* (1959) (report and minutes of proceedings not printed).

212 *BMC Case* (1965), PP 210(1964-66)9, 10, 11.

The Senate Committee of Privileges passed the following resolution on 6 May 1971:

- (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.<sup>213</sup>

The committee subsequently permitted a legal adviser to accompany a witness and to address the committee.

A witness accused of breach of privilege or contempt is not permitted to be present when other witnesses are giving evidence and has no right to cross-examine witnesses. In the *'Daily Telegraph' Case* (1971), an 'accused' witness was expressly refused permission to be present when other witnesses were giving evidence.<sup>214</sup>

It is traditionally observed that, in the consideration and determination of privilege matters, members of the committee do not act along party lines. In reaching a decision as to whether a breach of privilege or contempt had been committed in the *'Daily Telegraph'* case, 2 earlier decisions of the committee were recommitted due to the votes being taken when certain members of the committee were absent.<sup>215</sup>

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

### Proceedings following report

On presentation of the committee's report to the House by the chairman, it is now the regular practice that the report be ordered to be printed.<sup>216</sup> The House may then order that it be taken into consideration at the next sitting<sup>217</sup> or on a specified day.<sup>218</sup> In order that Members may consider the report and the questions of privilege involved, the practice of the House has been to consider the report at a future time<sup>219</sup>, but because of the importance of the House reaching decisions, particularly in respect of persons found by the committee to be guilty of committing a breach of privilege or contempt, early consideration is given by the House.<sup>220</sup>

If consideration is made an order of the day for a future day, the order of the day takes precedence over other notices and orders of the day.<sup>221</sup> A motion, or motions, may be moved declaratory of the House's view on the committee's report and recommendations and in respect of the House's proposed action, which motion is debated and decided at that time.<sup>222</sup> If the committee finds that no breach of privilege or contempt has been committed, the House may take no action in respect of the report after it has been tabled.<sup>223</sup>

213 See *Report of Senate Committee of Privileges*, Minutes of Proceedings, PP 163(1971)8-9.

214 PP 242(1971)9.

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

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

217 VP 1974/84.

218 VP 1978-80/1613.

219 For comment on this general view with respect to privilege questions see H.R. Deb. (29.5.08) 11 701-02; H.R. Deb. (27.3.35) 326.

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

221 NP 186(17.9.80) 11 681; VP 1978-80/1672-3; unless the order of the day is postponed, VP 1964-66/377.

222 VP 1978-80/147-8.

223 VP 1973-74/562; *Secretary of the Department of Aboriginal Affairs Case* (1973), PP 236(1973)4.

The House does not necessarily follow the committee's findings and recommendations in declaring itself in relation to the matter or any penalty that may be decided.<sup>224</sup>

In respect of the reports on 2 inquiries conducted by the Committee of Privileges in 1980 (the use of House records and the Bertheisen cases), which were tabled towards the end of the 31st Parliament, the House resolved, at its second last sitting, that it was of the opinion that the reports should be considered early in the next Parliament.<sup>225</sup>

### CODIFICATION OF PRIVILEGE

The question of codifying the law of privilege, both in limited areas and in an all embracing form, has been raised from time to time:

- A Parliamentary Evidence Bill was introduced in the Senate in 1904 to enable an oath or affirmation to be administered to witnesses. The bill was referred to the Standing Orders Committee after the second reading. The committee recommended that additional clauses be inserted in the bill for the punishment of witnesses who do not attend when summoned, who refuse to be sworn and who refuse to answer questions. The bill lapsed at prorogation.<sup>226</sup>
- Consideration of the above bill was resumed in the 1905 Session at the stage it had reached when interrupted by prorogation. The changes recommended by the Standing Orders Committee were made and the bill subsequently passed the Senate as the Parliamentary Witnesses Bill 1905.<sup>227</sup> The bill was introduced into the House and was read a first time, but lapsed at prorogation.<sup>228</sup> Further unsuccessful attempts were made in 1907 and 1908 to secure the passage of the bill through the House.
- In 1908, a joint select committee was appointed '... to inquire and report as to the best procedure for the trial and punishment of persons charged with the interference with or breach of the powers, privileges, or immunities of either House of the Parliament or of the Members or Committees of each House'.<sup>229</sup> The progress reports of the committee were adopted by the House<sup>230</sup> but the recommendations were not proceeded with.
- In 1934, the Standing Orders Committee requested the Crown law authorities to prepare a draft bill embodying the recommendations contained in the 1908 reports. The draft bill was duly prepared but never introduced.

On 13 June 1955, following the great amount of publicity and heated argument which developed in the press and elsewhere in respect of the Browne/Fitzpatrick case, Prime Minister Menzies, in a press statement, promised a review of privilege in the Commonwealth Parliament. In posing the question, 'Having regard to the great public interest in this matter, should Parliament address itself to a review of the machinery for declaring and enforcing its privileges', the Prime Minister suggested that, 'There could be no possible objection to this course. Indeed, I would welcome it, and will promote, in co-operation with the Opposition, the fullest consideration of it during the next sittings. But it should be understood that no future law ought to be made to operate retrospectively'.

The question of declaring the Parliament's privileges continued to be raised from time to time during the years that followed, but it was not until 1971 that a further positive statement was made. Following Senate action taken against 2 journalists in May

224 VP 1970-72/901-02.

225 VP 1978-80/1672-3.

226 J 1904/63,115,148; S 6(1904)1.

227 J 1905/4,111.

228 VP 1905/118, xlv.

229 VP 1907-08/299.

230 'Procedure in cases of privilege', *Progress reports of Joint Select Committee*, H of R 4 & 5(1907-08); VP 1907-08/516.

1971, Prime Minister McMahon was asked at a press conference whether he was prepared to revive the 1955 Menzies promise. He replied that he had asked the Attorney-General to prepare a Cabinet submission and to co-operate with others of his colleagues so that it could be taken to Cabinet.

Despite this statement, and others made subsequently by Prime Minister McMahon and others, no definitive action has been taken by the Parliament. The most recent occasion when the House of Representatives debated the matter was on 13 April 1978<sup>231</sup> when it considered the report of the Committee of Privileges relating to an editorial published in the *Sunday Observer* of 26 February 1978. As part of its report to the House the committee strongly recommended:

... that the whole question of parliamentary privilege should be referred to it for investigation and report to the House. Such reference should be couched in the broadest possible terms covering such matters as the means by which complaints of breach of privilege are referred to the Committee, the method of investigation of the complaint by the Committee, and the penalties which should be available to the House in respect of privilege offenders.<sup>232</sup>

The House agreed:

... in principle with the Committee's recommendation in relation to privilege in general, but is of the opinion that the investigation proposed should be undertaken by a Joint Select Committee, the resolution of appointment of which should be submitted to the House at the earliest opportunity.<sup>233</sup>

Draft terms of reference for the proposed joint select committee inquiry were considered and approved by the Committee of Privileges but no official response to the proposal was received from the Senate. The proposed inquiry has not eventuated.

The most persistent call made, especially from the media, is for the Parliament to 'codify its privileges'. It has been consistently claimed that the chief complaint against the present position is its uncertainty, that there is an arbitrariness in the judgments of the Committee of Privileges, that journalists work in a situation where they cannot predict the consequences of their actions, and that they are often inhibited in their inquiries and their comments as a consequence.

There is some justification for these complaints. Whilst the privileges, or more correctly the rights and immunities, of the House and its Members are limited and generally understood, it is in the area of contempt that difficulties can be experienced. As previously stated (*see* p. 644):

... any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any Member or officer of such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results may be treated as a contempt even though there is no precedent of the offence.

It would be impossible to define every act or omission which may constitute a contempt. With the changing role of Parliament and its Members, a degree of flexibility must exist for the House to deal with new circumstances that will arise. New forms of obstruction, new functions and new duties may all contribute to new forms of contempt. To set down now by definition those acts, or omissions, which may constitute contempt would be to encourage the carrying out of new acts or omissions, clearly contemptuous of the Parliament but which would not fall within the definitions. Just as the courts have not defined actions which they may regard as constituting contempt of court, and there has been no call for them to do so, so too must the Parliament retain the degree of flexibility necessary to deal with actions which obstruct or impede it, or its Members and officers, in fulfilling Parliament's role.

231 H.R. Deb. (13.4.78)1520-3.

232 VP 1978-80/147-8.

233 PP 120(1978)4.

## LIMITATIONS AND SAFEGUARDS IN THE USE OF PRIVILEGE

An important duty rests on each Member and the House as a whole to refrain from any course of action prejudicial to the privilege of freedom of speech or prejudicial to continued respect for its other rights and immunities.

This duty is expressed in the following ways:

- Firstly, in the need for a Member to avoid contractual arrangements of any kind prejudicial to limiting his independence as a Member. This duty is expressed in the resolution of the House of Commons on 15 July 1947 that:

... it is inconsistent with the dignity of the House, with the duty of a Member to his constituents, and with the maintenance of the privilege of freedom of speech, for any Member of this House to enter into any contractual agreement with an outside body, controlling or limiting the Member's complete independence and freedom of action in Parliament or stipulating that he shall act in any way as the representative of such outside body in regard to any matters to be transacted in Parliament; the duty of a Member being to his constituents and to the country as a whole, rather than to any particular section thereof.<sup>234</sup>

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

The privileges of the House are precious rights which must be preserved. The collateral obligation to this privilege of freedom of speech in the Parliament and the essential complementary privileges of the House will be challenged unless all members exercise the most stringent responsibility in relation to them. I reiterate what I said this morning, that when matters of privilege are raised I will consider them but if I come to the conclusion that there is clearly no basis whatever for the claim of privilege then I will have to report to the House that I believe that the member has misused its forms.<sup>235</sup>

- Thirdly, and analogous to the previous point, is the obligation on Members not to use the privilege of freedom of speech to be unfairly critical of the character or conduct of individuals in debate.<sup>236</sup> This view however requires some qualification in the added perspective given by Speaker Snedden in the following statement:

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

<sup>234</sup> May, p. 77. This resolution arose out of W. J. Brown's case in which the subject of the complaint was alleged improper pressure on a Member by a trade union, HC 118(1946-47); and see Marshall, in Walkland, *The House of Commons in the Twentieth Century*, pp. 223-5 for comment.

<sup>235</sup> H.R. Deb. (8.11.79)2819-20.

<sup>236</sup> See Chs on 'Motions' and 'Control and conduct of debate' for rules imposed by the House in the control of speech in the House.

had it not been for the freedom and absolute privilege that this Chamber has to raise matters and to ventilate them so that inquisitorial efforts could be taken by other people and so that the matter could be circulated with the qualified privilege of the media.<sup>237</sup>

- Fourthly, the House should exercise or invoke its privileges sparingly.<sup>238</sup> The 1967 House of Commons Select Committee on Privilege proposed the following rules to guide the House in dealing with complaints of contemptuous conduct:
  - (i) The House should exercise its penal jurisdiction (a) in any event as sparingly as possible, and (b) only when it is satisfied that to do so is essential in order to provide reasonable protection for the House, its Members or its Officers from such improper obstruction or attempt at or threat of obstruction as is causing, or is likely to cause, substantial interference with the performance of their respective functions.
  - (ii) It follows from sub-paragraph (i) of this paragraph that 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 Committee.
  - (iii) In general, the power to commit for contempt should not be used as a deterrent against a person exercising a legal right, whether well-founded or not, to bring legal proceedings against a Member or an Officer.
  - (iv) In general, where a Member's complaint is of such a nature that if justified it could give rise to an action in the courts, whether or not the defendant would be able to rely on any defence available in the courts, it ought not to be the subject of a request to the House to invoke its penal powers. In particular, those powers should not, in general, be invoked in respect of statements alleged to be defamatory, whether or not a defence of justification, fair comment, etc., would lie.
  - (v) The general rules stated in subsections (iii) and (iv) of this paragraph should remain subject to the ultimate right of the House to exercise its penal powers where it is essential for the reasonable protection of Parliament as set out in subsection (i) of this paragraph. Accordingly, those powers could properly be exercised where remedies by way of action or defence at law are shown to be inadequate to give such reasonable protection, e.g. against improper obstruction or threat of improper obstruction of a Member in the performance of his Parliamentary functions.<sup>239</sup>
- Fifthly, the House ensures that in exercising its power to punish for contempt its punitive action is appropriate to the offence committed (*see comment on previous point*).

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

238 Since the establishment of the Committee of Privileges in 1944, 20 matters have been referred to the committee; of these matters 9 were found to contain some kind of breach of privilege or contempt; and of these in only 5 cases did the House impose or insist on

any significant punitive measure; namely, in one case imprisonment, in another case a form of reprimand and in the other 3 the demand of a suitable apology; and *see* Appendix 32.

239 HC 34(1967-68)xvi-xvii. Paragraph (i) was adopted by the House of Commons on 6 February 1978, H.C. Deb. 54(6.2.78)1198; *see also* Thomas, *The Parliamentarian* LXI, p. 212.