

Parliamentary privilege

PRIVILEGE DEFINED

The term parliamentary privilege refers to the special rights and immunities which belong to the Houses, their committees and their Members, and which are considered essential for the proper operation of the Parliament. These rights and immunities allow the Houses to meet and carry out their proper constitutional roles, for committees to operate effectively, for Members to discharge their responsibilities to their constituents, and for others properly involved in the parliamentary processes to carry out their duties and responsibilities without obstruction or fear of prosecution.

Privileges are not the prerogative of Members in their personal capacities:

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.¹

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

Distinction between breach of privilege and contempt

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

Generally speaking, any act or omission which obstructs or impedes either House of Parliament in the performance of its functions, or which obstructs or impedes any Member or officer of such House in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results may be treated as a contempt even though there is no precedent of the offence. It is therefore impossible to list every act which might be considered to amount to a contempt, the power to punish for such an offence being of its nature discretionary.²

The distinction is made clearer in *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.³

It has been said that ‘All breaches of privilege amount to contempt; contempt does not necessarily amount to a breach of privilege’.⁴ In other words a breach of privilege (an infringement of one of the special rights or immunities of a House or a Member) is by its

1 HC 34 (1967–68) vii.

2 *May*, 23rd edn, p. 128.

3 *Halsbury’s Laws of England*, 3rd edn, vol. 28, p. 465; see also G Marshall, ‘The House of Commons and its privileges’, in *The House of Commons in the twentieth century*, S. A. Walkland (ed), Clarendon Press, Oxford, 1979, pp. 205–9.

4 HC 34 (1967–68) 171.

very nature a contempt (an act or omission which obstructs or impedes a House, a Member or an employee of the House, or threatens or has a tendency so to do), but an action can constitute a contempt without breaching any particular right or immunity.

THE COMMONWEALTH PARLIAMENT'S PRIVILEGE POWERS

This chapter does not attempt to record the history of the development of the law, practice and procedure of privilege, nor does it attempt to treat in detail all questions of privilege that may arise. It is limited to a general description and a summary of the more important aspects of the subject.⁵

Derivation

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.

Reference to House of Commons practice

Whilst the Commonwealth Parliament has passed legislation in this area, and although the House of Representatives has developed its own practice and created its own precedents in respect of most of its operations, in the area of parliamentary privilege⁶ the practice and precedents of the House of Commons are of continuing interest.

Statutory provisions

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

In addition, the Parliament has enacted a number of other laws in connection with some specific aspects of its operations,⁷ although it has been said that certain of these may be 'more properly . . . referred' to section 51(xxxix) of the Constitution, which deals with the

⁵ The more significant historical references are *May*, 23rd edn, together with Anson, *The law and custom of the Constitution*; House of Commons Select Committee on Parliamentary Privilege, *Report*, HC 34 (1967–68); Hatsell, *Precedents of proceedings in the House of Commons*. The first, second and third editions of *House of Representatives Practice* contain additional detail on earlier practice and precedents in the House. *Odgers* contains information on matters that have arisen in the Senate. For a scholarly survey of parliamentary privilege in Australia generally see Enid Campbell, *Parliamentary privilege*, Federation Press, 2003.

⁶ For a list of House of Representatives privilege cases see Appendix 25. For Senate cases see *Odgers*, 11th edn, pp. 607–41.

⁷ E.g. *Parliamentary Papers Act 1908*; *Parliamentary Proceedings Broadcasting Act 1946*; *Public Accounts and Audit Committee Act 1951*; *Public Works Committee Act 1969* and legislation making provisions in relation to certain committees.

power to make laws with respect to matters which are incidental to the execution of any power vested, inter alia, in the Parliament or either House.⁸

Judicial interpretation of section 49

The original privilege powers of the Commonwealth Parliament were tested and confirmed in a significant High Court judgment arising from the case of Browne and Fitzpatrick. On 10 June 1955 the House of Representatives judged Mr F. C. Browne and Mr R. E. Fitzpatrick guilty of a serious breach of privilege⁹ (see p. 731 for details of this case). On the warrant of the Speaker the two men were committed to gaol for three months. Subsequently, action was taken by the legal representatives of the offenders to apply to the High Court for writs of habeas corpus. The High Court heard the argument between 22 and 24 June and delivered its judgment on 24 June.¹⁰

The Chief Justice first dealt with the question of whether the warrants issued by the Speaker were a sufficient return to the writs of habeas corpus. He held that such warrants if issued in England by the Speaker of the House of Commons would have constituted sufficient answer, being drawn up in accordance with the law there which was finally established in the case of the *Sheriff of Middlesex* in 1840.¹¹ The law was established authoritatively by the decisions of the Privy Council in *Dill v. Murphy* in 1864,¹² and in the *Speaker of the Legislative Assembly of Victoria v. Glass* in 1871.¹³

The Court stated that:

. . . it is for the courts to judge of the existence in either House of Parliament of a privilege, but, given an undoubted privilege, it is for the House to judge of the occasion and of the manner of its exercise. The judgment of the House is expressed by its resolution and by the warrant of the Speaker. If the warrant specifies the ground of the commitment the court may, it would seem, determine whether it is sufficient in law as a ground to amount to a breach of privilege, but if the warrant is upon its face consistent with a breach of an acknowledged privilege it is conclusive and it is no objection that the breach of privilege is stated in general terms.¹⁴

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;

⁸ *R v. Richards; ex parte Fitzpatrick and Browne* (1955) 92 CLR 168. And see comments by Professor Enid Campbell, *Parliamentary Privilege*, Federation Press, 2003, p. 235.

⁹ VP 1954–55/267, 269–71; H.R. Deb. (10.6.55) 625–65.

¹⁰ (1955) 92 CLR 157.

¹¹ 11 Ad & E 273 [113 ER 419].

¹² 1 Moo. PC (N.S.) 487.

¹³ LR 3 PC App 560.

¹⁴ (1955) 92 CLR 162.

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

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

The answer, in our opinion, lies in the very plain words of s. 49 itself. The words are incapable of a restricted meaning . . . It is quite incredible that the framers of s. 49 were not completely aware of the state of the law in Great Britain and, when they adopted the language of s. 49, were not quite conscious of the consequences which followed from it.¹⁵

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.¹⁶

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.¹⁷

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.¹⁸

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.¹⁹

15 (1955) 92 CLR 165–6.

16 (1955) 92 CLR 167.

17 (1955) 92 CLR 168.

18 (1955) 92 CLR 170.

19 *R v. Richards; ex parte Fitzpatrick and Browne* (1955) 92 CLR 171 (PC).

No new privilege may be created except by legislation

The rights and immunities of the Houses, their committees and Members are part of the law of the Commonwealth, and the law may only be changed by the passage of legislation by the three component parts of the Parliament. Subject to the constraints imposed by the Constitution, it would however be possible for the Commonwealth Parliament to enact legislation which varied an existing right or immunity or created a new one.

Within the framework set by the Constitution and relevant legislation it is within the competence of each House to expound the law of privilege and apply that law to the circumstances of each case as it arises.²⁰ To suggest, as has on occasions been done, that the existing privileges of the Parliament have been extended in some particular case, is incorrect.

In the following sections, the principal rights and immunities of the House are described. While they have been enjoyed since Federation by virtue of the provisions of section 49,²¹ the *Parliamentary Privileges Act 1987* has modified the detail or provided amplification in some respects so that the provisions better meet the needs of the modern Houses.

THE PRIVILEGE OF 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.²²

The provisions of Article 9 became part of the law applying to the Commonwealth Parliament by virtue of section 49 of the Constitution.²³

The privilege has been variously described as one which has always been regarded as most valuable and most essential,²⁴ and as the only privilege of substance enjoyed by Members of Parliament.²⁵ Unquestionably, freedom of speech is by far the most important privilege of Members.

Members are absolutely privileged from suit or prosecution in respect of anything they might say in the course of proceedings in Parliament. Provided their statements are in accord with the rules and practices of the House, Members are able to express themselves as they judge fit. It is, however, incumbent upon Members not to abuse the privilege. The House itself, by its rules of debate and disciplinary powers, has the ability to deal with abuse (*see* Chapter on ‘Control and conduct of debate’, *and see* p. 753).

The Committee of Privileges has stated:

Allegations of wrongdoing are often made to Members of Parliament. Members enjoy very special rights—rights greater than those enjoyed by ordinary citizens. The privilege of freedom of speech is the greatest of these, but its very significance is such, where the reputation or welfare of persons may be an issue, that it should be used judiciously. If a Member is of the opinion that it is in the public interest to disclose such allegations, he or she should make all reasonable inquiries as to the truth of

20 For further comment *see* HC 34 (1967–68) 97–9.

21 *See Quick and Garran*, pp. 501–2 for an enumeration of the of 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.

22 1 Will. & Mary, sess. 2, c.2.

23 For a recent commentary on Article 9 and its application in Australia, *see* G. M. Kelly, ‘Questioning’ a privilege: article 9 of the Bill of Rights 1688, *Australasian Parliamentary Review*, v. 16, no. 1, Autumn 2001, pp. 61–99.

24 J. Hatsell, *Precedents of proceedings in the House of Commons with observations*, 4th edn, 1818, vol. I, p. 85.

25 HC 34 (1967–68) 91.

the allegations. The raising of a matter, in full detail, in the House is only one of the options available to Members . . . It is for the Member to resolve whether or not it is in the public interest to raise a matter in the House, and his or her actions will be judged accordingly.²⁶

In 1989 the Committee of Privileges reported on a reference concerning an allegation made in the House by one Member against another. While it did not find that a contempt had been committed, it concluded that having regard to the experience of the Member who had made the allegation he had offended against the rules of the House. It recommended that he be required to apologise and withdraw.²⁷ The House agreed to a motion calling on the Member to withdraw and apologise, but he declined to do so and was subsequently suspended by the House for two sitting days.²⁸

While there is no doubt that, ultimately, Members can be called to account by the House for their actions and statements, the cases cited above show the difficulties that can arise.²⁹ The Joint Select Committee on Parliamentary Privilege considered the issue of misuse of privilege. It commented that if it became the practice to examine formally—as by a reference to the Committee of Privileges—what Members say in the House, the essential freedom could be endangered. It acknowledged the danger of misuse, but concluded that the only practical solution consistent with the maintenance of freedom of speech could lie in allowing persons who had been subject to criticism or attack in either House to apply to have a response incorporated in Hansard.³⁰ (*See* p. 751 for details of the procedure adopted).

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

Absolute and qualified privilege

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

Proceedings in Parliament

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

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

- (a) the giving of evidence before a House or a committee, and evidence so given;

²⁶ PP 405 (1994) 5.

²⁷ PP 498 (1989) (the report was accompanied by two dissenting reports).

²⁸ VP 1987–89/1695–8, and *see* case of Senator Heffernan (2002).

²⁹ And *see* ‘The limits of free speech’, *Parliamentarian*, LXIII, no. 1, Jan. 1982, pp. 24–7; and Enid Campbell, *Parliamentary privilege*, Federation Press, 2003, pp. 50–68.

³⁰ PP 219 (1984), pp. 53–5.

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

The enactment of this provision gave some precision to the term.

It is clear that the ambit of the term, and so the extent of absolute privilege, is limited. The repetition by Members out of the House of statements they have made in the House has not been found to be protected by absolute privilege.³¹ It has been also observed that, for instance, conversations or comments among Members, or between Members and other persons, which are not part of a 'proceeding in Parliament' as such would not enjoy absolute privilege,³² and that citizens communicating with a Member in normal correspondence would not enjoy absolute privilege in this matter.³³

The use of the term 'for purposes of or incidental to' the transacting of the business of a House or a committee in s. 16 is, however, to be noted. Sometimes it will be clear whether a particular act forms part of 'proceedings in Parliament', but on other occasions a judgment may be necessary, for example as to whether a particular act was done 'for purposes of or incidental to' the transacting of the business of the House. In 1997 the Court of Appeal of the Supreme Court of Queensland was required to consider the application of subsection 16(2). Its decision recognised a claim that a number of documents obtained by or provided to a Senator which related to a subject he had raised in the Senate did not need to be produced in response to an order because of the protection of subsection 16(2).³⁴

On two occasions the Committee of Privileges has considered complaints arising from action, or threatened action, against Members following letters the Members had written to Ministers. In each case it accepted that such correspondence did not form part of 'proceedings in Parliament'.³⁵ In 1994 the committee considered action taken against a person who had sworn a statutory declaration and given it to a Member. The Member later used the material in a speech in the House. The committee was required to report on the Member's complaint that the action against his informant would interfere improperly with his ability to perform his duties as a Member. It commented that whether the informant's actions fell within the scope of s.16 of the Parliamentary Privileges Act would be determined in the course of court proceedings. An opinion appended to the report discussed the issue of whether the informant's actions might be protected³⁶ (*and see* p. 733).

In a 2000 report on the status of the records and correspondence of Members, the Committee recommended that there should be no additional protection, beyond that provided by the current law, given to the records and correspondence of Members. It recommended, however, that, at the discretion of the Speaker, the House may intervene to assert the protection of parliamentary privilege in court proceedings in which records and correspondence might reasonably be argued to fall within the definition of proceedings in Parliament. It also recommended that a memorandum of understanding be concluded between the Presiding Officers and the Minister for Justice on the execution of search

31 *R v. Abingdon*, 170 ER 337; *R v. Creevey* 105 ER 102, and see *Beitzel v. Crabb* [1992] VR 121; *Laurance v. Katter* [1996] QCA 471; *Jennings v. Buchanan* [2004] UKPC 36; and Campbell, *Parliamentary Privilege* (2003), pp. 13–14.

32 *May*, 23rd edn, p. 116.

33 *May*, 23rd edn, p. 153.

34 *O'Chee v. Rowley* [1997] QCA 401.

35 PP 118 (1992), PP 78 (1994).

36 PP 407 (1994).

warrants on Members, their employed staff and their offices—not so as to create any new immunity or to change the law but to enable ground rules to be agreed. Memoranda with State and Territory Attorneys-General in respect of electorate offices were also recommended.³⁷ The Government agreed with the substance of the recommendations, and a memorandum was negotiated between the Parliament and the Commonwealth.³⁸

In the case *Crane v. Gething* the Federal Court held that it should not decide whether certain documents were in fact protected by privilege, and the documents were sent to the Senate for determination of that matter. The Senate, by resolution, appointed a retired public servant with legal qualifications to determine whether any of the documents were immune from seizure. The view of the court was contrary to arguments that it was indeed the court's responsibility to decide the matter.³⁹

Although, as stated above, the House of Commons has not to date adopted a detailed definition of the term 'proceedings in Parliament', it has considered the meaning and scope of the term. In the London Electricity Board case in 1957 (more generally known as the *Strauss Case*), the House of Commons Committee of Privileges found that Mr Strauss in writing a letter to a Minister criticising certain alleged practices of the Board, was engaged in a 'proceeding in Parliament'. The committee also found that, in threatening a libel action against the Member, both the Board and its solicitors had acted in breach of the privilege of Parliament.⁴⁰ 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.⁴¹ In 1999 a joint committee of the British Parliament which had reviewed the law and practice in relation to privilege recommended against any extension of privilege to cover communications between Members and Ministers.⁴² In an important decision in 1939, the House of Commons agreed that notice in writing of a question to be asked in the House was 'protected by privilege'.⁴³

Privilege attaching to Hansard reports

Hansard reports of the proceedings are absolutely privileged.⁴⁴ However, it is considered that parliamentary privilege does not protect individual Members publishing their own speeches apart from the rest of a debate. If a Member publishes his or her speech, this printed statement becomes a separate publication,⁴⁵ a step removed from actual proceedings in Parliament and this is also the case in respect of the publication of Hansard extracts, or pamphlet reprints, of a Member's parliamentary speeches. In respect of an action for defamation, regard would also be had to the particular law applying in the State or Territory in which the action is taken or contemplated. Even qualified privilege may not

37 PP 417 (2000).

38 VP 2002–04/146 (government response); VP 2002–05/222 (memorandum of understanding presented; also Australian Federal Police, *National guideline for the execution of search warrants where parliamentary privilege may be involved*).

39 *Crane v. Gething* [2000] 169 ALR 727. S. Deb. (3.10.2000) 17683–4; S. Deb. (5.12.2000) 20668.

40 House of Commons Committee of Privileges, *Report*, HC 305 (1956–57) viii.

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

42 HL 43 (1998–99), HL 214 (1998–99), para. 112. The Committee recommended a definition of proceedings almost identical to that in s.16 of the 1987 Act.

43 House of Commons Committee of Privileges, *Report*, HC 101 (1938–39), para. 3.

44 The subject of parliamentary privilege relating to documents—including Hansard, House documents and documents presented to the House—is covered in the Ch. on 'Documents'.

45 *And see May*, 23rd edn, p. 99.

be available unless the publication is for the information of the Member's constituents.⁴⁶ In any case arising in the future, reference would need to be had to the provisions of the Parliamentary Privileges Act which could be relevant.

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

Use of Hansard and other documents in courts or other tribunals

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

Restriction on use of or reference to parliamentary records

Article 9 of the Bill of Rights 1688 prevents proceedings from being examined or questioned or used to support a cause of action.⁴⁷ Apart from court proceedings in respect of civil⁴⁸ and criminal⁴⁹ matters, the issue of references to parliamentary records has also arisen in respect of Royal Commissions,⁵⁰ and the documents involved have included the Votes and Proceedings,⁵¹ the Hansard report of proceedings,⁵² documents presented in the House,⁵³ a committee report,⁵⁴ the transcript of committee evidence,⁵⁵ documents submitted to parliamentary committees,⁵⁶ and documents related to a speech in the Senate.⁵⁷

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

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

This resolution reflected the attitude of the House of Commons on this aspect, and this attitude is in turn reflected in House of Representatives standing order 256.

Section 3 of the Parliamentary Privileges Act defines the terms 'court' (a federal state or territory court) and 'tribunal' (essentially a person or body having power to examine witnesses on oath). The law restricting the use of parliamentary material in court

46 Advice from Attorney-General's Department, dated 25 August 1978.

47 Many court decisions have confirmed this, e.g. *Church of Scientology of California v. Johnson-Smith* [1972] (UK) 1 QB 522.

48 VP 1980-83/908-9; VP 1983-84/956.

49 *R v. Lionel Keith Murphy, R v. John Murray Foord* (1985) (see p. 721).

50 Royal Commission into the Australian Meat Industry (1982), VP 1980-83/949; Royal Commission on Australia's Security and Intelligence Agencies (1983), VP 1983-84/149; Royal Commission into Activities of the Nugan Hand Group (1984), VP 1983-84/881.

51 VP 1998-2001/827.

52 VP 1980-83/908-9.

53 VP 1980-83/908-9; VP 1983-84/881.

54 VP 1985-87/1355.

55 *R v. Lionel Keith Murphy; R v. John Murray Foord*.

56 VP 1985-87/1355; VP 1987-89/965-6.

57 *O'Chee v. Rowley* [1997] QCA 401.

proceedings is sometimes referred to as an exclusionary rule of evidence or an exclusionary principle.⁵⁸

Following judgments which had the effect of permitting participants in proceedings in Parliament (in this case witnesses before committees—*see* p. 721) to be examined and cross-examined in court in respect of committee evidence, in 1987 the Parliament enacted legislation to restore and enshrine the traditional interpretation of Article 9, which it believed should be upheld in the interests of the Parliament. Section 16 of the Parliamentary Privileges Act provides, *inter alia*:

- (3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of—
- (a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;
 - (b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or
 - (c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.
- (4) A court or tribunal shall not—
- (a) require to be produced, or admit into evidence, a document that has been prepared for the purpose of submission, and submitted, to a House or a committee and has been directed by a House or a committee to be treated as evidence taken in camera, or admit evidence relating to such a document; or
 - (b) admit evidence concerning any oral evidence taken by a House or a committee in camera or require to be produced or admit into evidence a document recording or reporting any such oral evidence, unless a House or a committee has published, or authorised the publication of, that document or a report of that oral evidence.

In 1988 the application of section 16 was considered by the Federal Court. An application to tender an extract from Hansard was rejected, being seen as ‘. . . by way of or for the purpose of questioning the motive, intention or good faith of the Senator . . .’ and as ‘. . . by way of, or for the purpose of, inviting the drawing of inferences or conclusions from what was said in the Senate . . .’.⁵⁹ In 1992 the Federal Court held that an answer by a Minister to a question without notice could not be used in court proceedings in support of an argument as to the Minister’s disposition on the matter in dispute. This was held to be contrary to paragraphs 16(3)(b) and (c) of the Act.⁶⁰ In 1994 the Privy Council gave an interpretation of Article 9 of the Bill of Rights consistent with the articulation of Article 9 in section 16 of the Act.⁶¹

The effect of the Queensland Court of Appeal decision in *O’Chee v. Rowley* was that a Senator was not required to comply with an order to disclose certain documents which the Senator had claimed were created, brought into existence or had come into his possession for purposes of or incidental to the transacting of the business of the Senate—that is, in this case the Court held that the privilege articulated in section 16 had the effect that the documents did not need to be produced.⁶²

In *Laurance v. Katter* the Queensland Court of Appeal considered the application of subsection 16(3). The Court held that subsection 16(3) did not prevent Mr Laurance from

58 *See*, for example, Campbell, *Parliamentary Privilege* (2003), pp. 29, 67, 89, 97, 106, 124.

59 *Amman Aviation Pty Limited v. Commonwealth of Australia* (No. G667 of 1987, p. 15).

60 *Hamsher and ors v. Swift and ors* (1992) 33 FCR 545–67 at 547, 562–5.

61 *Prebble v. Television New Zealand Limited* (1994) 3 All ER 407–420 at 414.

62 *O’Chee v. Rowley* [1997] QCA 401

relying on statements Mr Katter had made in the House in an action for defamation in connection with statements Mr Katter had allegedly made in the course of an interview. (In the interview Mr Katter had referred to his statements in the House, but had not repeated them.) It was argued that the statements could not support an action for defamation unless they could be understood in the context of the statements in the House.⁶³ The decision was appealed to the High Court, but the case was settled before it was decided.⁶⁴ The Privy Council has held that a Member may be held liable in respect of a statement made out of the House in which the Member affirmed, but did not repeat, a defamatory statement the Member had made in the House.⁶⁵

In *Rann v. Olsen* the South Australian Supreme Court held that subsection 16(3) would prevent Mr Olsen from maintaining and supporting certain defences in a defamation action and it rejected submissions to the effect that the Act was invalid because it impermissibly infringed the implied constitutional guarantee of freedom of political communication.⁶⁶ In *R v Theophanous* the Victorian Court of Appeal held that subsection 16(3) had been breached when Dr Theophanous had been questioned about statements he had made in the House, even though he had tendered the records. The Appeal Court held however that the infringement was not such as to justify reversal of his conviction.⁶⁷

For discussion of constitutional issues possibly arising in connection with subsection 16(3) see Campbell, *Parliamentary Privilege* (2003).⁶⁸

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

Arrangements for the production of parliamentary records

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

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

The terms of the resolution limited it to the question of the attendance of officials. However, until 1980 the House of Commons had followed the practice of requiring leave to be granted both for the attendance of employees and for the production of parliamentary records, although it appears that the usual practice was for leave to be granted without any conditions being attached, presumably in the belief that the requirements of the Bill of Rights would always be observed.⁶⁹

The terms of the House of Commons' resolution of 1818 are applied, in more modern language, by standing order 253:

63 *Laurance v. Katter* [1996] QCA 471.

64 *Laurance v. Katter* B69/1996 (26 June 1997).

65 *Jennings v. Buchanan* [2004] UKPC 36..

66 *Rann v. Olsen* [2000] SASC 83.

67 *And see Campbell, Parliamentary Privilege* (2003), pp. 96–98.

68 pp. 99–104.

69 HC 102 (1978–79) 9.

Only if the House grants permission, may an employee of the House, or other staff employed to record evidence before the House or one of its committees, give evidence relating to proceedings or give evidence relating to the examination of a witness.

As was previously the case in the House of Commons, in the House of Representatives the usual practice has been to grant permission (formerly referred to as ‘leave’) for the production of parliamentary records as well as for the attendance of House employees, although technically the standing order is limited to the attendance of employees. Previously petitions have been presented from, or on behalf of, parties asking the House to grant the leave sought,⁷⁰ although in some cases motions have been moved in the House without a petition having been presented. In such cases it has been usual for a brief explanation to be made.⁷¹ The Speaker has presented a letter conveying a request,⁷² and when a motion was moved to grant the request, the Leader of the House made a brief explanation.⁷³

In deciding to grant permission, the House has not necessarily granted all that has been requested in a petition; for example, one petition, as well as seeking leave for subpoenas to be served for the production of records, for them to be adduced into evidence, and for the attendance of appropriate officers, also sought leave to interview and obtain proofs of evidence from employees of the Parliamentary Reporting Staff. The House did not grant leave for the employees to be interviewed.⁷⁴ In some cases no action has been taken on petitions.⁷⁵

In 1980 the House of Commons discontinued the practice of requiring petitions for leave to refer to parliamentary papers, and gave 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. The adoption of similar provisions for the Commonwealth Parliament was recommended by the Joint Select Committee on Parliamentary Privilege in its 1984 report. Although resolutions to give effect to the recommendations of the committee were presented, the recommendations were not implemented. The House therefore did not decide that the practice of granting permission should be discontinued. It has, however, been held by some authorities that the granting of permission is not required as a matter of law⁷⁶ and the Senate has agreed to a resolution to the effect that leave of the Senate is not required.⁷⁷ It should also be noted that the adduction into evidence of evidence taken in private is expressly prohibited by the Parliamentary Privileges Act.⁷⁸

Waiver of privilege by House not possible

The immunity conferred on participants in proceedings in Parliament, and the laws on the use of or reference to records of, or documents concerning, parliamentary proceedings are part of the law of the Commonwealth⁷⁹ and, as such, cannot be waived or suspended by either House acting on its own. The Committee of Privileges of the House has expressed

70 E.g. VP 1985–87/1207.

71 E.g. VP 1980–83/791; H.R. Deb. (18.3.82) 1134–5; VP 1983–84/881; H.R. Deb. (2.10.84) 1321–2; VP 1990–92/1334; H.R. Deb. (27.2.92) 390–2.

72 VP 1998–2001/823.

73 H.R. Deb. (1.9.99) 9565.

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

75 E.g. VP 1976–77/563; VP 1977/39.

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

77 J 1987–89/525, 536.

78 *Parliamentary Privileges Act 1987*, s.16(4). The Act uses the term ‘in camera’.

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

the view that ‘as a matter of law there is no such thing as a waiver of Parliamentary Privilege’.⁸⁰ In relation to the *Prebble v. Television New Zealand* case the New Zealand House of Representatives maintained that ‘article 9, as a rule of statute law, cannot be waived collectively by the House or individually by members (or others)’.⁸¹ The Senate has resolved not to accede to a request in a petition that it ‘waive privilege’ in relation to a submission made to a committee.⁸²

The Defamation Act 1996 (UK) enabled a person effectively to waive, in so far as it concerns that person, the immunity preventing ‘proceedings in Parliament’ from being impeached or questioned in court where the person’s conduct in relation to proceedings is an issue in defamation proceedings. The UK Act does not alter the law in respect of the Commonwealth Parliament. (A committee of the British Parliament has recommended that the UK law be changed to enable the House, and not any individual, to waive the privilege in court proceedings.⁸³)

Matters arising when House is not sitting

When the House has not been sitting and the production of parliamentary records has been desired, the Speaker has granted permission, but has noted that it was given on the understanding that proper regard will be had to the law based on Article 9 of the Bill of Rights. The Leader of the House, the Manager of Opposition Business and the Attorney-General have been advised of the decision, and it has been reported to the House as soon as practicable.⁸⁴

Precedents

The more important cases which have arisen are described in the following pages. It should be noted that most pre-date the enactment of the Parliamentary Privileges Act.

On 7 May 1963 the House authorised two Hansard reporters to attend in the Supreme Court of the Australian Capital Territory to give evidence in relation to a proceeding in the House (produce shorthand notebooks to prove the accuracy of a newspaper report of a particular proceeding).⁸⁵ No petition was presented to the House in this instance.

‘BRISBANE LINE’ ROYAL COMMISSION

In 1943 a royal commission was established to inquire, inter alia, into a statement made in the House by a Minister (Mr Ward), that ‘I am most reliably informed that one important report is now missing from the official files’, in the course of debate concerning the matter known as ‘The Brisbane Line’ (an alleged plan for the defence of Australia).⁸⁶ The Royal Commissioner held that Mr Ward was protected by the privilege of Parliament and could not be questioned in regard to his statement or his sources of information, stating:

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

80 House of Representatives Committee of Privileges, *Report relating to the use of or reference to the records of proceedings of the House in courts*, PP 154 (1980) 6. See also Campbell, *Parliamentary Privilege* (2003), pp. 27, 62 and chapter 8.

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

82 J 1985–87/153–4.

83 Joint Committee on Parliamentary Privilege, HL 43–I (1998–99); HC 214–I (1998–99).

84 E.g. VP 1980–83/949; VP 1983–84/149; VP 2002–04/83; and see J 1983–84/203.

85 VP 1962–63/464; and see Ch. on ‘Documents’.

86 H.R. Deb. (22.6.43) 58.

However, the Commissioner rejected argument that privilege prevented him from investigating the matter raised by the Minister's statement—that is, whether any such document was in fact missing.⁸⁷

SANKEY 'LOANS AFFAIR' PROSECUTION

In October 1975 a petition was presented from Mr Danny Sankey seeking leave to issue and serve subpoenas for the production of certain official records of the proceedings of the House held on 9 July 1975 and of documents tabled therein, and further to issue and serve subpoena for the attendance in court of those persons who took the record of such proceedings. The petition stated that Mr Sankey wished to institute proceedings against three Ministers and a former Senate Minister and the records sought were intended to be adduced in evidence in the prosecution.⁸⁸ In February 1976 a further petition from Mr Sankey sought 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.⁸⁹

On 4 June 1976, the House granted leave for the inspection of the tabled documents in question, for a subpoena to be issued and served for the production of the documents and for an appropriate staff member to attend at court and produce the documents.⁹⁰ 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.

Two further petitions were presented on behalf of Mr Sankey, in December 1976 and March 1977.⁹¹ No action was taken by the House in respect of either.

ORDER OF MR JUSTICE BEGG IN THE CASE OF *UREN V. JOHN FAIRFAX & SONS LTD*

In 1979 an order was made by a judge of the Supreme Court of New South Wales in a case in which a Member had commenced an action for defamation against the publishers of a newspaper. 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.⁹²

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

87 ALJ Vol. 18, 1944, pp. 70–76. See also E. Campbell, *Parliamentary privilege in Australia*, Melbourne University Press, 1966, pp. 39–40.

88 VP 1974–75/1002; H.R. Deb. (21.10.75) 2292–3.

89 VP 1976–77/33.

90 VP 1976–77/247.

91 VP 1976–77/563; VP 1977/39.

92 VP 1978–80/975.

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 examined the order and concluded that His Honour was in error. (The judge had expressed views to the effect that the broadcast of proceedings and the publication of those proceedings in Hansard amounted to a waiver of privilege.) The committee expressed concern that, as a consequence of his order, the answers to the interrogatories may have been used by counsel in cross-examination had the case (which was settled out of court) come to trial. Such a course, if allowed, may have been used for questioning the motives of the Member when he made his speech in the House, a violation of the privilege enshrined in Article 9 of the Bill of Rights. As well as commenting on the judge's order, the committee recommended, *inter alia*, that the petitioning process be continued and that petitions be referred to the Committee of Privileges,⁹³ but the recommendations were not implemented.

ROYAL COMMISSION INTO AUSTRALIA'S SECURITY AND INTELLIGENCE AGENCIES

In June 1983 during the winter adjournment the Speaker approved a request for the adduction into evidence before a Royal Commission of Inquiry into Australia's Security and Intelligence Agencies of certain Hansard reports, subject to the condition that proper regard be had to the provisions of Article 9. During the course of its proceedings the Royal Commission produced a statement of issues requiring resolution. Concern was expressed that a breach of privilege could arise in connection with two of the issues which could have involved the questioning of statements of Ministers in the House. Although some modifications of the issues in question were made, it was considered that there was still a risk to Parliament's interests, and counsel representing the Speaker, joined by the Deputy President of the Senate, was given leave to appear before the Royal Commission. Counsel addressed the Royal Commission on the law of parliamentary privilege, and junior counsel remained and represented the interests of the Speaker and the President, as necessary, in so far as the issue of privilege was concerned. The Speaker's actions were endorsed when reported to the House when sittings resumed on 23 August 1983.⁹⁴

CASES INVOLVING MR JUSTICE MURPHY AND JUDGE FOORD

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

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

The judge favoured a narrower view of the term 'impeached or questioned', indicating that there needed to be an adverse effect on freedom of speech or debates or proceedings in Parliament for Article 9 to be breached. The judge stressed the importance of cross-examination of witnesses with regard to previous statements, and referred to the competing interests involved. The judge held that 'questioning of witnesses . . . as to what they said before a committee of the Senate, does not necessarily amount to a breach of privilege as

93 PP 154 (1980) 6.

94 VP 1983-84/149; H.R. Deb. (23.8.83) 1-3.

being necessarily contrary to the Bill of Rights'.⁹⁵ The cross-examination permitted extended to evidence given in private and not authorised for publication. In a later trial, *R v. Foord*, witnesses were also cross-examined on their committee evidence.⁹⁶

In the second trial of Mr Justice Murphy a different view again was taken of the proper interpretation of the provisions of Article 9, although the result was similar. The judge held that what was meant by the declaration in Article 9 was that no court proceedings having legal consequences against a Member, or a witness, were permissible which would have the effect of preventing a Member or witness exercising his or her freedom of speech in Parliament or before a committee or of punishing him or her for having done so. It was held that statements to the committees could, without breach, be the subject of comment, used to draw inferences or conclusions, analysed and made the basis of cross-examination or submissions and comparisons made between such statements and statements by the same person outside Parliament.⁹⁷ The trial proceeded in light of these decisions.

Members and Senators were informed of these matters and, in due course, it was concluded that only by legislation could the preferred interpretation of Article 9 of the Bill of Rights be guaranteed, and this was one of the principal objects of the Parliamentary Privileges Bill sponsored by the President of the Senate and the Speaker.⁹⁸

ABORIGINAL AFFAIRS COMMITTEE INQUIRY

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

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

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

The committee received advice from the Attorney-General and gave the witnesses involved an opportunity to comment. It concluded that there was significant public interest

⁹⁵ Judgment of Cantor J, *R v. Lionel Keith Murphy*, N.S.W. Supreme Court, (1986) 64 ALR 498.

⁹⁶ Parliamentary Privileges Bill 1987, explanatory memorandum, p. 10.

⁹⁷ Judgment of Hunt J, *R v. Lionel Keith Murphy*, N.S.W. Supreme Court, (1986) 64 ALR 498.

⁹⁸ S. Deb. (4.6.86) 3307-8; S. Deb. (7.10.86) 893-5; H.R. Deb. (4.6.86) 4552-3; H.R. Deb. (19.3.87) 1154-6.

in the documents being available for use in the courts, which it did not want to disrupt, and noted that the witnesses consented to the release of the documents, so the question of protection of the witnesses did not affect any decision. The committee recommended that leave should be granted as requested. The House granted leave to the petitioners to issue subpoenas for the production of the documents and for the appropriate officer or officers to attend in court and produce the documents and the official report and give evidence concerning the inquiry 'with the intention that the said documents be available for production in all proceedings to which they are relevant'.⁹⁹

ROAD SAFETY COMMITTEE INQUIRY

In November 1988 a petition was presented from seeking, inter alia, leave for the petitioners to take possession of the transcript of proceedings of a Road Safety Committee inquiry and all documents tendered by parties appearing and giving evidence and, in particular, certain exhibits referred to in an appendix to the report, and for the production and admission into evidence of such documents. The House granted leave in respect of the published records of proceedings and the report of the committee, but not in respect of the confidential exhibits. When the petition was presented the Road Safety Committee had ceased to exist, but the Standing Committee on Transport, Communications and Infrastructure had responsibilities in that area, and so the House referred to that committee the question of whether the confidential exhibits should be presented to the House for the purpose of the House granting leave. In April 1989 the committee reported, having contacted those who had lodged the confidential exhibits. The committee evaluated the arguments for and against the release sought. It noted that the documents had been provided on the basis that they would be treated as confidential. In recommending against release, the committee stated that the House had a strong moral obligation to protect the arrangements made in obtaining information and stated that to authorise release of the documents for use in a court could seriously impair the future effectiveness of the working of parliamentary committees because witnesses could refuse to be forthcoming in what they said or provided, knowing that they could be disadvantaged in court proceedings by the release of evidence. It noted that the word of Parliament and the integrity of the institution could be called into question. The committee advised that the exhibits should not be presented to the House for the purposes sought and that in future the House should ask committees, when making such a decision, to take into consideration the concepts and propositions it had enunciated. In the event the matter was settled and the case did not proceed.¹⁰⁰

CASE INVOLVING CHARGES AGAINST A MEMBER

In 1999 the Speaker presented a request from the National Crime Authority seeking permission for the Votes and Proceedings for 10 November 1998 (the first sitting day of the 39th Parliament) to be produced in committal proceedings against a Member in the Melbourne Magistrates Court, and in any subsequent proceedings.¹⁰¹ The House gave leave for the Votes and Proceedings to be produced.¹⁰² It was understood that the objective

⁹⁹ VP 1985–87/1040–1. House of Representatives Standing Committee on Aboriginal Affairs, *Certain documents tendered to the committee during the Baryulgil community inquiry*, PP 355 (1986); VP 1985–87/1355.

¹⁰⁰ VP 1987–89/965–6. House of Representatives Standing Committee on Transport, Communications and Infrastructure; *Release of Tyre Safety Inquiry documents*, VP 1987–89/1095.

¹⁰¹ VP 1998–2001/823.

¹⁰² VP 1998–2001/827.

was to establish that the Member in question had in fact been elected, and taken the oath or affirmation of allegiance, as a Member.

Freedom of information

Section 46 of the *Freedom of Information Act 1982* states:

A document is an exempt document if public disclosure of the document would, apart from this Act and any immunity of the Crown . . . :

- (a) be in contempt of court;
- (b) be contrary to an order made or direction given by a Royal Commission or by a tribunal or other person or body having power to take evidence on oath; or
- (c) infringe the privileges of the Parliament of the Commonwealth or of a State or of a House of such a Parliament or of the Legislative Assembly of the Northern Territory or of Norfolk Island.

The Department of the House of Representatives, along with the other parliamentary departments, is excluded from the operation of the Act, being neither a department of state nor a 'prescribed authority' as defined in the Act.¹⁰³ It seeks, however, to comply with the intent of the Act where practicable in relation to the release of administrative information. The Department has released documents unless they would have fallen within an exemption under the Act or where a request would have been refused under the Act.

OTHER PRIVILEGES

Freedom from arrest

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

The following comment has been made about the retention of such an immunity:

The justification . . . is the need of Parliament to the first claim on the services of its Members, even to the detriment of civil rights of third parties.¹⁰⁴

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

The imprisonment of a Member of the House of Representatives was the subject of an inquiry by the Committee of Privileges in 1971. In April 1971 Mr T. Uren, MP was committed for 40 days after his failure to pay costs 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. However, if the commitment arose out of a case of a criminal character or which was more of a criminal than a civil character, the Member enjoyed no immunity and no breach of parliamentary privilege had occurred.

¹⁰³ Similarly, the definition of 'Department' in the *Privacy Act 1988* excludes the Parliamentary Departments, and this is complemented by s. 81 of the *Parliamentary Service Act 1999*.

¹⁰⁴ Joint Select Committee on Parliamentary Privilege, *Report*, PP 219 (1984) 70.

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

... having regard to the complexities and circumstances of the case ... the House would best consult its own dignity by taking no action in regard to the breach of Parliamentary Privilege which had occurred.¹⁰⁵

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 presented 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'.¹⁰⁶

House to be informed of the detention of a Member

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

On 26 February 1980 the Senate agreed to a resolution relating to the right of the Senate to receive notification of the detention of its members. A resolution reaffirming the resolution of February 1980 was agreed to by the Senate on 18 March 1987. The resolution was communicated to the Presiding Officers of the Parliaments of the States, the Attorneys-General of the States and the Speaker of the House of Representatives.¹⁰⁷

In 1984 the Joint Select Committee on Parliamentary Privilege recommended that the court or officer having charge of a detained Member should inform the relevant Presiding Officer but no specific action was taken by the House on this recommendation.¹⁰⁸

Extension of privilege to others

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

(2) An officer of a House:

...

(b) shall not be arrested or detained in a civil cause;

on any day:

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

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

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

...

(b) shall not be arrested or detained in a civil cause;

on that day.

Exemption from jury service

Based on the House's prior claim to the services of its Members, they are excused from service on juries. This exemption has been incorporated in the *Jury Exemption Act 1965*,

105 House of Representatives Committee of Privileges, *Commitment to prison of Mr T. Uren, M.P.*, PP 40 (1971) 6.

106 VP 1970-72/667; H.R. Deb. (23.8.71) 526-9.

107 See Ch. on 'The Parliament and the role of the House'.

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

which provides that Members of Parliament are not liable, and may not be summoned, to serve as jurors in any Federal, State or Territory court.¹⁰⁹

Certain employees of the Parliament are also exempted from attendance as jurors in Federal, State and Territory courts by regulations made under the Act.¹¹⁰

Exemption from attendance as a witness

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

The Parliament claims the right of the service of its Members and employees in priority to a subpoena to attend as a witness in court '... upon the same principle as other personal privileges, viz, the paramount right of Parliament to the attendance and service of its Members'.¹¹¹ In the House of Representatives, when a Member has received a subpoena requiring his or her attendance in court on a day on which a Member could not be compelled to attend, it has been common for the Speaker to write to the court authorities asking that the Member be excused.

In 1966 the Treasurer was served with a subpoena requiring his attendance before the Supreme Court of Victoria. The Speaker wrote to the court drawing attention to the claims of the House concerning the attendance of Members. The judge ruled in accordance with the Speaker's representations, and excused the Treasurer from attendance.¹¹²

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

ACTS CONSTITUTING BREACHES OF PRIVILEGE AND CONTEMPTS

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

... any act or omission which obstructs or impedes ... (it) ... in the performance of its functions, or which obstructs or impedes any Member or officer ... in the discharge of his duty, or which has a tendency, directly or indirectly, to produce such results ... even though there is no precedent of the offence.¹¹³

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

109 *Jury Exemption Act 1965*, s. 4.

110 *Jury Exemption Regulations*, SR 186 of 1987.

111 *May*, 23rd edn, p. 125.

112 *Di Nardo v. Downer* (1966) Victorian Reports 351–2.

113 *May*, 23rd edn, p. 128.

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

This provision should be taken into account at all stages in the consideration of possible contempts. It is important also to recognise that the Act does not codify or enumerate acts or omissions that may be held to constitute contempts.¹¹⁴

Section 6 of the Act provides that words or acts shall not be taken to be an offence against a House by reason only that those words or acts are defamatory or critical of the Parliament, a House, a committee or a Member, thus abolishing a previous category of contempt. This provision does not apply to words spoken or acts done in the presence of a House or a committee. The Act also contains specific provisions dealing with the protection of witnesses (*see* p. 734) and the unauthorised disclosure of evidence (*see* p. 735).

In 1984 the Joint Select Committee on Parliamentary Privilege recommended the adoption, by resolution, of detailed guidelines which, whilst they would not prevent the House from pursuing a matter not covered by their provisions, would indicate matters that may be treated as contempts. Whilst draft guidelines were presented in the House in 1987,¹¹⁵ action was not taken to adopt them. The committee also recommended the adoption of a policy of restraint in the exercise of the penal jurisdiction, proposing that each House should exercise its powers in this area only when satisfied that to do so was essential in order to provide reasonable protection for the House, its Members, its committees or its officers from such improper obstruction, or attempt at or threat of obstruction such as was causing, or likely to cause, substantial interference with their respective functions.¹¹⁶ Although no explicit action was taken by the House to implement this recommendation, successive Speakers, in giving decisions on complaints raised, have had regard to the policy of restraint and have indicated support for it.¹¹⁷

The following paragraphs are confined mainly to a note of matters highlighted in *May* and a record of those matters which the House of Representatives has determined to be acts or conduct constituting breaches of privilege or contempt, some occurring before enactment of the Parliamentary Privileges Act. The experience of the House is limited and for guidance as to precedents of other acts found to constitute contempt by the House of Commons, reference is made to the experience of that as recorded in *May*.¹¹⁸ In assessing the relevance to future cases of the precedents which do exist in the Commonwealth Parliament (and in the House of Commons), regard must be had to the provisions of the Parliamentary Privileges Act and, in particular, to section 4, which appears above. Appendix 25 contains a full listing of complaints raised in the House.

114 For judicial comment on s. 4 *see* *R. v. Theophanous* [2003] VSCA 70; *see also* Campbell, *Parliamentary Privilege* (2003), pp. 97–98, 211–2.

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

116 PP 219 (1984) 83; H.R. Deb. (5.5.87) 2632–3.

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

118 *May*, 23rd edn, p. 128–152. It is stated at p. 128 'It is therefore impossible to list every act which might be considered to amount to a contempt'.

Misconduct

In the presence of the House or a committee

May states:

Any disorderly, contumacious or disrespectful conduct in the presence of either House or a committee will constitute a contempt, which may be committed by strangers, parties or witnesses.¹¹⁹

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

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

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

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

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

Disobedience to the rules or orders of the House

Examples of this type of contempt include the refusal of a witness or other person to attend the House or a committee after having been summoned to attend and refusing to leave the House or a committee when directed to do so. ‘To prevent, delay, obstruct or interfere with the execution of the orders of either House or its committees is also a contempt’.¹²⁰

Curtin Case (1953): On 17 March 1953 the House resolved that contempt of its ruling and authority had taken place by a Member who had failed to observe an order for his exclusion from the Parliament building following his suspension from the House for using an unparliamentary expression. Following the resolution the Member made an apology to the House which the House resolved to accept and no further action was taken.¹²¹

Abuse of the right of petition

May states ‘Any abuse of the right of petition may be treated as a contempt by either House’.¹²² Precedents in this area include:

- frivolously, vexatiously or maliciously submitting a petition containing false, scandalous or groundless allegations against any person, whether a Member of such House or not, or contriving, promoting and prosecuting such a petition;
- inducing persons to sign petitions by false representations.¹²³

¹¹⁹ *May*, 23rd edn, p. 128.

¹²⁰ *May*, 23rd edn, p. 131.

¹²¹ VP 1951–53/609, 611.

¹²² *May*, 23rd edn, p. 131.

¹²³ *May*, 23rd edn, p. 131 (footnote 8).

Forged or falsified documents

The presenting of a forged, falsified or fabricated document to either House or to a committee, with intent to deceive, has been treated as a contempt.¹²⁴

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.¹²⁵ 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.¹²⁶

Conspiracy to deceive

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

Deliberately misleading the House

May states:

The Commons may treat the making of a deliberately misleading statement as a contempt. In 1963 the House resolved that in making a personal statement which contained words which he later admitted not to be true, a former Member had been guilty of a grave contempt.¹²⁷ (*Profumo's Case*, CJ (1962–63) 246)

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

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

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

¹²⁴ *May*, 23rd edn, p. 131 (footnote 8).

¹²⁵ VP 1907–08/165, 267.

¹²⁶ House of Representatives Committee of Privileges, *Report relating to a letter fraudulently written in the name of the honourable Member for Casey published in the Sun-News Pictorial on 6 December 1973*, PP 65 (1974); VP 1974/98.

¹²⁷ *May*, 23rd edn, p. 132.

apologised, the motion was withdrawn, by leave¹²⁸ (*and see* Chapters on ‘The Speaker, Deputy Speakers and officers’ and ‘Motions’).

Corruption in the execution of their office as Members

Section 141.1 of the Criminal Code deals with the offences of bribery of Commonwealth public officials. It provides for penalties of 10 years imprisonment for both giving and receiving bribes, and Members of Parliament are encompassed by the term ‘Commonwealth public official’.¹²⁹

As well as being a crime, corruption in connection with the performance of a Member’s duties as a Member could also be punished as a contempt.

May states:

The acceptance by a Member of either House of a bribe to influence him in his conduct as a Member, or of 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 either House, or to a committee is a contempt.¹³⁰

Section 45 of the Constitution also applies—*see* ‘Qualifications and disqualifications’ in Chapter on ‘Members’.

Advocacy by Members

May records that in 1995 the House of Commons, adding to a 1947 resolution, resolved that

no Member . . . shall, in consideration of any remuneration, fee, payment, reward or benefit in kind, direct or indirect, . . . advocate or initiate any cause or matter on behalf of any outside body or individual; or urge any Member of either House of Parliament, including Ministers, to do so, by means of any speech, Question, Motion, introduction of a bill, or amendment to a Motion or Bill.¹³¹

In Australia section 45 of the Constitution also applies—*see* ‘Qualifications and disqualifications’ in Chapter on ‘Members’.

Obstructing Members and House employees in the discharge of their duty

To cause or effect the arrest of a Member in a civil cause during periods when the immunity conferred by the Parliamentary Privileges Act applies could be pursued as a contempt (*see* p. 724); so too could molestation of a Member while attending, coming to, or going from the House.

In 1986 the Committee of Privileges considered a case in which the work of a Member’s electorate office had been disrupted as a result of a considerable number of telephone calls received in response to false advertisements in a newspaper. The committee’s report stated that the actions in question were to be deprecated; that in all the circumstances it did not believe that further action should be taken; but that harassment of a Member in the performance of his or her work by means of repeated or nuisance or orchestrated telephone calls could be judged a contempt.¹³²

128 VP 1985–87/1089, 1090, 1101–2.

129 Formerly covered by s. 73A of the *Crimes Act 1914*. In June 2002 a person was convicted and imprisoned for a number of offences, including a breach of section 73A, committed when he had been a Member, although an appeal succeeded in respect of one charge (*R v. Theophanous*, County Court, Victoria). *And see* p. 717 for comments re subsection 16(3) of the Parliamentary Privileges Act.

130 *May*, 23rd edn, p. 132, *see also May*, p. 137.

131 *May*, 23rd edn, p. 97.

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

The Committee of Privileges has also considered the effect of industrial action which involved bans on the delivery of mail to, and the despatch of mail from, Members' electorate offices. It found that the actions had disrupted the work of electorate offices, and impeded the ability of constituents to communicate with Members, but that as the actions were not taken with any specific intention to infringe the law concerning the protection of Parliament an adverse finding should not be made.¹³³

In 1995 the committee reported on a complaint following the execution, by officers of the Australian Federal Police, of a search warrant on the electorate office of a Member. The committee concluded that, although the work of the Member's electorate office had undoubtedly been disrupted, and that although the actions complained of amounted to interference in the free performance by the Member of his duties as a Member, the interference could not be regarded as improper interference as required by section 4 of the Act and so no contempt had been committed.¹³⁴

The Parliamentary Privileges Act also confers, by section 14, immunity from arrest in civil causes of officers required to attend on a House or a committee for certain periods (*see* p. 725). The obstruction of House employees in the execution of their duty, or other people entrusted with the execution of its orders, or the molestation of those people on account of their having carried out their duties, could be found to be a contempt. To commence proceedings against such people for their conduct in obedience to the orders of the House could be pursued as a possible contempt.

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

The offer of a benefit or bribe

As well as being a criminal offence,¹³⁵ punishable by 10 years imprisonment, the offering of bribes to Members to influence them in their parliamentary conduct is equally a contempt.

Intimidation etc. of Members

To attempt to influence a Member in his or her conduct as a Member by threats, or to molest any Member on account of his or her conduct in the Parliament, is a contempt. So too is any conduct having a tendency to impair a Member's independence in the future performance of his or her duty, subject, since 1987, to the provisions of the Parliamentary Privileges Act.

'BANKSTOWN OBSERVER' (BROWNE/FITZPATRICK) CASE

On 8 June 1955 the Committee of Privileges reported to the House that it had found:

- 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.

133 PP (122) 1994.

134 PP 376 (1995); *and see* p. 713 re the status of Members' records.

135 *Criminal Code Act 1995*, s. 141.1.

- 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.¹³⁶

The committee's inquiry and report followed a complaint made by a Member (Mr Morgan) on 3 May 1955 that an article published on 28 April 1955 in a weekly newspaper known as the *Bankstown Observer*, circulating in his electorate, had impugned his personal honour as a Member of Parliament and was a direct attack on his integrity and conduct as a Member of the House.¹³⁷

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 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.¹³⁸

On being brought to the Bar of the House the following morning¹³⁹ 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 motions in respect of Messrs Fitzpatrick and Browne to the effect that, being guilty of a serious breach of privilege, they should be imprisoned for three months and that the Speaker should issue warrants accordingly. 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. 709).

CASE INVOLVING HON. G. G. D. SCHOLES, MP

In 1990 the Committee of Privileges reported on actions taken by a solicitor in respect of the Hon. G. G. D. Scholes, MP. Mr Scholes had distributed certain information within his electorate, and had subsequently received a letter from a solicitor acting on behalf of a client affected by the information. The letter, *inter alia*, asked that Mr Scholes refrain from

136 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.

137 VP 1954–55/184; H.R. Deb. (3.5.55) 352–5.

138 VP 1954–55/267.

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

making such statements in the future, and stated that if assurances sought were not forthcoming, the solicitor would advise his client to initiate proceedings. Mr Scholes argued that the threat would inhibit him in carrying out his duties as a Member, but the committee found that there was not sufficient evidence to lead it to a conclusion that the statement should be found to constitute an attempt by improper means to influence Mr Scholes in respect of his participation in proceedings in Parliament.¹⁴⁰

CASES INVOLVING LETTERS WRITTEN BY MEMBERS

In the *Nugent Case* (1992) and the *Sciacca Case* (1994) the Committee of Privileges considered complaints about actions or threatened actions to sue Members on account of statements made in letters to Ministers. The substance of the Members' complaints was that they had been subject to improper interference in the performance of their duties as Members. In the case of Mr Nugent, the committee found that the terms of the letter containing the threat and the circumstances of its receipt had a tendency to impair Mr Nugent's independence in the performance of his duties, although it did not find that a contempt had been committed.¹⁴¹ The House subsequently resolved that the persons responsible should be required to apologise¹⁴² and they did so.¹⁴³ In the case of Mr Sciacca, the committee found that although Mr Sciacca had felt constrained, there was no evidence of an attempt to interfere improperly in the performance of his duties and a finding of contempt should not be made.¹⁴⁴

CASE INVOLVING MR KATTER, MP

In this case the committee was required to consider a complaint that action to sue a person who had sworn a statutory declaration and given it to a Member (who had used it in the course of proceedings in the House) amounted to improper interference in the performance of the Member's duties. The committee concluded that no evidence had been produced which would establish that the actions complained of amounted to or were intended or likely to amount to improper interference in the free performance by Mr Katter of his duties as a Member. Accordingly, it found that a contempt had not been committed.¹⁴⁵

BROWN CASE (U.K.)

In 1947 the House of Commons Committee of Privileges inquired into a complaint that certain actions of the Executive Committee of a union were calculated, improperly, to influence a Member (Mr Brown) in the exercise of his parliamentary duties. The Member had for many years been employed by the union. Upon his election to Parliament, the union entered into a contractual relationship with him that, whilst remaining a Member, he would hold an appointment with the union and would continue to receive a salary and certain other advantages, although his contract entitled him 'to engage in his political activities with complete freedom'. The Member complained that the effect of a sequence of events was such as to bring pressure on him to alter his conduct as a Member 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 union would be terminated or rendered intolerable. The Committee of Privileges found that, in the particular circumstances, the action of the union did not in fact

140 PP 428 (1990) 7.

141 PP 118 (1992).

142 VP 1990–92/1487, 1540, 1551.

143 VP 1990–92/1633.

144 PP 78 (1994).

145 PP 407 (1994). (*See also* p. 713).

affect the Member 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.¹⁴⁶

CHAIRMAN OF THE SYDNEY STOCK EXCHANGE CASE (1935)

The House resolved on 28 March 1935 that a letter written by the Chairman of the Sydney Stock Exchange, 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.¹⁴⁷

Offences against witnesses

Standing order 256 states that:

Any witness giving evidence to the House or one of its committees is entitled to the protection of the House in relation to his or her evidence.

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

Any conduct calculated to deter prospective witnesses from giving evidence before either House or a committee is a contempt.¹⁴⁸

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 contempt.¹⁴⁹

Section 12 of the Parliamentary Privileges Act provides that a person shall not, by fraud, intimidation, force or threat, by the offer or promise of any inducement or benefit, or by other improper means, influence another person in respect of any evidence given or to be given before a House or a committee, or induce another person to refrain from giving any such evidence. Further, under the Act a person shall not inflict any penalty or injury upon, or deprive of any benefit, another person on account of the giving or proposed giving of any evidence or any evidence given or to be given, before a House or a committee. The penalties, in each case, are \$5 000 for natural persons and \$25 000 for corporations. These provisions do not prevent the imposition of a penalty in respect of an offence against an Act establishing a committee.¹⁵⁰

Breach of the immunity of persons required to attend before the House or a committee from arrest in civil causes (and from compulsory attendance before a court or a tribunal as

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

147 VP 1934–37/149–50.

148 *May*, 23rd edn, p. 150.

149 *May*, 23rd edn, p. 151.

150 *Parliamentary Privileges Act 1987*, s. 12(3).

a witness) on days when they are required by the House or committee could be regarded as a contempt.¹⁵¹

Berthelsen Case (1980) and other cases

A matter of alleged discrimination against and intimidation of a witness who had given evidence to a parliamentary subcommittee was referred to the Committee of Privileges in 1980.¹⁵² Although the committee was not satisfied, on the evidence, that a breach of privilege had been proved against any person, it found that the witness had been disadvantaged in his career prospects in the public service. The House, on the recommendation of the committee, and being of the opinion that the report be given full consideration early in the 32nd Parliament, resolved that the Public Service Board be requested to do all within its power to restore the career prospects of the witness and ensure that no further disadvantage was suffered as a result of the case. A document from the Public Service Board informing the House of action taken in respect of Mr Berthelsen was presented on 24 February 1981.¹⁵³

On three other occasions the Committee of Privileges has considered allegations that witnesses had been discriminated against or penalised on account of their participation in committee inquiries, but in no case did the committee find that a contempt had been committed.¹⁵⁴ The Senate Committee of Privileges has also reported on a number of complaints of this nature.¹⁵⁵ (*And see* Chapter on ‘Parliamentary committees’).

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

Reflections on Members

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

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

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

Premature publication or disclosure of committee proceedings, evidence and reports

Standing order 242 provides (in part) that:

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

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

153 VP 1981–83/80.

154 PP 455 (1991); PP 136 (1994); PP (208) 2001.

155 E.g. PP 461 (1989); PP 258 (1991); PP 235 (1992); PP 85 (1993). *And see Odgers*.

(b) A committee's or subcommittee's evidence, documents, proceedings and reports may not be disclosed or published to a person (other than a member of the committee or parliamentary employee assigned to the committee) unless they have been:

- (i) reported to the House; or
- (ii) authorised by the House, the committee or the subcommittee.

The standing order further provides that a committee may resolve to publish press releases, discussion or other papers or preliminary findings. It also provides that a committee may resolve to divulge evidence, documents, proceedings or reports on a confidential basis to persons for comment.¹⁵⁶ In addition, the standing order allows a committee to resolve to authorise Members to give public briefings on matters related to an inquiry. The committee must determine the limits of the authorisation.¹⁵⁷ A Member must not disclose proceedings, evidence or documents not specifically authorised.

Most evidence taken by parliamentary committees is taken in public and publication of the evidence is expressly authorised. However, the publication or disclosure of evidence taken in private, of private deliberations and of draft reports of a committee before their presentation to the House, have been pursued as matters of contempt (*and see* Chapter on 'Parliamentary committees').

A Member wishing to raise a complaint in this area must raise it in the House at the first appropriate opportunity. The Member is not required to go into the detail of the matter, but must identify the committee and the nature of the concern. If it has not already done so, the committee in question must then consider the matter—in particular it must consider whether the matter has caused or is likely to cause substantial interference with its work, with the committee system or with the functioning of the House. The committee must also take whatever steps it can to ascertain the source(s) of the disclosure(s). The committee must inform the House of the results of its consideration and, if it finds that substantial interference has occurred, it must explain why it has reached that conclusion.¹⁵⁸ The issue is then considered by the Speaker, who determines whether or not to allow precedence to a motion on the matter. Should a committee conclude that substantial interference has not occurred the House should be informed accordingly.¹⁵⁹

On a number of occasions the House has referred issues of the unauthorised disclosure of committee evidence, reports or proceedings to the Committee of Privileges. Appendix 25 contains a list of such references and a precis of the committee's findings in each case. The committee's reports indicate the difficulty of reaching a satisfactory outcome in such inquiries. The committee has expressed the view that complaints in this area should not be given precedence unless the Speaker is of the opinion that there is sufficient evidence to enable the source(s) of disclosure to be identified or that there are such special circumstances (for example, the protection of sources or witnesses) as would warrant reference to the committee.¹⁶⁰

Specific statutory provisions have been included in the Parliamentary Privileges Act. Section 13 of the Act provides that:

¹⁵⁶ S.O. 242(c).

¹⁵⁷ S.O. 242(d).

¹⁵⁸ These requirements were first applied in 1990, but were set out more comprehensively in a statement by Speaker McLeay in 1992—H.R. Deb. (17.9.90) 1989–90; H.R. Deb. (7.5.92) 2661–2; VP 1990–92/ 187; 1489; for precedents *see*, for example, H.R. Deb. (18.9.90), 2087–8; H.R. Deb. (27.10.93) 2654; H.R. Deb. (8.11.97) 10630–1; H.R. Deb. (24.3.99) 4268–9; H.R. Deb. (9.11.2000) 22635–7.

¹⁵⁹ H.R. Deb. (7.5.92) 2661–2. For precedents *see* e.g. H.R. Deb. (23.11.93) 3401–2; H.R. Deb. (5.5.94) 367; H.R. Deb. (2.10.97) 9104 (2). A detailed statement has been made on such an occasion—H.R. Deb. (29.6.94) 2292–3.

¹⁶⁰ PP 26 (1995) 7.

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

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

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

Penalties under the section are \$5 000 in the case of a natural person and \$25 000 in the case of a corporation. Technically, a breach could be pursued both as a contempt and a statutory offence, but this is unlikely in most circumstances.

See also Chapter on ‘Parliamentary committees’.

Other offences

May states:

Other acts besides words spoken or writings published reflecting upon either House or its proceedings which, though they do not tend directly to obstruct or impede either House in the performance of its functions, yet have a tendency to produce this result indirectly by bringing such House into odium, contempt or ridicule or by lowering its authority may constitute contempts.¹⁶¹

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

May also cites in this category of contempt ‘serving or executing civil or criminal process within the precincts of either House while the House is sitting without obtaining the leave of the House’.¹⁶² Parliament House is not considered to be an appropriate place in which to serve such documents and, for example, service, or attempted service, on a Member on a sitting day, or on a day on which a Member was to participate in a committee meeting, could be complained of as a contempt.

On 6 October 1922 a complaint was made in the House of Representatives that a summons had been served upon a Member, Mr Blakeley, in the precincts of the House while the House was sitting.¹⁶³ The Attorney-General expressed 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’.

Interference with the administration of the Parliament

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

¹⁶¹ *May*, 23rd edn, p. 142.

¹⁶² *May*, 23rd edn, p. 142.

¹⁶³ VP 1922/190, 201; H.R. Deb. (6.10.22) 3337–8; H.R. Deb. (11.10.22) 3555.

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.¹⁶⁴

PENAL JURISDICTION OF THE HOUSE

Power and source

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

The High Court judgment in the case of *Browne and Fitzpatrick* (*see* p. 731) left no doubt that the House of Representatives possessed all of the powers, privileges and immunities of the Commons, and the Parliamentary Privileges Act provides that, except to the extent that the Act expressly provides otherwise, the powers, privileges and immunities of each House, and the committees and Members of each House, as in force under section 49 before the commencement of the Act, continue.

The power of the House to punish by means of imposing a fine on persons found to have committed a breach of privilege or a contempt was problematic, but the issue was resolved by the provisions of section 7 of the Parliamentary Privileges Act (*see* p. 740).

The means by which the Houses may enforce the observance of their privileges and immunities, and punish people found guilty of contempt, include:

- commitment to prison (*see* p. 739);
- imposition of a fine (*see* p. 740);
- (public) reprimand or admonishment (*see* p. 740);
- exclusion from the precincts (*see* p. 741); or
- requirement for an apology—publicly, if appropriate (*see* p. 742).

In a case in which an offence may be adjudged a breach of privilege or a contempt but also an offence at law, or in which penalties available to the House are considered inadequate, or for some other reason, the House may choose not to exercise its power of punishment. Alternatively, it is a recognised right of a House to request government law officers to prosecute an alleged offender and it would also be possible to initiate a private prosecution. Section 10 of the *Parliamentary Precincts Act 1988* provides that the functions of the Director of Public Prosecutions in respect of offences committed in the precincts shall be performed in accordance with general arrangements agreed between the Presiding Officers and the Director of Public Prosecutions.

There is no case of the House directing or requesting the law officers to prosecute, *per se*.¹⁶⁵ 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

¹⁶⁴ VP 1917–19/587; *see also* Ch. on ‘Parliament House and access to proceedings’.

¹⁶⁵ 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.

would be unsuccessful.¹⁶⁶ 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.¹⁶⁷

Although the House may consider that a breach of privilege or a contempt has been committed it may take no further action¹⁶⁸ or it may decide, having regard to the circumstances of the case, to ‘consult its own dignity’ by taking no punitive action¹⁶⁹ (*and see Browne/Fitzpatrick Case*, p. 731).

Another course of action adopted by the House of Representatives in respect of enforcing its privileges was by resolution requesting that remedial action be taken by the Public Service Board to restore the career prospects of a public service witness who was found by the Committee of Privileges to have been disadvantaged as a result of his involvement with a parliamentary subcommittee.¹⁷⁰

Commitment

Section 7 of the Parliamentary Privileges Act provides that the House may impose a penalty of imprisonment for a period not exceeding six months for an offence against it. Such a penalty is not affected by prorogation or dissolution. Before the enactment of this provision, the House, under section 49 of the Constitution, possessed the same power in this area as the House of Commons in 1901; the Commons was considered to be without the power to imprison for a period beyond the session, although apart from this constraint there were no other limits in terms of the length of committal.¹⁷¹

On the only occasion when the House of Representatives has exercised its power of commitment (*see* p. 731), Messrs Browne and Fitzpatrick, in 1955, were committed for three months. No prorogation or dissolution of the Parliament intervened during the period of their imprisonment and they served the full period of their commitment.

Form of warrant

Section 9 of the Parliamentary Privileges Act states:

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

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

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

166 VP 1907–08/165, 267.

167 ‘*Sun News Pictorial*’ Case (1973), PP 65 (1974); VP 1974/98.

168 ‘*South Australian Worker*’ Case (1931), VP 1929–31/613; ‘*Sunday Sun*’ Case (1933), VP 1932–34/755.

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

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

171 *May*, 23rd edn, pp. 160–1.

If the warrant specifies the ground of the commitment the court may, it would seem, determine whether it is sufficient in law as a ground to amount to a breach of privilege, but if the warrant is upon its face consistent with a breach of an acknowledged privilege it is conclusive and it is no objection that the breach of privilege is stated in general terms. This statement of law appears to be in accordance with cases by which it was finally established, namely, the *Case of the Sheriff of Middlesex*.¹⁷²

Because particulars of the matters determined to constitute the offence must, by virtue of section 9 of the Parliamentary Privileges Act, be set out in the resolution imposing the penalty and the warrant committing the person, the effect of the case law that has been established is therefore that a court may review a decision to impose a penalty of imprisonment to determine whether the conduct or action in question was capable of constituting an offence.¹⁷³

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

Imposition of a fine

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

For many years there had been substantial doubt as to whether the Houses had the power to impose fines, the issue turning, because of the provisions of section 49 of the Constitution, on whether the House of Commons had such power in 1901. This was because the House of Commons had not imposed fines on persons found guilty of breach of privilege or contempt since 1666. The matter was finally resolved by the insertion of a provision conferring the power to fine in the Parliamentary Privileges Act. At the time of publication neither House had exercised this power.

Reprimand or admonishment

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

In the *BMC Case* (1965) the Committee of Privileges found that an advertisement¹⁷⁴ which appeared in the *Canberra Times* and other newspapers on 18 August 1965, represented a breach of privilege. The committee also found that the ultimate responsibility for publication of the advertisement lay with ten named individuals, and that the publication

¹⁷² *R v. Richards; ex parte Fitzpatrick and Browne* (1955) 92 CLR 162; (and see p. 709).

¹⁷³ Parliamentary Privileges Bill 1987—explanatory memorandum.

¹⁷⁴ 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.

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.¹⁷⁵

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.¹⁷⁶

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'. The resolution was transmitted to the named offenders.¹⁷⁷

In 1971 two people found guilty of a breach of privilege were called to the Bar of the Senate and were reprimanded by the Deputy President. The background to this case was that on 4 May 1971 articles published in the *Sunday Australian* and the *Sunday Review* newspapers allegedly contained certain findings and recommendations of a Senate select committee which had not been reported to the Senate.¹⁷⁸

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. On the recommendation of the committee, the two editors were required to attend before the Senate, where they were reprimanded by the Deputy President.¹⁷⁹

Exclusion of persons from precincts

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

In 1912 a notice of motion proposing the exclusion of representatives of the *Age* newspaper from the press gallery for statements concerning a Member was withdrawn following an apology.¹⁸⁰ Later that year the House agreed, without debate, to a motion, concerning misrepresentation of Members in newspapers. The motion proposed that if the House accepted a statement by a Member to the effect that an article was erroneous, misleading or injurious, representatives of the newspaper concerned should be excluded from the premises until the newspaper published the Member's explanation.¹⁸¹

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

175 PP 210 (1964-66) 7.

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

177 VP 1964-66/386.

178 J 1970-72/555.

179 Senate Committee of Privileges, *Report upon articles in the Sunday Australian and the Sunday Review of 2 May 1971*, PP 163 (1971) 3. J 1970-72/606, 612.

180 VP 1912/91.

181 VP 1912/305.

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.¹⁸²

Apology

Before the current provisions concerning defamatory contempts were enacted, there were precedents in the House of Representatives for the publication of a suitable apology from offenders in a class of cases involving reflections on the House or its Members by speech, action or writing being considered an acceptable action. While not inflicting punishment, in its strict sense, the House considered this course sufficient vindication of its authority.¹⁸³

On a number of occasions under the previous provisions comments published in newspapers, or other publications, have been regarded by the House as reflections on itself and its Members and those responsible have been adjudged guilty of contempt.¹⁸⁴ An apology may also be considered appropriate in relation to other categories of contempt.

In 1992 the Committee of Privileges reported that the terms of a letter threatening legal action against a Member (following a letter the Member had written to a Minister) and the circumstances of its receipt had had a tendency to impair the Member's performance of his duties. Although the committee did not make a finding that a contempt had been committed, the House resolved that the persons responsible should be required to apologise, and they did so, a letter of apology being received and reported by the Speaker.¹⁸⁵

PUNISHMENT OF MEMBERS

In respect of Members whom the House determines have committed contempts, the House's power to punish includes commitment or reprimand but has a further dimension, namely, suspension for a period from the service of the House. In some cases an apology by the Member concerned may forestall further action.

Action taken by the House to discipline its Members for offensive actions or words in the House¹⁸⁶ may be regarded as based on the concept of privilege, but in practice the offences are dealt with as matters of order (offences and penalties under the standing orders) rather than as matters of privilege or contempt.¹⁸⁷

Apology

A Member has apologised for remarks reflecting on the Chairman of Committees which were published in a newspaper, and in view of the apology a motion that he be suspended from the service of the House was withdrawn.¹⁸⁸ When (before the enactment of the

182 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 access to proceedings'.

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

184 For details *see* the 1st, 2nd and 3rd editions and Appendix 25.

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

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

187 Notwithstanding the right of Members to freedom of speech the report of the Committee of Privileges relating to remarks made in the House (H.R. Deb. (24.5.55) 1000) by a Member (together with other matters) found that the remarks of the Member were not a matter of privilege but one of order. The committee stated that all words in the House are privileged, but the House is able to place restraint on the conduct of Members including their offensive accusations against other Members, '*Argus*' Case (1955) (report not printed). *See also* VP 1983–84/475–6; 490–2 re censure of a Member and *see* 'Motions of no confidence or censure' in Ch. on 'Motions'.

188 The matter was raised as a matter of privilege. VP 1945–46/63; *see also* H.R. Deb. (9.3.29) 856–65.

Parliamentary Privileges Act) a Member reflected on the Speaker outside the House, a motion was moved that the comments constituted a breach of the privileges of the House. The motion was withdrawn by leave when the Member again withdrew the remarks and apologised.¹⁸⁹

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 unless he sooner unreservedly retracts the words uttered by him at Ballarat . . . and reflecting on the Speaker, and apologises to the House’. However, in the next Parliament the House resolved to expunge the resolution of suspension from the journals of the House ‘as being subversive of the right of an honourable Member to freely address his constituents’.¹⁹⁰

In the *Tuckey Case* (1987) a Member was suspended for seven sitting days, including the day of suspension, following remarks critical of the Speaker made outside the House.¹⁹¹

In the *Aldred Case* (1989) a Member was suspended for two sitting days. The Committee of Privileges had found that the Member had offended against the rules of the House in making certain statements about another Member which the committee concluded should have been put forward in a substantive motion. The House adopted the report and called on the Member to withdraw the allegation and apologise. He declined to do so and was suspended for two sitting days.¹⁹²

Former power of expulsion

The only occasion the House has exercised the power of expulsion was in the *Mahon Case* (1920) when a Member was expelled for ‘seditious and disloyal utterances’ made outside the House making him, in the judgment of the House, ‘guilty of conduct unfitting him to remain a Member’.¹⁹³

Since the enactment of the Parliamentary Privileges Act neither House has had the power to expel a Member from its membership.¹⁹⁴

MANNER OF DEALING WITH PRIVILEGE AND CONTEMPT

Raising of matter

A Member may raise a matter of privilege at any time during a sitting. The Member raising a matter must be prepared to move without notice, immediately or subsequently, a motion declaring that a contempt or breach of privilege has been committed, or referring the matter to the Committee of Privileges.¹⁹⁵

When a Member raises a matter of privilege the Speaker may reserve the matter for further consideration, or may give the matter precedence and invite the Member to move

189 VP 1985–87/1089, 1090, 1101–2.

190 VP 1913/151–3; VP 1914–17/181.

191 VP 1985–87/1467–8.

192 PP 498 (1989); VP 1987–89/1695–8.

193 VP 1920–21/423, 425, 431–3; and see Ch. on ‘Members’.

194 *Parliamentary Privileges Act 1987*, s. 8. See also Campbell, *Parliamentary Privilege* (2003), pp. 213–221.

195 S.O. 51(a).

one of the above motions.¹⁹⁶ It is the practice of the House that no seconder is required for either of these motions.

If the matter is given precedence, consideration and decision of every other question is suspended until the matter of privilege has been disposed of, or until debate on any motion related to the matter of privilege has been adjourned.¹⁹⁷

In order to grant precedence to a privilege motion over other business the Speaker must be satisfied that:

- a prima facie case of contempt or breach of privilege has been made out, and
- the matter has been raised at the earliest opportunity.¹⁹⁸

If a matter of privilege related to the proceedings of the Main Committee is raised in the Main Committee, the Chair must suspend the proceedings and report the matter to the House at the first opportunity.¹⁹⁹

The Member raising and stating the matter of privilege or contempt may speak on the matter, although the Speaker may intervene to indicate that sufficient information has been provided. The Speaker may also permit another Member to speak to the matter.²⁰⁰ Although it is irregular for debate to ensue on the matter raised until a motion has been moved,²⁰¹ for the purposes of clarification Members have sometimes been allowed to speak by leave or indulgence to a matter raised, before the Speaker's opinion has been given and without a motion having been moved.²⁰² The Speaker may obtain information or advice to assist in clarification of an issue.²⁰³ A Member may refer to a matter of privilege without raising a formal complaint.²⁰⁴

Two separate matters have been raised by a Member at the same time.²⁰⁵ It has been held that a Member may not raise a matter on behalf of another Member.²⁰⁶ In the past the Speaker, normally by way of a statement, has raised matters coming within his or her knowledge for the consideration and action of the House as it deems necessary.²⁰⁷ It has also been held that a matter should not be raised by way of a question to the Chair.²⁰⁸ A personal explanation should not be made under the guise of a matter of privilege.²⁰⁹ A matter of order or a matter coming within the standing orders or practice should not be raised as a matter of privilege.²¹⁰ 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.²¹¹

A matter may be raised at any time. While the standing orders refer to complaints being raised at the earliest opportunity, it is often more convenient, with the Speaker's agreement,

196 S.O. 51(b).

197 S.O. 51(c).

198 S.O. 51(d); VP 1978–80/1168.

199 S.O. 51(e).

200 E.g. H.R. Deb. (3.6.97) 4675.

201 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.

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

203 H.R. Deb. (26.2.2001) 24319.

204 E.g. H.R. Deb. (21.6.2004) 30952–4.

205 VP 1976–77/123.

206 E.g. H.R. Deb. (25.5.55) 1060; VP 2002–04/1070.

207 VP 1917–19/177–8, 587; VP 1951–53/131, 609.

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

209 See H.R. Deb. (27.9.04) 4916–17.

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

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

for a matter to be raised at an appropriate opportunity later in a day's proceedings.²¹² There have been cases of matters not being granted precedence because they had not been raised at the earliest opportunity.²¹³ Business before the House has been interrupted to raise matters.²¹⁴ An exception to this rule is that a matter of privilege cannot be raised during the course of a division.²¹⁵

If a Member cites a statement in a published document in connection with a contempt or breach of privilege, he or she must present to the House an extract of the publication containing the statement and be able to identify the author, printer or publisher.²¹⁶ Leave is not required for a Member to present a document relating to the matter he or she is raising.

Determination of whether a matter can be accorded precedence

When a matter is raised by a Member (unless the Speaker has held that the matter has not been raised at the earliest opportunity) the Speaker may give an opinion immediately as to whether a prima facie case of breach of privilege exists²¹⁷ or state that he or she will consider the matter and give an opinion later. This may be later in the same sitting²¹⁸ or at a subsequent sitting.²¹⁹ Establishing a prima facie case is, in a technical sense, only for the purpose of precedence being given to a motion in relation to the matter, but the practice usually provides the House with some guidance as to the nature and substance of the complaint.

The Speaker may not necessarily use the term 'prima facie' in giving his or her opinion on a matter, but simply indicate whether or not precedence will be accorded to a motion. This decision indicates whether or not the requirements of the standing orders for precedence to be given have been met. In addition, since 1990 Speakers have required complaints concerning unauthorised disclosure of information concerning committees to be considered in the first instance by the committees themselves (*see* p. 735). This approach has also been taken in respect of other matters concerning committees, such as the possible intimidation of witnesses.

In determining that a prima facie case exists, the Speaker typically refers to the matter briefly, but does not express concluded views on the issues themselves, as it is for the House to decide, in practice after examination by the Committee of Privileges, whether a contempt or breach of privilege has been committed.

An opinion by the Speaker that a prima facie case has been made out does not imply a conclusion that a breach of privilege or a contempt has occurred, or even that the matter should necessarily be investigated.²²⁰ Although the Speaker may find that a prima facie case has been made out, or that precedence may be given to a motion in respect of a complaint, this does not compel the Member who raised the complaint, or any other Member, to move a motion on the matter. For instance, it may be considered inappropriate

212 E.g. VP 1993–94/909, 1072; VP 1998–2001/681; H.R. Deb. (6.11.2000) 2219 (on matter being raised at start of proceedings, Speaker suggested that rather than take up private Members' business, the matter could be proceeded with after question time).

213 E.g. VP 1974–75/310; H.R. Deb. (12.8.2003) 18215–23, VP 2002–04/1062–3.

214 VP 1978–80/714, 1100.

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

216 S.O. 53; VP 1978–80/27.

217 E.g. VP 1978–80/1035; VP 2002–04/1126.

218 VP 1978–80/1372, 1375.

219 VP 1998–2001/681, 702–3.

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

or inconsistent with the dignity of the House either to give further consideration to a matter or to refer the matter to the Committee of Privileges for inquiry.²²¹

The Speaker may give reasons or make comments if, in his or her opinion, a prima facie case does not exist.²²² 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. Although the Speaker may be of the opinion that a prima facie case has not been made out, this does not prevent a Member from lodging a notice of motion in relation to the matter, but such a motion is not entitled to any precedence.

An opinion by the Speaker on a complaint raised under standing order 51 is not a ruling and so a dissent motion, as provided for in standing order 87, is not in order.²²³

Matter arising in committee proceedings

If a question of privilege arises in connection with proceedings of a select or standing committee the committee reports the matter to the House, by special report if necessary.²²⁴

Matter arising when the House is not sitting

During a period when the House is not sitting and is not expected to meet for a further period of at least two weeks, a Member may bring to the attention of the Speaker a matter of privilege which has arisen since the House last met and which he or she proposes should be referred to the Committee of Privileges. If satisfied that a prima facie case of breach of privilege has been made out and the matter requires urgent action, the Speaker must refer it immediately to the Committee of Privileges and report the referral to the House at its next sitting. Immediately after the Speaker's report the Member who raised the matter must move (without notice) that the referral be endorsed by the House. If this motion is not agreed to, the Committee of Privileges may take no further action on the matter.²²⁵

Recommended changes

The (former) Standing Orders Committee and the Joint Select Committee on Parliamentary Privilege recommended that complaints of breach of privilege or contempt should be raised in writing with the Speaker, in the first instance, with the Speaker then advising the Member whether or not he or she would allow precedence to a matter. The House has not, however, adopted these proposals. For more details *see* pp. 718–9 of the third edition.

Committee of Privileges

In order to assist the House in its examination of issues of privilege the House appoints a Committee of Privileges at the commencement of each Parliament. The committee was first established, by standing order, on 7 March 1944.²²⁶

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

222 VP 1976–77/129; VP 1978–80/76, 471; VP 1998–2001/702–3.

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

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

225 S.O. 52; VP 1993–95/2303–4.

226 S.O. 216; VP 1943–44/80.

Membership

The committee consists of the Leader of the House or his or her nominee, the Deputy Leader of the Opposition or his or her nominee and nine other Members. The chair of the committee is normally a backbench Member of considerable parliamentary experience. During the 28th Parliament (1973–1974) the chair was also a Minister (Mr Enderby) and the Prime Minister (Mr Whitlam) was a member of the committee. The committee often has a number of lawyers among its members. A member may be discharged from the committee and another appointed in his or her place for the consideration of particular inquiries.²²⁷ This may occur if a member of the committee has raised the matter being inquired into in the House,²²⁸ or if a member is absent or will be absent for a significant part of the inquiry, or for some other reason such as a member having had some prior involvement in respect of a particular issue. A member on being elected Speaker (for example, Speaker Sir John McLeay) withdraws from the committee and another Member is appointed to fill the vacancy.²²⁹ In other cases members have not participated in inquiries (for example, because they were also members of a committee involved in the inquiry), but they have not been replaced. In respect of certain inquiries the committee has resolved that any statements to the press were to be made by the chairman after being authorised by the committee.²³⁰

Authority and jurisdiction

The committee's purpose is to inquire into and report on complaints of breach of privilege or contempt referred to it by the House under standing order 51 or by the Speaker under standing order 52 (matters arising when the House is not sitting), or any other matter referred to it by or in accordance with a resolution of the House.²³¹ On the basis that privilege questions are matters for each House alone, the committee has no power to confer with the Senate Committee of Privileges, although it has been recommended that the two committees should be empowered to confer.²³² In 1982 the House and the Senate resolved to appoint a joint select committee to review and report whether any changes were desirable, inter alia, in respect of 'the law and practice of parliamentary privilege as they affect the Senate and the House of Representatives, and the Members and the committees of each House . . .' and substantial changes, described elsewhere in this chapter, followed this inquiry.²³³

The House of Representatives Committee of Privileges has inquired into complaints arising from inquiries conducted by joint committees. In 1973 it inquired into the unauthorised publication of the contents of a draft report of the Joint Committee on Prices;²³⁴ in 1980 the committee gave careful consideration to the question of its jurisdiction before determining that it had the power to inquire into matters arising from an inquiry conducted by a subcommittee of the Joint Committee on Foreign Affairs and

227 VP 1973–74/432.

228 VP 1978–80/35.

229 VP 1956–57/341, 377.

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

231 S.O. 216(a). For example, references concerning the use of House documents in the courts, PP 154 (1980), and public interest immunity, PP 408 (1995). In 1999 the committee reported on the release of evidence from the *Bankstown Observer* inquiry of 1955, PP 371 (1999), and in 2000, on the status of Members' records, PP 417 (2000).

232 PP 219 (1984) 127; and see J 1987–89/525, 536.

233 VP 1980–83/805–6; J 1980–83/884.

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

Defence;²³⁵ in 1987 it inquired into the unauthorised publication of information concerning the Joint Select Committee on Telecommunications Interception; in 1994 it inquired into a matter concerning the Joint Committee of Public Accounts;²³⁶ and in 2000–2001 into matters concerning the Joint Committee on Foreign Affairs, Defence and Trade.

The committee may not only investigate the specific matter referred but also the facts relevant to it.²³⁷ The committee has also reported on matters arising during, or as a consequence of, its inquiry, such as refusal of witnesses to provide information, without first seeking a separate reference from the House.²³⁸

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.²³⁹

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.²⁴⁰ The committee inquiring into the '*Century*' *Case* (1954), acting in accordance with the practice of the House of Commons of inquiring into facts surrounding and reasonably connected with the matter of the particular complaint, commented on aspects of the production of Hansard existing at the time.²⁴¹ In 1955 two separate but related matters referred by the House were considered together by the committee and one report made.²⁴²

Procedures

The practice of the committee is to write to persons from whom it may wish to receive evidence, providing relevant information, such as the terms of the matter referred to the committee, extracts from Hansard, any documents presented in connection with the matter and information on the committee. Normally persons are invited to make a written submission.²⁴³ Having considered written submissions received, the committee may then invite persons to appear before it. It has the power to compel persons to attend before it and to require that documents be produced.²⁴⁴ Where relevant, written submissions from one party may be published to another party.²⁴⁵

It is usual for the Clerk of the House to prepare a memorandum for the assistance of the committee. The Clerk is acknowledged as the committee's principal adviser on the principles and law of parliamentary privilege and has 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. The Speaker and law officers of the Crown have also given evidence to, or conferred informally with, the committee. During its 1980 inquiry into the use of House documents in the courts, a leading barrister served as a specialist adviser to the committee.

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

236 PP 135 (1987).

237 *May*, 23rd edn, p. 783, states that for the House of Commons Committee on Standards and Privileges 'The scope of any inquiry [into matters relating to privilege] comprises all matters relevant to the matter referred'.

238 PP 135 (1987) 12–13.

239 VP 1954–55/225, 239.

240 H of R 1 (1943–44) 3.

241 VP 1954–55/81, 94 (report not printed).

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

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

244 S.O. 236.

245 PP 456 (1991) (minutes).

Since 1987 the practice of the committee has been to permit witnesses to be accompanied by an adviser when giving evidence. Normally witnesses have chosen to be accompanied by lawyers,²⁴⁶ but on other occasions persons such as a Member's assistant²⁴⁷ or another Member²⁴⁸ have accompanied witnesses. Witnesses are permitted to consult freely with their advisers when giving evidence, but advisers are not permitted to make submissions themselves or to question other witnesses. In 1955 (*Browne/Fitzpatrick Case*) the committee heard counsel on his right to appear on behalf of a witness and on the committee's authority to administer an oath. The committee did not agree to the request to appear, and witnesses were examined on oath.²⁴⁹

The committee has often taken evidence in private. The question of taking evidence in public had been raised over the years by Members of the committee, but it was not until 1987, during its inquiry into matters concerning the Joint Select Committee on Telecommunications Interception, that the committee took evidence in public.²⁵⁰ Prior to the 1987 decision, a copy of the transcript of evidence had sometimes been published in full.²⁵¹ In the *Browne/Fitzpatrick Case* the committee published extracts of the evidence in its report. The minutes of proceedings of the committee are always presented with its report. (*And see* p. 751 re release of the committee's records.)

Witnesses, including Members, are normally examined on oath or asked to make an affirmation. Before 1987 witnesses had not been permitted to be present when other witnesses were giving evidence. The cross-examination of witnesses has never been permitted. In the '*Daily Telegraph*' Case (1971), an 'accused' witness was expressly refused permission to be present when other witnesses were giving evidence.²⁵² The practice of the committee since 1987 has been, even where evidence is taken in private, to publish that evidence to another party where the other party is seen as having an interest in the evidence. The other party may be invited or required to appear.²⁵³

The committee is not bound by the rules of evidence applying in courts, although the practice of the committee is to avoid receiving hearsay evidence, and to advise witnesses that it wishes to obtain information from witnesses about matters within their direct or personal knowledge. Witnesses are also advised that they can ask the committee to take evidence in private at any stage if they wish to, and the request is then considered. Witnesses are given the opportunity to make an opening statement if they wish before questioning commences and, at the conclusion of questioning, are given a further opportunity to make additional comments.²⁵⁴

During the course of inquiries into matters concerning joint committees the committee has advised the House by special report or statement that it wished to be able to take evidence from Senators, and it proposed that the House should communicate with the Senate by message asking it to grant leave for Senators to appear. This advice has been

246 PP 78 (1994) (minutes).

247 PP 77 (1994) (minutes).

248 PP 498 (1989) (minutes).

249 H of R 2 (1954–55) 9–10.

250 PP 135 (1987) 6.

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

252 PP 242 (1971) 9.

253 PP 78 (1994) (minutes).

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

acted upon, and Senators have been given leave to appear if they thought fit.²⁵⁵ The Senate has added qualification to a motion authorising Senators to attend, drawing attention to the principle that one House should not inquire into or adjudge the conduct of a member of the other House.²⁵⁶

It is traditionally observed that, in the consideration and determination of privilege matters, members of the committee do not act along party lines. In reaching a decision as to whether a breach of privilege or contempt had been committed in the *Daily Telegraph Case*, two earlier decisions of the committee were recommitted due to the votes being taken when certain members of the committee were absent.²⁵⁷

Reports

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 chair, the practice is for the report to be ordered to be made a Parliamentary Paper.²⁵⁸ The House may then order that it be taken into consideration at the next sitting²⁵⁹ or on a specified day.²⁶⁰ 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,²⁶¹ but in cases where persons have been found by the committee to be guilty of committing a breach of privilege or contempt, early consideration is usually given by the House.²⁶²

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.²⁶³ 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. A motion of this kind is normally debated and decided at that time,²⁶⁴ although debate may be adjourned and resumed later.²⁶⁵ 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 presented.²⁶⁶ The House has agreed to a resolution, on the recommendation of the Committee of Privileges, requesting the Speaker to initiate discussions with the Minister for Justice on a matter.²⁶⁷ The House does not necessarily follow the committee's findings and recommendations in declaring

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

256 VP 1998–2001/2157.

257 PP 242 (1971) 13–14, 19–20.

258 VP 1978–80/1613; VP 1993–95/1697, 2567. The report's details should not be debated on this motion.

259 VP 1974/84.

260 VP 1978–80/1613.

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

262 See H.R. Deb. (11.9.80) 1178–84.

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

264 VP 1978–80/147–8.

265 VP 1990–92/1540.

266 VP 1973–74/562; House of Representatives Committee of Privileges, *Report relating to a letter allegedly written by the Secretary, Department of Aboriginal Affairs*, PP 236 (1973) 4; VP 1985–87/1272; VP 1993–95/1697.

267 VP 1993–95/2664.

itself in relation to the matter or any penalty that may be decided.²⁶⁸ Any motion proposed is subject to amendment.²⁶⁹ It has been recommended that seven days' notice should be required of any motion to impose a fine or commit a person for contempt or breach of privilege, although the recommendation has not been implemented.²⁷⁰

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

Records of the committee

On 7 December 2000 the House agreed to a motion authorising the publication of all evidence or documents taken in-camera or submitted on a confidential or restricted basis and which have been in the custody of the Committee of Privileges for at least 30 years. The motion authorises the transfer of the records to the National Archives of Australia to enable public access. It also provides that, where the Speaker accepts advice that the release of a particular record would affect the national security interest, or represent an unreasonable intrusion upon the personal affairs of any person, alive or dead, or would otherwise be an exempt record under section 33 of the Archives Act if the Act applied, the release and transfer of the record is not authorised.²⁷¹ This motion was put forward on the recommendation of the committee.

CITIZEN'S RIGHT OF REPLY

Submissions from persons referred to in debate

A person who has been referred to in a debate in the House may make a submission, claiming that he or she has been adversely affected in reputation or in respect of dealings or associations with others, or injured in occupation, trade, office or financial credit, or that his or her privacy has been unreasonably invaded, by reason of that reference, and requesting that an appropriate response be incorporated in the parliamentary record. Submissions must be sent to the Speaker.²⁷² If the Speaker is satisfied that the matter is not obviously trivial, or frivolous, vexatious or offensive, and that it is practicable for the committee to consider the submission under the procedure, he or she must refer it to the Committee of Privileges. The Committee of Privileges may decide not to consider a submission if it considers that the submission is not sufficiently serious or that it is frivolous, vexatious or offensive. Such a decision must be reported to the House.

When it considers a submission, the Committee of Privileges:

- may confer with the person who has lodged it, and the Member(s) who referred to the person;
- may meet in private session;

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

269 VP 1954–55/270.

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

271 VP 1998–2001/2021.

272 VP 1996–98/1868–70.

- may not consider or judge the truth of any statements made in the House or in the submission;
- may not publish the submission or its proceedings in relation to the submission, but may present minutes of its proceedings and all or part of the submission to the House.

In a report under the procedure the committee can only recommend that a response by the person, in terms agreed by the person and the committee and specified in the report, be published by the House and incorporated in Hansard, or that no further action be taken by the House or the committee. The committee may not make any other recommendation. A recommended response must be succinct and strictly relevant to the questions in issue and must not contain anything offensive in character. A recommended response must not contain any matter the publication of which would unreasonably adversely affect or injure a person, or unreasonably invade a person's privacy; nor may it contain material which would unreasonably add to or aggravate any such adverse effect.²⁷³

The Committee of Privileges is authorised to agree to guidelines and procedures, not inconsistent with the resolution establishing the procedure, to apply to the consideration of submissions. Guidelines adopted in 1997,²⁷⁴ revised in October 2003,²⁷⁵ provide that:

- an application must be received within 3 months of the making of the statement to which the person wishes to respond unless, because of exceptional circumstances, the committee agrees to consider an application received later;
- applications should only be considered from natural persons, they should not be considered if lodged by or on behalf of corporations, businesses, firms, organisations or institutions;
- applications should only be considered from persons who are Australian citizens or residents;
- an application must demonstrate that a person, who is named, or readily identified, has been subject to clear, direct and personal attack or criticism, and has been damaged as a result;
- applications must be concise, be in the character of a refutation or explanation only and must be confined to showing the statement complained of and the person's response and must not contain any offensive material;
- applications concerning statements made in the Main Committee may be considered;
- applications should not be considered from persons who wish to respond to a statement or remarks made in connection with the proceedings of a standing or select committee—such persons should contact the committee direct on the matter; and
- in considering applications, the committee will have regard to the existence of other remedies that may be available to a person referred to in the House and whether they have been exercised.

The first committee recommendation for the incorporation of a response in Hansard was made in November 2003 and adopted by the House.²⁷⁶ Neither the recommendation, nor the agreement of the House to the question 'That the report be adopted' and the subsequent

273 For examples of reports see VP 1996–98/2513; 2957; VP 1998–2001/488; 897.

274 VP 1996–98/2513.

275 H.R. Deb. (7.10.2003) 20652.

276 H.R. Deb. (6.11.2003) 22296; VP 2002–04/1304–5. This was the 13th submission under the procedure.

incorporation, can be taken as implying that either the committee or the House agrees with the content of the response.

LIMITATIONS AND SAFEGUARDS IN THE USE OF PRIVILEGE

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

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

The privileges of the House are precious rights which must be preserved. The collateral obligation to this privilege of freedom of speech in the Parliament and the essential complementary privileges of the House will be challenged unless all members exercise the most stringent responsibility in relation to them. I reiterate . . . 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.²⁷⁷

- Secondly, 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.²⁷⁸ This view, however, requires some qualification and an added perspective was given by Speaker Snedden in the following statement:

In regard to freedom of speech, I think it is important for us to understand that there are occasions on which a Member in this House, exercising the freedom of absolute privilege of what he says in this House, can and does attack persons who apparently are defenceless. This privilege in the past has been used outrageously by individual Members. But . . . there is a fundamental sense of justice in a House and if a Member is acting badly the House will recognise it and treat him accordingly. The public will also recognise it and rob him of his credibility. So I feel that we do not need to invent any rules whereby a Speaker or anybody else should make the judgment as to whether a Member should be allowed to proceed with his privileged attack on an individual. It would not be within the capacity of a Speaker to make the right judgment because he would not have the facts. He would not know. Therefore the person raising the matter must bear the consequences himself. But I would not like to see that privilege limited or diminished in any way. All of us can think of not one, but many examples where, if it had not been for the freedom of speech and the attack on an individual in Parliament crime would have gone undetected and unpunished. Some people who were being seriously disadvantaged by rapacious people would not have been protected had it not been for the freedom and absolute privilege that this Chamber has to raise matters and to ventilate them so that inquisitorial efforts could be taken by other people and so that the matter could be circulated with the qualified privilege of the media.²⁷⁹

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

277 H.R. Deb. (8.11.79) 2819–20.

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

279 *Report of 5th Conference of Commonwealth Speakers and Presiding Officers*, Govt Pr., Canberra, 1978, pp. 70–1 (Speaker Thomas comments at p. 62).

. . . In the final analysis, however, it is for the Member to resolve whether or not it is in the public interest to raise a matter in the House, and his or her actions will be judged accordingly.²⁸⁰

- Thirdly, the House should exercise or invoke its powers in respect of matters of contempt and privilege sparingly.²⁸¹ As noted, the Joint Select Committee on Parliamentary Privilege recommended the formal adoption by the House of a policy of restraint in these matters, such as was adopted by the House of Commons in 1978. Although this recommendation has not been formally adopted by the House, Speakers have had regard to the policy and have indicated support for it.²⁸²
- Finally, the House should be careful to ensure that, in exercising its power to punish for contempt, its punitive action is appropriate to the offence committed (*see* comment on previous point).

280 PP 407 (1994) 5; *and see* p. 712.

281 From the establishment of the Committee of Privileges in 1944 to December 2004, 43 matters have been referred to the committee; of these matters 19 were found to contain some kind of breach of privilege or contempt; and of these in only five cases did the House impose or insist on any significant punitive measure; namely, in one case imprisonment, in another case a form of reprimand and in the other three the demand of a suitable apology; *and see* Appendix 25.

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