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Parliamentary Privileges

The Vision in Hindsight: Parliament and the Constitution: Paper No. 6

Vision in Hindsight

Vision in Hindsight is a Department of the Parliamentary Library (DPL) project for the Centenary of Federation.

The Vision in Hindsight: Parliament and the Constitution will be a collection of essays each of which tells the story of how Parliament has fashioned and reworked the intentions of those who crafted the Constitution. The unifying theme is the importance of identifying Parliament's central role in the development of the constitution. In the first stage, essays are being commissioned and will be published, as IRS Research Papers, of which this paper is the sixth.

Stage two will involve the selection of eight to ten of the papers for inclusion in the final volume, to be launched in conjunction with a seminar, in November 2001.

A Steering Committee comprising Professor Geoffrey Lindell (Chair), the Hon. Peter Durack, the Hon. John Bannon and Dr John Uhr assists DPL with the management of the project.

Centenary of Federation 1901–2001

Professor Enid Campbell
27 July 2000

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Major Issues

The framers of the Constitution of the Commonwealth of Australia envisaged that the Federal Parliament should, amongst its legislative powers, have power to enact legislation on what the powers, privileges and immunities of its Houses, members and committees were to be. But they considered it appropriate that until such time as the Parliament enacted such legislation, the Houses of the Federal Parliament, their members and committees, should be endowed with the same powers, privileges and immunities as were possessed by the House of Commons of the United Kingdom Parliament, its members and committees, at the establishment of the Commonwealth. Section 49 of the Federal Constitution gave expression to that intent.

More than eighty years were, however, to pass before the Federal Parliament enacted fairly comprehensive legislation on the subject of parliamentary privileges. Its enactment—the *Parliamentary Privileges Act 1987*—followed an inquiry by a Joint Select Committee which had been commissioned in 1982 to undertake a general inquiry into the matter. The Committee presented its final Report in 1984.

The Act of 1987 is a most important document in that it represents an attempt to reform the laws about parliamentary privileges, having regard to difficulties and uncertainties attending the laws which applied by virtue of section 49 of the Constitution, and also changes which had taken place in the workings of parliamentary institutions since the establishment of the Commonwealth of Australia (on 1 January 1901).

The Act of 1987 effected some major changes in the laws concerning federal parliamentary privileges. It reduced the time during which members are immune from arrest in civil causes and requirements to attend before courts and tribunals. It removed the power of the Houses to expel their members. It also reduced the punitive powers of the Houses.

In 1955 the High Court, in the case of *Fitzpatrick and Browne*, had held that, under section 49 of the Constitution, the Houses had authority to order the imprisonment of persons they adjudged in contempt of the House. The Court's decision, however, revealed that if a House chose to exercise this power it could be difficult for a court to assess whether the conduct of the offender was capable of being regarded as an offence against the House. The 1987 Act removes impediments to judicial review, at least when a House has imposed a penalty of imprisonment. It defines essential elements of offences punishable by the Houses. It removes the power of the Houses to punish contempt by defamation except in

relation to words spoken in the presence of a House or a parliamentary committee. It prescribes the penalties which may be imposed.

There continue to be differences of opinion about whether Houses of Parliament need to have punitive powers to enable them to carry out their functions. A Joint Committee of the Houses of the United Kingdom Parliament has recently recommended that legislation be enacted to give the courts jurisdiction to try offences now punishable as contempt of Parliament in those cases in which the alleged offender is not a member of either House. This recommendation may prompt reconsideration of the relevant provisions of the Commonwealth Act of 1987.

One of the central provisions of the 1987 Act is section 16. It affirms the application of Article 9 of the English Bill of Rights 1689 to the Federal Parliament. Article 9 declares that 'freedom of speech and debates or proceedings in parliament ought not be impeached or questioned in any court or place out of parliament'. Section 16 amplifies the meaning of the term 'proceedings in parliament' and it also imposes restrictions on the uses which may be made of evidence of parliamentary proceedings in cases before courts and tribunals. Section 16 has presented some problems for the courts, including some relating to the constitutionality of the subsection on admissibility of evidence of parliamentary proceedings. The constitutional issues have yet to be considered by the High Court.

The Act of 1987 is not an exhaustive code of the law about federal parliamentary privileges and it allows for the continued operation of some of the powers and privileges of the House of Commons which apply by virtue of s. 49 of the Constitution, among them the investigatory powers of the Houses and their duly authorised committees. The Act does not, for example, attempt to define what powers the Houses and their committees may exercise in order to gather information or the grounds on which persons may properly object to the provision of information which is sought of them. One problem which the Act has not resolved is whether the investigatory powers of the Houses are constrained by a doctrine under which officers of the executive branch may properly object that the provision of information sought by a House would be contrary to the public interest. A Bill introduced in 1994 sought to address this problem but was not passed into law.

Introduction

In its eighty-seventh year the Parliament of the Commonwealth of Australia enacted:

> An Act to declare the powers, privileges and immunities of each House of Parliament and the members and committees of each House, and for related purposes.

The Act—the *Parliamentary Privileges Act 1987*—was 'the culmination of more than eighty years of spasmodic enthusiasm to effect' such a declaration.[1] It followed a comprehensive review of the law by the Joint Select Committee on Parliamentary Privilege, appointed in 1982.[2] It was enacted principally in reliance on section 49 of the Commonwealth of Australia Constitution, read in conjunction with section 51(xxxvi).

Section 49 of the Constitution provides that:

> The powers, privileges and immunities of the Senate and 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 so 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.

Section 51(xxxvi) gave the Parliament power to make laws with respect to 'Matters in respect of which this Constitution makes provision until the Parliament otherwise provides'. Section 49 was one such provision.

The effect of section 49 was that, until the enactment of the *Parliamentary Privileges Act 1987*, the powers, privileges and immunities of the Houses of Australia's Federal Parliament, their members and committees were co-extensive with those of the House of Commons at Westminster as of 1 January 1901. Had the Constitution not included section 49, these powers, privileges and immunities would have been less extensive than those accorded to the House of Commons. They would have been restricted to those reasonably necessary for the discharge of the functions assigned to the Houses by the Constitution and they would not have included a power to impose penalties for breach of privilege or the offence known as contempt of Parliament.[3]

The *Parliamentary Privileges Act 1987* brought about some important changes in the law relating to the Houses of the Federal Parliament, its members and committees. Section 8 stripped the Houses of the power to expel their members, a power which had been exercised only once in the history of the Parliament.[4] This change did not, however,

detract from the power of the Houses to determine whether a member's seat had become vacant for any of the disqualifying causes listed in sections 44 and 45 of the Constitution. Section 6 took away from the Houses their power to punish contempts by defamation except when committed in the presence of a House or committee.[5] The penal jurisdiction was further limited by section 4. This specifies essential elements of the offences punishable by the Houses. The periods of time during which members, parliamentary officers and parliamentary witnesses are immune from arrest or detention in civil causes, and from requirements to attend before courts or tribunals were abridged, having regard to modern means of transport.[6] Section 16 confirmed the application to the Federal Parliament of the freedom of speech and debate assured by Article 9 of the English Bill of Rights 1689; it also sought to clarify the effects of that important provision.

The Act of 1987 does not purport to be an exhaustive code on the powers, privileges and immunities of the Houses of the Federal Parliament, their members and committees. This is made clear by section 5 of the Act which provides that:

> Except to the extent that this Act expressly provides otherwise, the powers, privileges and immunities of each House, and of the members and committees of each House, as in force under section 49 of the Constitution immediately before the commencement of this Act, continue in force.

Powers which the Houses continue to possess by virtue of section 49 of the Constitution include the power of each House to suspend members from the service of the House; the power of the Houses and their duly authorised committees to require the attendance of persons before them to give evidence and to produce documents; and the power to regulate their internal proceedings. The last mentioned power is fortified by section 50 of the Constitution.[7]

The *Parliamentary Privileges Act 1987* was the model for the Northern Territory's *Legislative Assembly (Powers and Privileges) Act 1992* and for the Parliamentary Privileges Bill introduced in New Zealand's House of Representatives in 1994.[8] Section 24 of the *Australian Capital Territory (Self Government) Act 1988* (Cwlth) makes the federal Act definitive of the powers, privileges and immunities of the Legislative Assembly of the Australian Capital Territory, though it withholds from the Assembly a power to impose penalties by fine or imprisonment. None of the Parliaments of the Australian States has, to date, chosen to enact legislation along the lines of the 1987 federal Act.[9]

The framers of Australia's Federal Constitution clearly intended that the Federal Parliament should have power to enact legislation which gave to the Houses, their members and committees powers, privileges and immunities which might be somewhat different from those possessed by the House of Commons, its members and committees, and perhaps even greater than those possessed by the House of Commons as of 1901.[10] They did not, however, pause to consider whether the Constitution might impose some constraints on the kind of legislation the Parliament could validly enact pursuant to section 49, read in conjunction with section 51(xxxvi). The Federal Parliament's legislative

powers were to be limited to enumerated subjects. Hence section 49, read in conjunction with section 51(xxxvi), could not be construed as giving the Parliament an unlimited legislative power. The scope of that particular power could not but be affected by contemporary understandings about what matters pertained to parliamentary privilege,[11] and in determining whether a federal law is one of a kind within this head of power, a court of law would probably need to be satisfied that the law is in aid of and ancillary to the performance of the Parliament's functions under the Constitution.

Over the years the High Court of Australia was to discover in the Federal Constitution certain implied limitations on federal legislative powers, among them limitations on the capacity of the Federal Parliament to make laws binding the States and their instrumentalities, and to make laws which interfere with judicial processes. In 1992 the High Court ruled that the Constitution impliedly prohibits exercise of federal legislative powers to make laws which are unduly restrictive of freedom of political communication.[12] The High Court has not yet had occasion to decide whether these implied limitations control the exercise of the legislative power in respect of parliamentary privileges, or for that matter the powers which are exercisable by the Houses under section 49 itself. This constitutional issue is considered later in the paper.

The paper, it needs be stressed at the outset, does not attempt a comprehensive review of the federal laws of parliamentary privilege and of the ways in which they have been administered.[13] Rather it concentrates on those aspects of this body of law which present particular problems: the punitive powers of the Houses and the manner of their exercise; freedom of speech and debate in Parliament and what it entails; and the investigatory powers of the Houses and their duly authorised committees. The last part of the paper raises some issues which may merit further attention by the Parliament.

Punitive Powers

Prior to federation, legislation had been enacted to invest the Houses of all of the Australian colonial Parliaments, with the exception of those in New South Wales, with extensive punitive powers.[14] In South Australia and Victoria the legislation gave to the Houses the same penal jurisdiction as was possessed by the House of Commons as of a specified date.[15] The result was that the Houses of Parliament in those colonies could order the imprisonment of persons they found guilty of breach of privilege or contempt of the House, for the duration of the current session of Parliament. In Queensland, Tasmania and Western Australia the punitive powers of the Houses were more limited since penalties could be imposed only in respect of defined offences.[16] The framers of the Australian Federal Constitution preferred the expedient which had been adopted in South Australia and Victoria.

While there have been many occasions on which the Houses of the Federal Parliament have adjudged conduct to be in breach of their privileges or in contempt, there has been

only one occasion on which they have chosen to impose a penalty of imprisonment.[17] This was in 1955 when the House of Representatives committed Raymond Edward Fitzpatrick and Frank Courtney Browne, the proprietor and editor respectively of the *Bankstown Observer*, to prison.[18] These men had been responsible for publishing a series of articles which suggested that, before entering Parliament, a Member of the House had been involved in an immigration racket. The House's Committee of Privileges advised that Fitzpatrick and Browne had been guilty of a serious breach of privilege.[19] In publishing the articles they had 'intended to influence and intimidate a Member ... in his conduct in the House' and 'had deliberately attempted to impute corrupt conduct as a Member against' the Member 'for the express purpose of discrediting and silencing him'.[20] The House accepted this advice and on 10 June 1955 resolved that the two men be committed to and kept in custody until 10 September, or until earlier prorogation or dissolution, unless the House should sooner order their discharge.[21]

Fitzpatrick and Browne instituted court proceedings against their gaoler, the Chief Commissioner of Police in the Australian Capital Territory. They sought writs of habeas corpus to secure their release from custody. The case was removed into the High Court of Australia. On behalf of Fitzpatrick and Browne it was argued, unsuccessfully, that the power exercised by the House was essentially a judicial power and that under Chapter III of the Constitution, the judicial powers of the Commonwealth were exercisable only by the courts therein described. In the opinion of the High Court, section 49 of the Constitution established a clear exception to this general principle.[22] And following English judicial authority[23] the Court held that the Speaker's warrants to the respondent gaoler were a sufficient answer to the applications for habeas corpus. The warrants simply recited that the House had resolved that Fitzpatrick and Browne had been guilty of breach of privilege and that they be committed to custody. There was no legal requirement that the warrants set out particulars of the offence; nor could the Court look beyond the warrants.[24]

The *Parliamentary Privileges Act 1987* has altered the law which had been applied in the case of Fitzpatrick and Browne. If their case were to arise today and the House resolved that they be punished by imprisonment, the House would, under section 9 of the Act, be required to sentence them to imprisonment for a fixed term, not exceeding six months. That penalty would not be affected by a prorogation of the Parliament or the dissolution or expiration of the House. More importantly, under section 11 the resolution of the House imposing the penalty, and the warrants committing them to custody, would need to 'set out particulars of the matters determined by the House to constitute' a breach of privilege or contempt. The significance of this requirement is that if the offenders sought judicial review of the determination against them, a court would have to decide whether the conduct particularised was capable of being regarded as an offence against the House.[25] And in deciding that question the court would have to consider whether the essential elements of an offence, as declared in section 4 of the Act, had been satisfied. The court could not, however, review the House's 'sentence'.

Section 4 of the Act provides that:

> 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 a Committee of its authority or functions, or with the free performance by a member of the member's duties as a member.[26]

Prior to the enactment of the *Parliamentary Privileges Act 1987* there was doubt about whether the Houses could impose monetary fines.[27] The House of Commons had not imposed such penalties since the eighteenth century.[28] Section 7 of the Act authorises the Houses to impose fines on those who commit parliamentary offences: in the case of natural persons, a fine not exceeding $5000; in the case of corporations, a fine not exceeding $25 000. But a natural person cannot be both fined and imprisoned. A fine is declared to be a debt due to the Commonwealth and is recoverable 'on behalf of the Commonwealth in a court of competent jurisdiction by any person appointed by a House for that purpose'.[29]

Curiously the Act does not require that a resolution of the House which imposes a fine should set out particulars of the matters determined by the House to constitute the offence. In an action to recover a fine, the existence of the alleged debt could not be proved otherwise than by production of the House's resolution.[30] But what if that resolution stated no more than that the House had adjudged the defendant guilty of an offence? Could the court look beyond the resolution? That question awaits judicial resolution but it is one which would be more satisfactorily resolved by amendment of section 11 of the Act. There can surely be no good reason why a House should be required to particularise when it decides to impose a penalty of imprisonment but not when it decides to impose a fine. Why, it may be asked, should a House be required to give particulars when it decides that a journalist be imprisoned for contempt, but not be required to give particulars when it fines the journalist's employer for the same offence?

There have been differences of opinion about whether the Houses should retain their punitive powers and also about whether their punitive powers should be limited to offences defined by statute.[31] Some have taken the view that the penal jurisdiction reposed in Houses of Parliament should be transferred to the ordinary courts of law. Their objection is principally that in exercising their penal jurisdiction, the Houses are acting as judges in their own cause. Those who support the maintenance of a parliamentary penal jurisdiction have, however, pointed out that it is a jurisdiction akin to that which superior courts of law themselves exercise when they impose penalties for contempt of court. If courts are considered to be the best judges of what conduct is prejudicial to the performance of their functions, it is argued, should not it also be accepted that the Houses of a Parliament are the best judges of what conduct is prejudicial to the performance of parliamentary functions? Another argument in favour of the maintenance of the penal jurisdiction of the Houses is that transfer of the jurisdiction to the courts would eliminate the large measure of discretion which the Houses exercise in determining whether it is appropriate to impose penalties.

The Australian Parliaments whose Houses possess a penal jurisdiction have not been disposed to relinquish that jurisdiction entirely, though the federal *Parliamentary Privileges Act 1987* signified a preparedness on the part of the Federal Parliament to remove from its Houses a part of their former penal jurisdiction, and also to expose determinations in exercise of the jurisdiction to judicial review.[32]

Moved no doubt by the advice of the Joint Select Committee on Parliamentary Privilege in its 1984 Report,[33] the Federal Parliament chose not to include in the *Parliamentary Privileges Act 1987* definitions of the conduct punishable by the Houses. The Parliament was prepared to do no more than specify essential elements of the offences punishable by them. The task of framing more precise statutory provisions on what kinds of conduct are punishable by the Houses was, it seems, perceived to be as difficult as that which would attend any attempt to define by statute what conduct may be punishable as contempt of court. Short of legislation which defines the offences punishable by the Houses, the Houses can do little more than provide guidance about the conduct they may adjudge to be punishable by them, in the form of resolutions of the kind passed by the Senate on 28 February 1988.[34] Those resolutions are not, however, binding on the courts.

Since proceedings to determine whether an offence against a House has occurred are essentially judicial in character, it is important that the proceedings be conducted in accordance with the principles of natural justice.[35] There were some unsatisfactory aspects of the proceedings against Fitzpatrick and Browne in 1955. The hearings of the Committee of Privileges of the House of Representatives were held in camera. The accused were compelled to answer questions under oath. They were not allowed legal representation; nor were they afforded an opportunity to cross-examine the Member who had made the complaint against them. That Member had given his evidence in their absence. After the Committee had presented its report, Fitzpatrick and Browne were summoned to appear at the Bar of the House and were given an opportunity to address the House. But once again they were denied legal representation.

The Joint Select Committee on Parliamentary Privilege reviewed the procedures for conduct of inquiries by the Privileges Committees and in its Report of 1984 recommended that they be revised in certain respects.[36] The recommended changes are to a large extent reflected in the Senate's resolutions of 1988 on parliamentary privilege.[37] The procedures laid down in the resolutions, if followed, ensure that those accused of breach of privileges or contempt of a House are treated fairly.

In reviewing decisions by a House to punish for offences against the House, courts are unlikely to inquire whether the procedures adopted by the House have fulfilled minimal standards of procedural fairness. Such inquiry might well be considered an impermissible intrusion into the internal proceedings of the House and contrary to Article 9 of the Bill of Rights 1689. The only possible basis upon which a court might justify inquiry by it into the fairness of the procedures adopted by a House of the Federal Parliament is that the exercise by the House of its penal jurisdiction involves the exercise of judicial power and

that the validity of any purported exercise of judicial power is contingent on the observance of minimal standards of procedural fairness.[38]

The occasions on which Houses of Parliament are likely to impose penalties by way of fine or imprisonment for offences against the House may be few. Federal parliamentary experience suggests that even when an offence against a House is found to have been committed, the House will often be content to record that finding, with perhaps the addition of a reprimand or admonition, exaction of an apology or an assurance that the offender will take certain corrective action.[39] There are some other sanctions which a House may think it appropriate to apply, for example withdrawal of 'privileges' accorded to representatives of the mass media in relation to facilities afforded to them within parliamentary precincts.[40]

The Houses also possess disciplinary powers in relation to their own members. As has been mentioned earlier, the *Parliamentary Privileges Act 1987* removed from the Houses of the Federal Parliament their former power to expel their members.[41] The Houses nevertheless retain their power to suspend their members.[42] The extent to which, if at all, the power of suspension is subject to constitutional constraints is unclear.

In a series of cases, most of them emanating from New South Wales, courts have recognised that a House which does not possess punitive powers may nonetheless suspend its members for self-protective purposes or to force a member to comply with a valid command of the House.[43] Determination of whether a power of suspension has been exercised for a permissible self-protective or coercive purpose rather than for an impermissible punitive purpose may not, however, be an easy matter. And such a determination will nearly always involve investigation of what has occurred in the course of parliamentary proceedings.

The *Parliamentary Privileges Act 1987* did not diminish the power already possessed by the Houses of the Federal Parliament, by virtue of section 49 of the Constitution, to suspend members from their service and to do so even for punitive purposes. There could, however, be a question whether the power of suspension can be employed to penalise a member for exercise of the constitutionally protected freedom of political communication.[44]

Freedom of Speech and Debate

One of the most important of the privileges of Parliament is that expressed in Article 9 of England's Bill of Rights 1689.[45] Article 9 provides:

> That the freedom of speech, and debates or proceedings in parliament, ought not be impeached or questioned in any court or place out of parliament.

This Article applied to the Houses of the Federal Parliament by force of section 49 of the Constitution and this application has been confirmed by section 16(1) of the *Parliamentary Privileges Act 1987*.

The primary object of Article 9 was to protect members of the English Parliament against legal liabilities for what they said or did in the course of debate.[46] But it also established the right of the Houses to determine what matters were to be considered by them. Article 9 was instrumental in establishing the independence of the Houses of the Crown and the supremacy of Parliament.

The protections accorded by Article 9 extend not only to members but also to parliamentary witnesses, to those who have presented petitions to Parliament and to authors of documents which have been tabled in a House. Article 9 has also been interpreted as imposing restrictions on the reception and use of evidence of parliamentary proceedings by courts and other extra-parliamentary bodies, such as royal commissions of inquiry.[47]

Proceedings in Parliament

Questions have arisen, both in the courts and in parliaments, about what are to be regarded as proceedings in parliament for the purposes of Article 9. In the courts there may be a question about what are proceedings in parliament for the purposes of the laws of defamation, including the rule that the defendant to an action for defamation may plead in defence that the publication alleged to be defamatory is a fair and accurate report of parliamentary proceedings.[48] There is little doubt that proceedings in parliament encompass proceedings at formal sittings of Houses and of their committees. But what is the status of communications of the following kinds?

1. Communications between members and Ministers on matters which might be raised in Parliament.[49]

2. Communications between members of Parliament and members of the public, again in relation to matters which might be raised in Parliament.[50]

3. Communications in caucus.[51]

4. Media releases in relation to matters which have already been the subject of statements in a House or before a parliamentary committee.[52]

The Joint Select Committee on Parliamentary Privilege recognised that there was uncertainty about what may be regarded as proceedings in Parliament.[53] It proposed enactment of legislation to define that concept.[54] The definition it recommended was fairly detailed. The definition which appears in section 16(2) of the *Parliamentary Privileges Act*

1987 is much less detailed and it does not purport to be an exhaustive definition. The sub-section provides that:

> For the purposes of the provisions of Article 9 of the Bill of Rights, 1689 as applying in relation to the Parliament, and for the purposes of this section, 'proceedings in Parliament' means all words spoken and acts done in the course 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 the evidence so given
>
> (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 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 committee and the document so formulated, made or published.[55]

This sub-section may well have extended the concept of proceedings in Parliament, at least for the purposes of Article 9 of the Bill of Rights.[56] Paragraph (c), for example, would seem to cover many documents generated by members preparatory to the formal transaction of parliamentary business (e.g. draft questions on notice), documents assembled by officers or employees of a House for use by a parliamentary committee, draft petitions, and unsolicited submissions to a parliamentary committee. Queensland's Court of Appeal has held that paragraph (c) covers documents sent by strangers to Members but only if the Member chooses to keep the documents for the purpose of transacting parliamentary business.[57] Paragraph (d) covers all documents ordered to be printed and published by a House. To an extent it may have displaced the *Parliamentary Papers Act 1908*.

Publications which are within the statutory definition of proceedings in Parliament are absolutely privileged for the purposes of the law of defamation. Section 16(3), which is examined presently, restricts the use which may be made of these publications in the courts. Article 9 of the Bill of Rights 1689 forbids the impeachment or questioning of such proceedings in any court or place out of Parliament. That can mean that a court cannot order production of protected documents for inspection by litigants.[58] The Senate's Committee of Privileges has expressed concern about possible abuse of section 16(2) of the Act. It has recognised that 'it is vital for the proper functioning of a house of parliament that information is produced to the maximum extent possible to enable proper decision making'.[59] At the same time it has recognised that:

> If all information given to senators for the purpose of speeches to the Senate is covered by privilege, there may be some danger that Senate privilege could be used to

> protect documents and files which may be required in court proceedings. This is especially true of primary documents which do not exist in any other form.[60]

There has never been any doubt that documents tabled before a House become proceedings in Parliament, whatever their source and whatever their content. For an extra-parliamentary, governmental body to undertake inquiry into the truth of statements contained in the tabled documents may be held in breach of privilege. A House may even adjudge it an offence for an extra-parliamentary body to undertake inquiry into the circumstances which attended supply of documents which were subsequently tabled before a House.[61] Nevertheless the Senate's Committee of Privileges has drawn attention to 'the gravity of senators' actions in placing on public record, under parliamentary privilege, documents on behalf of or authored by other persons'. It has said that: 'It is the duty of all senators to read all aspects of material they are tabling and to take responsibility for it'.[62]

The statutory definition of 'proceedings in parliament' has, to an extent clarified the ambit of the protection afforded by Article 9 of the Bill of Rights 1689. It does not, however, resolve some of the uncertainties about the status of members' correspondence. Some such correspondence may answer the description of documents prepared for the purpose of or incidental to the transacting of the business of a House or a parliamentary committee. But much correspondence generated by members in discharge of their functions will not fall into that category: for example, representations made on behalf of constituents to ministers and other agents of the executive. Correspondence of this kind is generally regarded as outside the protection of Article 9 of the Bill of Rights 1689, though under the laws of defamation it will usually be covered by the defence of qualified privilege.

Parliamentary Privilege in Court Proceedings

One of the most contentious provisions in the *Parliamentary Privileges Act 1987* is section 16(3). This provision restricts the reception of evidence of proceedings in Parliament and the uses which may be made of such evidence by courts and tribunals. It applies to all Australian courts and tribunals, tribunals being defined in section 3(1) as all bodies having power to examine witnesses on oath.

Prior to 1987 a number of courts had construed Article 9 of the Bill of Rights as imposing such restrictions,[63] but in 1985 and 1986, judges of the New South Wales Supreme Court ruled that Article 9, as applied to the Federal Parliament, did not preclude reception by the Court of evidence of what some of the witnesses before the Court had said in evidence they had previously given before a parliamentary committee, even though the purpose was to attack the credibility of those witnesses.[64] Section 16(3) of the 1987 Act was enacted to counteract those judicial rulings.[65] It provides as follows:

> 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.

Some general points to be made about section 16(3) are these:

(i) it does not prohibit absolutely reception by courts and tribunals of evidence of proceedings in the Federal Parliament. The prohibition is expressed rather in terms of the purposes for which that evidence may be received and used. The provision has been interpreted by courts as not precluding reception of evidence to prove simply an occurrence in the course of parliamentary proceedings[66]

(ii) there is no provision whereby a House or a member may waive the provision,[67] and

(iii) Section 16(5) makes exceptions in relation to proceedings in courts and tribunals so far as they relate to questions arising under section 57 of the Constitution or interpretation of federal Acts.[68]

In *Prebble v New Zealand Television Ltd*,[69] the Judicial Committee of the Privy Council, on appeal from New Zealand, expressed the view that section 16(3) is declaratory of one of the effects of Article 9 of the Bill of Rights 1689.[70] But the correctness of that pronouncement has been queried.[71] The subsequent case of *Laurance v Katter*[72] revealed some problems about the meaning and effect of section 16(3) of the 1987 Act and also about its constitutionality.

The plaintiff in this case, Mr Laurance, had brought an action for defamation against Mr Katter in respect of remarks the latter had made in the course of a media interview. The interview concerned statements Mr Katter had made about Mr Laurance in the course of debate in the House. Those statements were prima facie defamatory, but having been made under parliamentary privilege they would not have exposed Mr Katter to any legal liability. In answer to questions asked by the interviewer, Mr Katter said no more than that he adhered to what he had said in the House. That answer could have prompted interested listeners to consult the Hansard record of what the Member had said in Parliament. Had the interviewer simply read from that record he or she would have been assured (by section 10 of the Act) that no liability would be attracted by the mere reading of the record. The interviewer's and broadcaster's defence to an action for defamation against them would have been that of a fair and accurate report of a parliamentary proceeding.

That defence would not, however, have been available to Mr Katter if it was possible to adduce evidence to prove that his answers to the interviewer incorporated his statements in the House. The question the court had to decide was whether evidence of the Member's statements in Parliament was admissible.[73]

A majority of the judges of the Queensland Court of Appeal held that it was, but their reasons were different. J. A. Pincus concluded that section 16(3) of the *Parliamentary Privileges Act 1987* 'does not validly operate with respect to the conduct of defamation suits'.[74] In coming to that conclusion J. A. Pincus had regard to the implied constitutional freedom of political communication and to the effect section 16(3) would have on discussion of parliamentary affairs. Unless read down, section 16(3), his Honour observed, would 'inhibit legitimate attacks outside parliament on what is said within it, by subjecting the critics to the risk of an unjust liability for damages'.[75] It could 'interfere with freedom to attack or analyse what happens in parliament by distorting, to the point of absurdity, the way in which defamation suits relating to that subject must be conducted'.[76] It would do so simply by exclusion of evidence necessary to establish defences such as truth and fair comment.

J. A. Davies also considered that section 16(3) had to be read down, but in light of section 16(1). The question was therefore whether admission of evidence of what Mr Katter had said in Parliament would involve the impeachment or questioning of parliamentary proceedings. In the opinion of J. A. Davies it would not. What was being questioned in the action for defamation was rather what the Member had said outside the Parliament.[77]

The dissenting judge, P. Fitzgerald, thought that section 16(3) was effective to preclude admission of evidence of what Mr Katter had said in Parliament. He also rejected the plaintiff's challenge of the constitutionality of section 16(3). In his opinion the provision was one of a kind authorised by section 49 of the Constitution. Moreover the legislative power conferred by section 49 was not constrained by implied constitutional limitations.[78] His Honour failed to mention section 51(xxxvi) of the Constitution. The legislative powers conferred by section 51 are clearly subject to implied constitutional limitations. The constitutionality of provisions in the *Parliamentary Privileges Act 1987* cannot therefore be determined simply by reference to section 49 of the Constitution.

Mr Katter sought and obtained special leave to appeal to the High Court against the decision of the Queensland court. In granting leave to appeal the High Court clearly recognised that the case presented important constitutional issues.[79] The Court lost the opportunity to pronounce on those issues when Mr Katter discontinued his appeal. But there will, no doubt, be occasion in the future for the constitutional issues to be considered by the High Court. The issues are essentially these:

(i) Is the legislative power conferred by section 49 of the Constitution, read in conjunction with section 51(xxxvi), constrained by implied constitutional limitations, and in particular the implied freedom of political communication, the

implications found in Chapter III of the Constitution—the Judicature chapter—and implied limitations on federal powers to affect the operations of institutions of State government?

(ii) If the relevant federal legislative power is subject to these implied limitations, does section 16(3) of the *Parliamentary Privileges Act 1987* violate any of those limitations?

(iii) If section 16(3) of the 1987 Act is invalid, what, if anything, does section 49 of the Constitution mandate regarding reception and use of evidence of federal parliamentary proceedings in litigation before courts or proceedings before other extra-parliamentary agencies of government which are empowered to require the giving of evidence?

In considering the constitutionality of section 16(3) the High Court will need to consider both the legal and the practical effects of the sub-section.[80]

Courts are bound to recognise that in some cases application of section 16(3) will require them to exclude evidence which is both relevant and vital to the issues before them. If they conclude that, without such evidence, they cannot do justice according to law, they may consider that they are obliged to order a stay of the proceedings.[81] An exclusionary rule of evidence which forces such an outcome must surely raise a question about whether the rule amounts to an illegitimate interference with judicial processes, contrary to implications found in Chapter III of the Constitution,[82] and contrary also to the principle that federal legislative powers cannot be used to interfere with the functioning of State courts as organs of State government.[83]

In adjudging the constitutionality of section 16(3) of the *Parliamentary Privileges Act 1987*, the High Court would not be concerned with the desirability of such a provision. On the other hand, if the Court were to accept that the validity of the provision depends, in part, on whether it represents an impermissible interference with the implied constitutional freedom of political communication, it would have to consider not only the extent to which the provision may inhibit commentary on proceedings in Parliament, but also whether it is a provision reasonably necessary and appropriate to maintain freedom of speech and debate in Parliament.[84] Parliamentarians and judges may well differ on that question.[85]

If section 16(3) were to be held invalid on constitutional grounds there would still be a question about whether section 49 of the Constitution itself ordains an exclusionary rule of evidence. That is really a question about the effect of Article 9 of the Bill of Rights 1689. Prior judicial decisions on the meaning and effect of Article 9 are not binding on the High Court of Australia and it would be open to the Court to hold that Article 9 does not require courts to exclude relevant evidence of parliamentary proceedings, except when the object of those seeking to adduce the evidence is to fix some legal liability on someone for what has been said or done in the course of those proceedings. The High Court might

nonetheless take the view that, independently of Article 9, the public interest may in some circumstances require a court to exclude evidence of parliamentary proceedings. The public interest immunity doctrine is one which has been developed largely by the courts. Its application in individual cases requires a court to balance the public interest to be served by exclusion of particular evidence (for example, national security) against the public interest in the administration of justice according to law and relevant evidence. The High Court would undoubtedly recognise the importance of sustaining the utmost freedom of speech in parliamentary forums but it may not be prepared to accept that this freedom cannot be assured without an exclusionary rule of evidence as wide and as absolute as that expressed in section 16(3) of the *Parliamentary Privileges Act 1987*, read in conjunction with the definition of parliamentary proceedings in section 16(2) of the Act.

In its consideration of what Article 9 of the Bill of Rights 1689 means and requires, the High Court could not ignore the fact that this Article is part of the law of all of the Australian polities and is thus protective of freedom of speech in State and Territory legislatures as well as in the Federal Parliament. Nor could the Court overlook its prior rulings that the implied constitutional freedom of political communication constrains the powers of government at all levels and that it also controls Australian common law. That implied constitutional freedom may well inhibit powers to enact legislation which detracts from freedom of speech in parliamentary forums. But equally it may inhibit use of parliamentary powers (judicial as well as legislative) in ways which are unduly restrictive of the freedom of those who do not enjoy parliamentary privileges to criticise the actions of persons who have acted under the protections those privileges.

While the Houses of the Australian Parliament have, by the *Parliamentary Privileges Act 1987*, substantially renounced their power to impose penalties for defamation of them and their members, they have not come to grips with the inequalities in relative freedoms to communicate on matters political which are created, in a practical way, by section 16 of that Act.

But what some may regard as the fundamental flaw in section 16(3) of the Act is the potential of the exclusionary rule of evidence it expresses to prevent courts from adjudicating matters before them with reference to what is clearly relevant evidence.

During debate on the Bill for the 1987 Act some Members of the Parliament indicated their concerns about the proposed exclusionary rule, and in particular about the impact it could have on the ability of persons charged with criminal offences to question the credibility of witnesses on the ground that they had made prior inconsistent statements before a parliamentary committee.[86] That particular concern was addressed in a Bill introduced by Duncan Kerr MP in 1992, but his Bill did not proceed beyond the second reading stage.[87]

The Joint Committee on Parliamentary Privilege of the United Kingdom Parliament has recommended enactment of legislation similar to section 16 of the Australian Act, though with some important qualifications. While the Committee considered that the general

principle that no one should incur legal liability for things said or done in the course of parliamentary proceedings should be maintained, it recommended that evidence of parliamentary proceedings should be admissible in proceedings before courts to test the validity of administrative acts. The Committee also recommended that the Houses he authorised to waive the exclusionary rule of evidence.[88]

Abuse of Privilege

Houses of Parliament have recognised that the freedom of speech accorded to participants in parliamentary proceedings is capable of being abused and that abuses can occasion considerable damage to individual reputations.[89] The potential for injury to reputational interests is compounded by the legal protections afforded to those who publish fair and accurate reports of parliamentary proceedings.[90] Defamatory statements made under parliamentary privilege may attract wide publicity in the mass media.

The Houses of the Federal Parliament have power to deal with abuses of the privilege of free speech in several ways. Members who abuse the privilege may be suspended from the service of the House. Penalties may be imposed on witnesses who have given false testimony. Parliamentary committees may be appointed to inquire into the truth of accusations made under parliamentary privilege. Since 1988 the Senate has, by resolution, accorded what is termed a citizen's right to reply.[91] The House of Representatives adopted a similar resolution in August 1997. When that right is accorded, after inquiry by the Committee of Privileges, the reply may be incorporated in the parliamentary record.[92]

There could be occasions on which accusations made under parliamentary privilege are thought to be so serious as to warrant inquiry by an extra-parliamentary body such as a royal commission of inquiry. The House concerned may be fully supportive of such an inquiry.

Federal royal commissions are formally brought into being by Letters Patent under the hand of the Governor-General, though they can also be established pursuant to statute.[93] *The Royal Commissions Act 1902* (Cwlth) equips federal royal commissions with powers to compel the attendance of witnesses and the production of documents and to require the giving of evidence under oath or affirmation. The Act does not, however, allow reception of evidence of parliamentary proceedings and section 16(3) of the *Parliamentary Privileges Act 1987* expressly prohibits inquiry by royal commission into the truth of statements made under federal parliamentary privilege.[94] If the Federal Government wished to appoint a royal commission to inquire into the truth of accusations made in the course of federal parliamentary proceedings, it would therefore need to seek enactment of legislation to authorise that inquiry.

The decision of the New South Wales Court of Appeal in *Arena v Nader*,[95] and the High Court's decision to refuse the application for special leave to appeal against that decision,[96]

suggest that legislation to that end, if suitably framed, would survive challenge on constitutional grounds. The legislation under challenge in *Arena v Nader* was special State legislation to enable inquiry to be made into whether there was any evidence to support accusations a member of the State's Legislative Council had made in Parliament about the conduct of the Premier and some others.[97] The legislation made it clear that the inquiry could not proceed without the consent of the Legislative Council. Provision was also made to authorise the House to waive privilege to the extent declared by it. Waiver by the House of privilege did not, however, have the effect of depriving the accusing member of her individual right to refuse to answer before the extra-parliamentary commission of inquiry.

One of the grounds on which the constitutionality of the New South Wales legislation was assailed was that it violated the implied freedom of political communication. The Court of Appeal and the High Court emphatically rejected that contention. In so doing they signalled that MPs cannot rely on what one author[98] has termed the 'arch privilege' of freedom of speech in Parliament to resist inquiries by extra-parliamentary bodies, commissioned pursuant to statute, to inquire into and report on the truth of assertions they have made under parliamentary privilege.

Parliamentary Investigations

The powers with which the Houses of Australia's Federal Parliament are endowed by force of section 49 of the Federal Constitution include a power to initiate inquiries by their members, armed with a range of coercive powers. The Houses have power to command the attendance of persons before them to give evidence and to produce documents. They also have power to order the arrest of persons who defy such commands and to have brought them, by force, before the House. The investigatory powers include power to require that evidence be given under oath or affirmation. Those who act in disobedience of a House's commands in these respects may be penalised by the Houses.[99]

The regime brought into being by force of section 49 of the Federal Constitution was one under which the Houses could delegate their powers of inquiry to committees of their members, though not their power to impose penalties.[100]

The Houses of the Federal Parliament, and especially the Senate, have made extensive use of their investigatory powers. Typically the task of inquiry has been assigned to committees. The committees may be select committees appointed ad hoc or standing committees. Some of the committees have a statutory basis.[101] The statutory committees are generally joint committees whose members are drawn from both Houses. While the investigatory powers of the Houses may be assigned only to committees consisting of members of Parliament, those committees may be assisted by non-members who are appointed to act much like counsel assisting royal commissions.[102]

Parliamentary investigations may be undertaken for a variety of purposes, among them to consider proposed legislation, to examine subordinate legislation, to review existing statutes, to scrutinise a government's estimates of expenditure, to determine whether there are grounds for removing a judge of a federal court from office pursuant to section 72 of the Constitution, to determine whether an offence against a House has been committed, and to review action taken or proposed by the executive branch of government. The conduct of some investigations will necessarily involve the calling of witnesses and their examination under oath or affirmation. Other inquiries may involve no more than invitation of written submissions or comments.

The Ambit of the Investigatory Power

There is still uncertainty about whether the Federal Constitution imposes restrictions on the matters which the Houses of the Federal Parliament and their committees may investigate. It could be argued that the federal investigatory power is constrained by the limitations on federal legislative powers and that therefore the Houses of the Federal Parliament and their committees cannot investigate matters within the exclusive legislative domain of the States.[103] It is doubtful whether the High Court would accept this argument, having regard to the fact that a federal parliamentary inquiry could, quite properly, be undertaken to determine whether the Constitution should be amended to enlarge federal legislative powers. The Court might also have regard to the circumstance that the federal grants power under section 96 of the Constitution permits the Federal Parliament to grant financial assistance to States on conditions and that these conditions may relate to matters within the exclusive province of the States. The Federal Parliament clearly has an interest in discovering whether States which have accepted grants of financial assistance on conditions have complied with the terms of those grants.

Constitutional issues of a different order may arise when Houses of the Federal Parliament or their committees purport to exercise their investigatory powers in ways which may trespass on the powers, privileges and immunities of the Houses of State Parliaments, their members and committees.[104] It could be that section 49 of the Constitution would be held not to authorise federal parliamentary inquiries in breach of Article 9 of the Bill of Rights 1689 so far as it applies to State Parliaments, or to authorise the federal Houses and their committees to require the attendance before them of State parliamentarians during sittings of the State Houses. Officers of the federal Houses have certainly counselled against exercise of federal investigatory powers in ways which might be seen as intruding on State parliamentary privileges.[105]

From time to time the executive branch of the Commonwealth has objected to the giving of evidence or production of documents to Houses and parliamentary committees on the ground that the evidence or material sought relates to matters which cannot or should not be disclosed.[106] While such objections have often been accepted, the Houses have not formally acknowledged that their investigatory powers are limited by a doctrine of

executive privilege. Those supporting the existence of an executive privilege have maintained that a certificate of the responsible Minister asserting the privilege should be treated as conclusive.

The *Parliamentary Privileges Act 1987* does not clarify the law in this regard. The Joint Select Committee on Parliamentary Privilege of 1982–84 considered the matter[107] but thought it 'impossible to devise any means of eliminating contention between the' parliamentary and executive arms of government 'without one making major concessions to the other'. In its view 'the wisest course is to leave to Parliament and the Executive the resolution of clashes in this quintessentially political field'.[108]

It is possible that a clash between the Senate and the Executive in this 'political field' might arise for judicial determination if the Senate were to adjudge the officer or officers of the Executive who claimed executive privilege to be guilty of contempt in refusing to provide information sought, and were to resolve that they be imprisoned for their contempt. In that event the officers might seek judicial review of the Senate's action and the court would find it necessary to decide whether the action of the officers was capable of being regarded as in contempt of the House.[109]

Some intimation of the position the High Court might take in such a case provided by its recent decision in *Egan v Willis*,[110] on appeal from New South Wales. In that case a State Minister sought review of a decision of the State's Legislative Council to suspend him from the service of the House. The suspension followed the Minister's failure to table certain documents he had been ordered to table. Although the case did not involve consideration of a claim of executive privilege, the Court clearly recognised the right of the House to order the tabling of documents by the Minister and to coerce compliance with that order by suspension. That view was based largely on what were seen to be principles of responsible government-principles concerning the relationships between the executive and parliamentary arms of government under a Westminster style of government.

In a subsequent case, arising from the same course of events, the New South Wales Court of Appeal ruled that the investigatory powers of the Houses of the State Parliament are not subject to certain principles which constrain the powers of courts in the exercise of their judicial functions. In the opinion of the New South Wales Court, demands by a House for production or giving of evidence cannot be resisted on the ground that the evidence sought is protected by legal professional privilege or the so-called public interest immunity. The one exception allowed by the State court was in respect of proceedings in cabinet.[111]

This decision of the New South Wales Court is not, of course, definitive of the ambit of the investigatory powers of the Houses of the Federal Parliament. Nevertheless it is an indication of the preparedness of the judicial branches of government to accord extensive powers of discovery to the legislative arms of government, and to do so by reference to conceptions of the roles of representative and popularly elected legislative Houses in political systems such as ours.

In 1994 a Bill was introduced in the Senate which, if enacted, would have enabled disputes concerning the right of the Houses to demand information to be determined by the Federal Court of Australia. The Bill—The Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill—made provision for prosecutions to be initiated, by authority of the Houses and their committees, for the offence of failing to comply with a lawful order of a House or a parliamentary committee, without reasonable excuse. It would be a defence to a prosecution for this offence that the order in question required the giving of evidence or disclosure of a document and that disclosure of the information 'would be substantially prejudicial to the public interest' and 'the prejudice to the public interest would not be outweighed by the public interest in ensuring that a House and its committees can conduct inquiries freely.' The penalties the Federal Court might impose for the statutory offence were to be the same as those the Houses themselves might impose in exercise of their contempt jurisdiction. But in addition the Court would have been authorised to make such orders as were 'necessary to prevent a continuation or recurrence of the offence and to ensure compliance with the lawful order of the House or committee in respect of which the offence was committed.'

The Bill made special provision in relation to officers and employees of the Commonwealth who committed the statutory offence because of a direction of a minister. They could not be convicted of or penalised for the offence. On the other hand they could be subject to court orders to compel compliance with a lawful parliamentary order.

Had the Bill been enacted it would not have deprived the Houses of their jurisdiction to punish those who failed to comply with their lawful orders. On the other hand, once a prosecution for the statutory offence had been commenced in the Federal Court, the Houses would have been deprived of power to punish the accused for contempt of Parliament.

The Parliamentary Privileges Amendment (Enforcement of Lawful Orders) Bill 1994 was referred to the Senate Committee of Privileges. That Committee recommended that the Bill not be proceeded with, principally on the ground that it was not considered appropriate for courts to decide whether it was or was not in the public interest that certain information be disclosed to the Houses or their committees.[112]

The powers of the Houses to extract information in documentary form from the executive branch have no doubt been strengthened by the *Freedom of Information Act 1982* (Cwlth). Agencies of the executive branch are now unlikely to claim executive privilege in respect of documents which are accessible to members of the public under this legislation.

Protection of Parliamentary Witnesses

Persons who appear as witnesses before the Houses of the Federal Parliament receive all of the protections afforded by Article 9 of the Bill of Rights 1689 and section 16 of the

Parliamentary Privileges Act 1987. They also receive protection under section 12 of the Act. This section creates certain criminal offences triable in the ordinary courts. Sub-section (1) 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.

Sub-section (2) provides that:

> A person shall not inflict any penalty or injury upon a person, or deprive of any benefit, another person on account of:
>
> (a) the giving or proposed giving of any evidence, or
>
> (b) any evidence given or to be given... .

These provisions could be invoked against officers of the executive branch who have attempted to prevent their subordinates from giving evidence or who have victimised them on account of the evidence they have given.

The Act of 1987 does not specify what other protections may be afforded to parliamentary witnesses. Specifically it does not indicate whether they can rely on the protections which would be available to them were they to be witnesses before courts of law or tribunals. It has generally been assumed that the Houses and their committees are not bound by curial rules of evidence. But courts have taken the view that some of these rules are of such a fundamental nature that they bind extra-curial bodies which have statutory powers to coerce the giving of evidence, unless clear statutory provision has been made to exempt a body from the operation of the rules. The fundamental rules include the privilege against self-incrimination and legal professional privilege.[113] The federal *Royal Commissions Act 1902*, as amended, modifies the law regarding the privilege of self-incrimination so far as it would otherwise apply to federal royal commissions.[114] Similar modifications are contained in other federal Acts to do with extra-parliamentary bodies of inquiry.[115]

There is nothing in the Australian Federal Constitution which expressly guarantees to those who are summoned to attend as witnesses before the Houses of the Federal Parliament or their committees any minimal rights. It has, however, been recognised that it is desirable that parliamentary inquiries be conducted, as far as possible, in ways which conform with notions of natural justice and which are attentive to some of the curial rules of evidence. In 1984 the Joint Select Committee on Parliamentary Privilege recommended that the Houses of the Federal Parliament declare, by resolution, principles and practices concerning the conduct of parliamentary inquiries.[116] The Senate adopted that recommendation in a series of resolutions passed on 25 February 1988.[117]

International Obligations

Australia has since March 1976 been a party to the International Covenant on Civil and Political Rights (the ICCPR). This instrument is not part of Australian domestic law, though it is something courts may take into account in resolving ambiguities in statutes and in developing the common law. Australia's accession to the First Optional Protocol of the ICCPR means that even if governmental acts are in accordance with Australian law, they may be the subject of complaint to the United Nations' Human Rights Committee on the ground that they violate the ICCPR.

There are several provisions in the ICCPR which have a bearing on the law of parliamentary privilege.[118] Article 14(1), for example, provides that in the determination of criminal charges against them, 'everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law'. Charges of breach of parliamentary privilege and contempt of Parliament are classifiable as criminal charges, but can it be said that Houses of Parliament, in determining such charges, are acting as independent and impartial tribunals? In *Demicoli v Malta*[119] the European Court of Human Rights considered whether Malta's House of Representatives had acted in breach of Article 6 of the European Convention on Human Rights—a provision similar to Article 14(1) of the ICCPR—when it adjudged a journalist guilty of contempt and imposed a penalty upon him. The European Court ruled that Article 6 had been infringed, mainly because the two Members of the House who had been defamed by the journalist had participated in the adjudicatory proceedings before the House. The Court did not find it necessary to decide whether the exercise of a penal jurisdiction by the House in cases of alleged contempt was incompatible with Article 6, though the European Commission of Human Rights seems to have thought that it was. What the Court's decision suggests is that Members of Parliament who are, in a sense, victims of alleged offences against Parliament should not participate in adjudications of those offences.

Article 14 of the ICCPR also prescribes minimal requirements of due process for the determination of criminal charges. The procedures for the protection of witnesses before the Senate's Privileges Committee, set out in resolution 2 of the resolutions on parliamentary privilege agreed to by the Senate on 25 February 1988, appear to conform with most of these requirements. There may, however, be a question about whether Australian law regarding judicial review of parliamentary convictions and sentences for offences against a parliament conforms with Article 14(5). This provides that: 'Everyone convicted of a crime shall have the right to his convictions and sentence being reviewed by a higher tribunal'. Article 14(5) does not indicate what form this review must take. Must it, for example, allow for review of the fact findings of trial court or may reviews be limited to determination of whether some error of law has occurred? Australian courts would certainly be entitled to take Article 14(5) into account when considering the scope of their jurisdiction to review parliamentary convictions and sentences for parliamentary offences.

Prior to the enactment of the *Parliamentary Privileges Act 1987* there might have been doubts about whether Australian federal law on parliamentary offences conformed with the stipulation contained in Article 9(1) of the ICCPR that: 'No one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law'. The 1987 Act does not define parliamentary offences with precision, but it at least specifies essential elements of such offences. Nonetheless there may be a query about whether the procedures for dealing with charges of such offences have been 'established by law'.[120]

Article 19 of the ICCPR declares that 'Everyone shall have the right to freedom of expression ...'. It recognises that this right 'carries with it special duties and responsibilities' and 'may therefore be subject to certain restrictions ...'. But Article 19 declares that these restrictions:

> shall only be such as are provided by law and are necessary:
>
> (a) for respect of the rights and reputations of others, and
>
> (b) for the protection of national security or of public order (*ordre public*), or of public health or morals.

Domestic laws which immunise participants in parliamentary proceedings against legal liabilities on account of what they have said in the course of those proceedings cannot be regarded as inconsistent with Article 19. On the other hand domestic laws which operate so as to inhibit the freedom of members of the public to express opinions on parliamentary affairs and proceedings may be seen to be restrictive in ways not permitted by Article 19. I have already drawn attention to the inhibitions on freedom of expression which may have been created by section 16(3) of the *Parliamentary Privileges Act 1987*.[121] The High Court of Australia has still to resolve the question whether this provision violates the implied constitutional freedom of political communication, or must be read down in light of that freedom.

Whither Parliamentary Privilege?

The *Parliamentary Privileges Act 1987* is essentially the handiwork of parliamentarians. It was enacted following a comprehensive review of the law by a Joint Select Committee of the Houses of the Federal Parliament and the Bill for the Act was introduced by the Presiding Officers of the Houses rather than by Ministers. The Act brought about some important changes in the law though it left some aspects of the prior law untouched, for example that relating to parliamentary inquiries.

Under the Act the penal jurisdiction of the Houses has been delimited and slightly reduced. It has been delimited by prescription of essential elements of the offences triable and punishable by the Houses[122] and by prescription of the maximum penalties they may

impose.[123] It has been reduced by removal of their jurisdiction to punish contempt by defamation, otherwise than in the face of the Houses and their committees,[124] and by conversion of some parliamentary offences into statutory offences triable in the courts.[125] The Houses have not, however, been prepared to surrender their penal jurisdiction to the courts or to support legislation which defines with precision the offences punishable by them. It is nonetheless conceivable that the Houses might support legislation to extend the range of parliamentary offences triable in the courts to include, say, failure to attend before a House or committee on summons, without reasonable cause; refusal on the part of a parliamentary witness to be sworn or make affirmation, or to answer questions or produce documents without good cause; or the giving of false evidence.[126] Provisions to enable such offences to be tried in the courts might be qualified by a requirement that prosecutions not be initiated except by direction of the House concerned.

The *Parliamentary Privileges Act 1987* does not attempt to define or delimit the investigatory powers of the Houses and their committees. The investigatory powers of standing parliamentary committees established by statute are necessarily limited as regard the matters which may be the subject of inquiry by those committees, but no good purpose would be served by inclusion within the *Parliamentary Privileges Act 1987* of provisions which would tie the hands of the Houses in relation to other matters of inquiry. On the other hand there is something to be said in favour of inclusion within a general Act such as the 1987 Act of provisions which make it known that the Houses and their duly authorised committees have power to require the attendance of persons and the production of documents, and the giving of evidence under oath or affirmation, and to order the arrest of persons who have defied summons to attend and have them brought before the House or the relevant parliamentary committee. Provisions of these kinds are contained in the *Royal Commissions Act 1902* (Cwlth) and have been so included because, at common law, royal commissions have no coercive powers. Members of the public may not always appreciate that, legally, there is a distinction between inquiries by royal commission and inquiries by Houses of Parliament and by parliamentary committees. A statute declaratory of the powers of the Houses of a Parliament could well incorporate provisions to give statutory expression to powers which already exist under section 49 of the Constitution. There could, however, be differences of opinion about whether the grounds on which witnesses may decline to answer questions should be specified in legislation.

Reference has already been made to the constitutional issues which attend the exclusionary rule of evidence contained in section 16(3) of the *Parliamentary Privileges Act 1987*.[127] Should this provision survive constitutional challenge there could be moves to have it modified by addition of a clause to permit waiver of the rule in certain circumstances. Section 13 of the United Kingdom's *Defamation Act 1996* permits the exclusionary rule to be waived by individual participants in parliamentary proceedings but only in relation to reception of evidence relevant to suits for defamation. Those who exercise the right of waiver do not, however, incur any legal liability for what they have said in the course of parliamentary proceedings. The immediate object of section 13 was to make it possible for an MP to pursue an action for defamation against a newspaper in

respect of statements made about the MP's conduct in Parliament. A court had stayed the action on the ground that the defendant newspaper was effectively precluded from defending the suit in that Article 9 of the Bill of Rights 1689 rendered evidence of what had occurred in Parliament inadmissible. Section 13 of the United Kingdom Act has been criticised by a number of commentators[128] and it would probably not be seen as a provision which should be emulated by Australian Parliaments.[129]

The United Kingdom Parliament's Joint Committee on Parliamentary Privilege has recommended that section 13 of the Defamation Act 1996 be repealed and be replaced by a provision which authorises the Houses to waive the privilege, but not so as to expose anyone to legal liability.[130]

A matter of continuing concern is the protection which should be accorded to Members' correspondence and records.[131] As has been mentioned,[132]section 16 of the *Parliamentary Privileges Act 1987* provides very limited protection in this regard. It also offers no protection against searches and seizures pursuant to valid search warrants or authorised interceptions of telecommunications In same circumstances, however, a House might regard such activities as 'an improper interference ... with the free performance by a member of the member's duties as a member' and thus an offence against the House within the meaning of section 4 of the Act.[133]

Endnotes

1. G. S. Reid and Martyn Forrest, *Australia's Commonwealth Parliament 1901–1988*, Chapter 6 of this work describes proposals for legislation. Carlton, Vic., Melbourne University Press, 1989, p. 249.
2. The final Report of the Committee was presented in October 1984–PP No 219/1984. The background is described in Reid and Forrest, op. cit., pp. 266–9 and H. Evans, 'Parliamentary Privilege: Changes to the Law at Federal Level' (1988) 11 *University of New South Wales Law Journal*.
3. *Kielley v Carson* (1842) 4 Moo PC 63; 13 ER 225; *Fenton v Hampton* (1858) 11 Moo PC 347; 14 ER 727.
4. The member for Kalgoorlie, Hugh Mahon, was expelled by the House of Representatives in 1920–V & P (HR–1920-1) 423, 425, 431–3; see Reid and Forrest, op. cit., (n 1) p. 271 and Gavin Souter, *Acts of Parliament*, Melbourne University Press, Carlton, Vic., 1988, pp. 182–4.
5. On contempt by defamation see Enid Campbell, *Parliamentary Privilege in Australia* Melbourne University Press, 1966, Chapter 8. Seditious libels in respect of the Federal Parliament are still offences under the federal *Crimes Act 1914*—see sections 24A, 24D, 24E and 24F.

6. Section 14.

7. Section 50 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, and

   (ii) The order and conduct of its business and proceedings either separately or jointly with the other House.

8. See M. Harris, 'Sharing the Privilege: Parliamentarians, Defamation and Bills of Rights', *Auckland Law Review* 47, 1996, p. 8. A number of the recommendations of the United Kingdom's Joint Committee on Parliamentary Privilege are based upon provisions in the federal Act—HL Paper 43–I; HC Paper 214–I, 1999.

9. Section 3 of Queensland's *Parliamentary Papers Act 1992* contains a definition of proceedings in Parliament which is based on the definition contained in section 16(2) of the *Parliamentary Privileges Act 1987* (Cwlth). The definition is declared to be for the purposes of both this State Act and also for the purposes of Article 9 of the Bill of Rights 1689.

10. The debates at the Constitutional Conventions on what became section 49 are summarised in Reid and Forrest, op. cit., pp. 250–2. The debates reveal that the only question of much concern was whether the Federal Parliament should have authority to endow its Houses with powers greater than those possessed by the House of Commons in 1901.

11. In *R v Richards; Ex parte Fitzpatrick and Browne*, 1955, 92 CLR 157 at pp. 167–9, the High Court suggested that the *Parliamentary Papers Act 1908* (Cwlth) and the *Parliamentary Proceedings Broadcasting Act 1946* (Cwlth) rest not on section 49 of the Constitution, but rather on section 51(xxxix) of the Constitution, the provision which empowers the Federal Parliament to make laws with respect to, inter alia, 'Matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof ... or in the Federal Judicature ...'.

12. The 1992 cases were *Nationwide News Pty Ltd v Wills*, 1992, 177 CLR 1 and *Australian Capital Television Ltd v Commonwealth*, 1992, 177 CLR 106. See also *Lange v Australian Broadcasting Corporation*, 1997, 189 CLR 520.

13. The paper complements chapter 6 in Reid and Forrest, op. cit., pp. 249–302. That chapter examines the concept of parliamentary privilege. It also surveys the history of attempts to produce a statutory declaration of the privileges of the houses of the Federal parliament, their members and committees. It presents an analysis of cases of alleged breach of privilege and contempt between 1901 and 1987.

14. The Houses of the New South Wales Parliament were accorded limited punitive powers by the *Parliamentary Evidence Act 1901*, an Act which consolidated provisions dating back to 1881.

15. See Campbell, op. cit., p. 24.

16. ibid., pp. 24–5.

17. Information about federal cases up to 1987 is presented in tabular form in Reid and Forrest, op. cit., in Chapter 6 of that work.

18. Chapter 6 of Reid and Forrest (op. cit., n 1) records various commentaries on this case. See also Campbell, op. cit., pp. 158–161.

19. Mr Frank Green, then the Clerk to the House, advised that no breach of privilege could be established: see Campbell, op. cit., p. 159.

20. PP 1954–5 (HR) No 2.

21. The returns made to the applications for habeas corpus are set out in (1955) 92 CLR 157.

22. *R v Richards; Ex parte Fitzpatrick and Browne* (1955) 92 CLR 157 at 167. On this aspect of the case see A. Twomey, 'Reconciling Parliament's Contempt Power with the Constitutional Separation of Powers' (1997) 8 *Public Law Review* 88. Justice Kirby has signalled that the correctness of this ruling is open to reconsideration by the High Court: *Egan v Willis* (1998) 158 ALR 527 at para [136].

23. *Sheriff of Middlesex* (1840) 11 A & E 273; 113 ER 419.

24. (1955) 92 CLR 157 at pp. 162 & 164.

25. ibid., p. 162.

26. The term 'offence' is defined in section 3(3).

27. Joint Select Committee on Parliamentary Privilege, *Final Report*, October 1984 (PP No 219/1984) paras 7.14–7.17.

28. ibid., para 7.14.

29. Section 7(6).

30. Section 17 of the Act provides that a certificate signed by or on behalf of the presiding officer of a House stating that a specified fine has been imposed on a specified person by a House is evidence of that matter.

31. Arguments for an against a penal jurisdiction are set out in H. Evans, ed, *Odgers' Australian Senate Practice*, 8th ed, Canberra, AGPS, 1995, pp. 58–61. See also chapter 6 of the Report of the Joint Committee on Parliamentary Privilege, op. cit.

32. Section 12 and 13 of the Act create offences triable in courts.

33. Joint Select Committee on Parliamentary Privilege, *Final Report*, October 1984 (PP No 219/1984), Ch. 7.

34. Resolution 6. (The resolutions are reproduced in an appendix to Evans, op. cit. The proposed resolutions and an explanatory memorandum were presented to the Houses on the introduction of the Bill for the 1987 Act: see CPD (Senate) 17 March 1987, pp 792–9; CPD (HR) 5 May 1987, pp 2629–34; 6 May 1987, pp. 2672–9.

35. The principles of natural justice require that a decision maker should be above reasonable apprehension of bias and that persons who stand to be affected by a decision should be afforded a reasonable opportunity of being heard.

36. *Final Report* (PP No 219/1984), paras 7.38–7.70.

37. Resolution 2.

38. See Notes 22 and 109.

39. For an example of corrective action see Senate Committee of Privileges, *72nd Report*, June 1988.

40. See C. Lloyd, *Parliament and the Press*, Melbourne University Press, Carlton, Vic., 1986, pp. 60–1, pp. 65–9, pp. 149–50, 1988.

41. See Note 4.

42. See Campbell, op. cit., pp. 82–5.

43. *Doyle v Falconer* (1866) LP 1 PC 328; *Barton v Taylor* (1886) 11 AC 197; *Egan v Willis* (1998) 158 ALR 527.

44. Enid Campbell, 'Contempt of Parliament and the Implied Freedom of Political Communication' 10 *Public Law Review* 196.

45. According to the Julian calendar the Bill of Rights was enacted in 1688, but according to the calendar inaugurated by the Calendar (New Style) Act 1751 it was enacted in 1689.

46. On the history of Article 9 see G. F. Lock, 'The 1689 Bill of Rights' (1989) 37 *Political Studies* 540 and G Griffith, *Parliamentary Privilege: Use, Misuse and Proposals for Reform* (NSW Parliamentary Library, Sydney, Briefing Paper 4/97), pp. 12–14.

47. The cases are summarised in Griffith, op. cit., pp. 24–8.

48. This is a defence under the common law of defamation. It is also a statutory defence, though sometimes with qualifications: *Parliamentary Privileges Act 1987* (Cwlth) section 10; *Defamation Act 1974* (NSW) sections 24, 26, Schedule 2; *Defamation Act 1889* (Qd) section 13(1)(a); *Wrongs Act 1936* (SA) section 7(ab); *Defamation Act 1957* (Tas), section 13(1)(a); *Criminal Code* (WA) section 354(1); *Defamation Act 1938* (NT) section 16(1)(ba). See also *Burchett v Kane* [1980] 2 NSWLR 266; *James v John Fairfax & Sons Ltd* [1986] 4 NSWLR 466; *Baffsky v John Fairfax & Sons Ltd* (1991) 106 FLR 21 at p. 40.

49. See Report from the Select Committee on the Official Secrets Act (HC 101 of 1938–9) para 4; Fifth Report from the Committee of Privileges (HC 305 of 1956-7); 591 HC Deb 5s, col 334 (8 July 1958); GF Lock, 'Parliamentary Privilege and the Courts: The Avoidance of Conflict' [1985] *Public Law* 64. English judicial decisions on whether such communications are absolutely privileged for the purposes of the law of defamation are conflicting: see *Beach v Freeson* [1972] 1 QB 14; *Rost v Edwards* [1990] 2 QB 460; *Koolman-Darnley v Gunter*, *The Times* 19 April 1967.

50. Courts have held that under the laws of defamation such communications are not absolutely privileged but are protected by qualified privilege: *R v Rule* [1937] 2 KB 375; *Grassby* (1991) 55 A Crim R 419 at pp. 430 & 432.

51. See *R v Turnbull* [1958] Tas SR 80; D. McGee, 'Parliament and Caucus' *New Zealand Law Journal*, [1997], p. 137.

52. See *Roman Corporation Ltd v Hudson's Bay Oil and Gas Co Ltd* (1972) 23 DLR (3d) 292 at 298; (1973) 36 DLR (3d) 413 at 419; *Re Clark and Attorney-General of Canada* (1978) 81 DLR (3d) 33; *Stopforth v Goyer* (1978) 87 DLR (3d) 373 at 381; *Australian Broadcasting Corporation v Chatterton* (1986) 46 SASR 1 at 33 and 36; *Hutchinson v Proxmire*, 99 S Ct 2675 (1979); *Toyne v Everingham* (1993) 91 NTR 1.

53. PP No 219/1984, paras 5.5–5.28.

54. ibid., para 5.29.

55. Under section 17 of the *Parliamentary Privileges Act 1987* (Cwlth) a certificate signed by or on behalf of a presiding officer of a House, or a chairman of a committee, which states that 'a particular document was prepared for the purpose of submission, and submitted, to a House or committee' is evidence of that matter.

56. The question of what is a proceeding in Parliament may arise in contexts other than Article 9, for example when a defendant to an action for defamation pleads the defence of fair and accurate report of parliamentary proceedings.

57. *O'Chee v Rowley* (1997) 150 ALR 199. See also Senate Committee of Privileges, *67th Report* (PP No 141/1997).

58. 150 ALR 199 at pp. 212 & 215, 1997.

59. PP No 141/1997, para 2.12.

60. ibid., para 2.46.

61. See Senate Committee of Privileges, *72nd Report*, June 1998.

62. ibid., para 2.33.

63. See 45 above.

64. These rulings were made in the course of the first and second trials of Justice Lionel Murphy of the High Court. The ruling of J. Cantor in the first trial is described in Sir C. Harders, 'Parliamentary Privilege—Parliament versus the Courts: Cross-examination of Committee Witnesses' (1993) 67 *Australian Law Journal* 109. J. Hunt's ruling in the second trial is reported: (1986) 5 NSWLR 18.

65. See Second Reading speeches: CPD (Senate) 7 Oct 1986, pp 892–5; CPD (HR) 19 March 1987, pp 1154–6.

66. *Amman Aviation Pty Ltd v Commonwealth*, 81 ALR 710 at p. 718, 1988.

67. *Hamsher v Swift*, 33 FCR 545 at p. 564, 1992.

68. Evidence of parliamentary proceedings may also be adduced to establish the defence of fair and accurate report under section 10.

69. [1995] 1 AC 321.

70. ibid., p. 489.

71. *Laurance v Katter*, 141 ALR 447 at p. 484 per J. A. Pincus, 1996.

72. (1996) 141 ALR 447.

73. The case came before the Court of Appeal by way of a demurrer to the defence.
74. (1996) 141 ALR 447 at p. 486.
75. ibid., p. 485.
76. ibid., p. 486.
77. ibid., pp. 490–1.
78. ibid., pp. 478–81.
79. 28 June 1997, transcript p. 5.
80. Potential applications of section 16(3) are discussed in E. Campbell, 'Parliamentary Privilege and the Admissibility of Evidence', (1999) 27 *Federal Law Review*, p. 367.
81. *Prebble v New Zealand Television Ltd* [1995] 1 AC 321 at p. 338.
82. *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; *Nicholas v The Queen* (1998) 72 ALJR 456.
83. *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192 at 217, 235; *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518; *Re Education Union; Ex parte Victoria* (1995) 184 CLR 188 at p. 231; *Victoria v Commonwealth* (1996) 187 CLR 416.
84. *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at pp. 561–2.
85. Section 16(3) was enacted to counteract the judicial rulings in the case of Justice Murphy—see Note 64.
86. CPD (Senate) 17 March 1987 at pp. 808 & 813; CPD (HR) 6 May 1987 at p. 2668.
87. Parliamentary Privileges (Amendment) Bill, 1 R 17 Sept 1992; 2 R 8 Oct 1992.
88. Report, HL Paper 43–I; HC Paper 214–I, 1999.
89. See the resolutions agreed to by the Senate on 25 February 1988.
90. See n 46 above.
91. See Resolution 5 of Resolutions agreed to by the Senate on 25 February 1988.
92. See Evans, op. cit., (n 29) 65–6; see also PP Nos 108/1996; 48/1997; 89/1997; 158/1997; 183/1997.
93. e.g. *Royal Commissions Act 1954* (Cwlth).
94. The term 'tribunal' is defined in section 3(1).
95. (1997) 42 NSWLR 429.
96. (1997) 71 ALJR 1604.
97. The case is discussed in Enid Campbell, 'Investigating the Truth of Statements made in Parliament: The Australian Experience' [1997] *Public Law*, p. 125.
98. B. Walker, 'Has Lange Really Settled the Common Law? (1997) 8 *Public Law Review* 216 at p. 218.

99. See Campbell, op. cit., (n 5) Ch. 10.

100. Committees to whom investigatory powers are delegated are authorised to send for persons and papers.

101. The statutory committees include the Australian Security Intelligence Organization Committee, the Corporations and Securities Committee, the National Crime Authority Committee, the Public Accounts and Audit Committee and the Public Works Committee.

102. See Evans, op. cit., (n 29) pp. 496 & 501.

103. See *Attorney-General for the Commonwealth v Colonial Sugar Refining Co Ltd* (1913) 15 CLR 182; [1914] AC 237; Enid Campbell, 'Commonwealth Powers and State Parliamentary Privileges', 20 *University of Queensland Law Journal* 201.

104. See article referred to in n 102.

105. ibid.

106. See G. Lindell, 'Parliamentary Inquiries' (1995) 20 *Melbourne University Law Review* 383.

107. *Final Report*, Oct 1984 (PP No 219/1984), pp. 153–4.

108. ibid., para 9.15.

109. See Page 19 and Note 22 above.

110. (1998) 158 ALR 527.

111. *Egan v Chadwick*, 46 NSWLR 563, 1999.

112. Senate, Committee of Privileges, 49th Report. For an analysis of the Bill and constitutional issues raised by it see Lindell (n 104 above) pp. 404–8.

113. S. McNicol, *The Law of Privilege* (Law Book Co, Sydney, 1992) Chs. 2 & 3.

114. *Royal Commissions Act 1902*.

115. e.g. *National Crime Authority Act 1984* section 30.

116. *Final Report*, Oct 1984 (PP No 219/1984) Chap 9.

117. Resolution 1.

118. See D. O'Brien, 'Parliamentary Privilege and the Implied Freedom of Speech' [1995] *Queensland Law Society Journal* 569 at p587; A. Twomey, 'Parliamentary Privilege: Who wants to take this to Geneva?' (1995) 1 *Constitutional Centenary Foundation Newsletter* 7; A. Twomey, 'Reconciling Parliament's Contempt Power with the Constitutional Separation of Powers' (1997) 8 *Public Law Review* 88 at pp. 102–3.

119. (1991) 1 EHRR 47.

120. Query: Can it be said that the procedures have been 'established by law' simply because they may have been prescribed in the standing rules and orders of the Houses?

121. See Note 44.

122. Section 4.

123. Section 7.

124. Section 6.

125. Sections 12 and 13.

126. The United Kingdom Parliament's Joint Committee on Parliamentary Privilege has recommended that jurisdiction to try such offences should be transferred to the courts.

127. See Page 13, Note 81 above.

128. A. Sharland and I. Loveland, 'The Defamation Act 1996 and Political Libels' [1997] *Public Law* 113 and K. Williams, 'Only Flattery is Safe: Political Speech and the Defamation Act 1996' (1997) 60 *Modern Law Review* 388.

129. The Western Australian Commission on Government recommended that there be no power of waiver—*Report No 1* p. 369, 1995.

130. Report HL Paper 43–I; HC Paper 214–I (1999) paras 69 and 73.

131. See *Parliamentary Debate*, House of Representatives, 29 June 1999, pp. 7698–9.

132. ibid.

133. See *Parliamentary Debates* House of Representatives, 29 June 1999, pp. 7697–9, 2939–40. The possibility that an offence against a House may have been committed seems to have been recognised by J. French in *Crane v Gething* (2000) 169 ALR 727. In this case his Honour concluded that the seizure of various documents from a Senator's electoral and parliamentary offices, pursuant to a search warrant issued by a magistrate, was not in breach of section 16 of the *Parliamentary Privileges Act 1987*. The material which had been seized was not yet being presented to a court as evidence of alleged criminal conduct.